EMPLOYMENT TRIBUNALS

Claimant: Miss C Thompson

Respondent: LBS Worldwide Limited

Heard at: Manchester by CVP **On:** 16th October 2020

Before: Employment Judge Humble

REPRESENTATION:

Claimant: Mr Porter, Lay Person
Respondent: Mr Haines, Consultant

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed.

2. The respondent is ordered to pay the claimant the sum of £3677.87. The recoupment regulations do not apply.

3. The claim for unauthorised deduction from wages is dismissed on withdrawal by the claimant.

REASONS

The Hearing

1. The hearing took place on 16 October 2020 by Video Link. The claimant was represented by Mr Porter, who was a trained trade union representative but was representing the claimant in a lay capacity. The claimant gave evidence on her own behalf. The respondent was represented by Mr Haines, a consultant, and evidence was given by Mr Alistair Jowett, a manager within the respondent's business, and Ms Elizabeth Foster, the former financial manager of the respondent. There was an agreed bundle of documents which extended to 314 pages.

2. Evidence in chief was taken as read based on the witness statements provided by the parties. The evidence and closing submissions were concluded on the afternoon of 26th October 2020 and Judgment was reserved.

The Issues

3. The claimant brought a claim of unfair dismissal and the issues were identified and agreed at the outset of the hearing as follows:

3.1 Whether the respondent was able to show a potentially fair reason for the dismissal in accordance with Section 98(1) and (2) Employment Rights Act 1996. In this case the respondent relied upon conduct as the potentially fair reason for dismissal.

3.2 If the respondent could show that the dismissal was for a potentially fair reason, whether the respondent acted reasonably under section 98(4) ERA 1996 having particular regard to:

3.2.1 whether the respondent had a genuine belief in misconduct on reasonable grounds having conducted a reasonable investigation;

3.2.2 whether the respondent followed a fair procedure having regard to the ACAS Code of Practice; and

3.2.3 whether the decision to dismiss was within the band of reasonable responses of a reasonable employer.

3.3 If the claimant was unfairly dismissed, whether any award of compensation should be reduced for contributory fault and/or by way of a Polkey reduction.

4. Having identified those points, the respondent's representative conceded that the respondent had not followed a fair procedure and that the dismissal was unfair. He explained that the respondent would rely upon seeking reductions to any award, in whole or in part, by way of contributory fault and under the *Polkey* principles.

5. The claimant had initially brought a claim for unauthorised deductions from wages. Following the evidence, at the outset of his submissions the claimant's representative conceded that the claim was substantially out of time and therefore withdrew that claim. It was therefore dismissed upon withdrawal.

Procedural Points

6. At the outset of the hearing the claimant opposed the admissibility of some specific documents. These related to correspondence from the respondent to the claimant from October 2013 in which the claimant was suspended and later invited to attend a disciplinary hearing. The claimant objected to the inclusion of these documents since it was argued that they related to unconnected events which were resolved by way of a confidential Settlement Agreement. The respondent submitted that the documents should be admitted because the allegations made against the claimant in this instance involved "malicious gossip" and alleged disclosure of confidential information, which were similar charges to those which led to the dismissal of the claimant in the current case. After a recess, for reading time and some consideration of the matter, the Tribunal held that that the documents should be included in the bundle since they might have relevance to the case and there was no

evidence that the Settlement Agreement prohibited the disclosure of these documents in subsequent proceedings.

7. During the course of the evidence of Mr Jowett, following a line of questioning by the claimant's representative, the Judge asked of Mr Jowett: "*Was this company a competitor?*" Mr Jowett paused to consider the question and the Tribunal heard a voice, quite distinctly, say "*Yes it is.*" The Judge picked up on this interjection and asked where the voice had come from. Mr Haines, on behalf of the respondent, suggested that it may have emanated from Ms Foster, but she was in a different location to Mr Jowett and she denied saying anything. The Judge asked Mr Jowett where the voice had come from and he said that Mr Peter Greaves had made the remark. It transpired that Mr Greaves, a director of the respondent, was sat in the same room as the claimant out of view of the Tribunal. The Tribunal ordered Mr Greaves to leave the room with immediate effect. Mr Greaves appeared from behind the camera, where he had been sat opposite the witness, and left the room.

8. The Tribunal sought an explanation from Mr Haines as to why Mr Greaves was present in the room and interfering with the witness's evidence. Mr Haines said that he had advised that Mr Greaves could be in the room with the witness provided that he remained quiet. The Tribunal indicated that it would proceed with the remainder of the evidence but would take submissions upon how to deal with the matter in due course. Following a recess for lunch, at which point the respondent's evidence was concluded, the Tribunal indicated that it would hear the claimant's evidence and then take submissions from both parties, which would include submissions upon the involvement of Mr Greaves involvement in the hearing. The Tribunal said that it would consider appropriate sanctions for the behaviour of the respondent, which could include a consideration of a strike out of the response for scandalous and unreasonable behaviour under rule 37(1)(b) of the Rules of Procedure, or alternatively might result in it disregarding Mr Jowett's evidence.

9. During submissions, Mr Haines apologised on behalf of Mr Greaves for the interjection. He said that he took responsibility for Mr Greaves being present in the room with the witness without the knowledge of the Tribunal, and that he believed this was acceptable practice. It was not explained how Mr Haines had come to this view. The Judge had advised the witnesses at the outside of the hearing that they should be alone and without distractions when giving evidence and that the formal rules of procedure applied. Further, an email had been sent to the parties representatives the evening before the hearing which stated: *"Please ensure you endeavour to minimise distractions – we understand the difficulties in this regarding the accommodations required by the current situation however this is still a formal tribunal."*

10. For his part, Mr Porter submitted that Mr Jowett's evidence should be disregarded but did not seek any other sanction. The Tribunal took the view that Mr Jowett's evidence was unsafe. Mr Greaves was present when he was giving the majority of the evidence, was facing the claimant, had not disclose his presence, and had interjected on at least one occasion by instructing the witness to answer a question in a specific way. Given that he was out of camera shot it could not be determined whether Mr Greaves did anything else to influence the witness but it was at least a strong possibility. The Tribunal held that Mr Jowett's evidence was unsafe and that the respondent acted unreasonably, his evidence could not be relied upon and it was to be disregarded in its entirety. The Tribunal stopped short of a strike out in this case since, although it took the view that the respondent acted unreasonably, in the circumstances of the case the disregarding of Mr Jowett's evidence was sufficient. The

Tribunal took account of the fact that the respondent had a second witness who was in a different location to Mr Jowett and whom the Tribunal were satisfied gave evidence without interference.

The Law

11. The Tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

"*In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*

a) the reason (or, if more than one, the principal reason) for the dismissal, and

b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Then by sub-section (2):

"*A reason falls within this sub section if it:*

b) relates to the conduct of the employee…"

Then by sub-section (4):

"*Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b) shall be determined in accordance with equity and the substantial merits of the case."

12. In considering this alleged misconduct case, the Tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold a genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances.

13. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4). Thus, as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09, this means that the respondent only bears the burden of proof on the first limb of the Burchell guidance, which addresses the reason for dismissal, and does not do so on the second and third limbs where the burden is neutral.

14. The tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT) as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that:

"*It is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.*"

There may be occasions where one reasonable employer would dismiss, and others would not, the question is whether the dismissal is within the band of reasonable responses.

15. The band of reasonable responses test applies to the investigation and procedural requirements as well as to the substantive considerations see Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, Ulsterbus Limited v Henderson [1989] IRLR251, NI CA.

16. The Tribunal must take into account whether the employer adopted a fair procedure when dismissing having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If the Tribunal hold that the respondent failed to adopt a fair procedure the dismissal must be unfair (Polkey v A E Deighton [1987] IRLR503, HL) and any issue relating to what would have happened with a fair procedure would be limited to an assessment of compensation (i.e. a Polkey reduction). The only exception to that principle is where the employer could have reasonably concluded that it would have been utterly useless to have followed the normal procedure (it is not necessary for the employer to have actually applied his mind as to whether the normal procedure would be utterly useless, Duffy v Yeomans [1994] IRLR, CA). The respondent accepted in this case that the dismissal was "procedurally" unfair and did not seek to submit that this was a case in which the employer could have reasonably concluded that it would have been "utterly useless" to have followed the normal procedure. Consideration of the Polkey principles was therefore limited to an assessment of compensation.

17. The Tribunal should also give consideration as to whether, if the dismissal is procedurally unfair, the employee contributed to her own dismissal. If so, to what extent did she contribute to that dismissal such as to reduce the level of any compensation to which she would otherwise be entitled having regard to the principles in Nelson v BBC (No.2) [1979] IRLR 346, CA.

18. The claimant also referred the Tribunal to the cases of Dr J Dronsfield v The University of Reading, UKEAT/0255/18/LA and Ethnic Minorities Law Centre v Mr R Deol, UKEAT/0184/15/JOJ.

19. On remedy, in respect of mitigation, the Tribunal were guided by the principles in Wilding –v- British Telecommunications plc [2002] IRLR 524, CA. The claimant also referred us to the case of Cooper Contracting Ltd v Lindsey UKEAT/0184/15/JOJ.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the Tribunal made findings of fact only on those matters which were material to the issues to be determined and not upon all the evidence placed before it):

20. The claimant commenced work for the respondent on 11 April 2016. The respondent is in the business of supplying landscaping, irrigation and horticultural

products. At that time, the business was owned and run by the claimant's family and her mother, Mrs Anne Wolfenden, was the managing director.

21. The claimant had a sabbatical from work from 31 December 2016, when she undertook some travelling, and returned to the respondent on 22 May 2017 in the role of sales ledger and credit control administrator. There was an earlier issue within these proceedings as to whether there was a break in service during this period, which was resolved at a preliminary hearing on 2 May 2019 which determined that the claimant had sufficient continuous service for the purposes of section 108 Employment Rights Act 1996.

22. In about August 2017 the respondent had some financial difficulties which resulted in the appointment of an administrator on 16 October 2017. The company entered into a company voluntary arrangement on 13 December 2017 and, as part of the rescue plans to ensure the continued trading of the business, Mrs Wolfenden left the respondent and a consortium of individuals took over the company and thereafter the business was run principally by Peter Reeves with some involvement from Maurice Parker. The claimant retained some shares in the business, having a 16% shareholding, while her brother, Harry Thompson, also worked within the business and had a smaller shareholding.

23. In March 2018 there was a shareholders meeting at which Mr Reeves informed the claimant and Mr Thompson that there was a short-term cash flow problem. Mr Reeves said words to the effect that a loan to the company of £50,000 was required to avoid insolvency. The claimant and her brother agreed to loan the business £50,000 on condition that it would be repaid within three months. While that money was later repaid, there was a dispute as to whether it was repaid within the agreed time limit which caused some distrust to arise between the claimant and the directors.

24. In May 2018, a board meeting was held which was attended by the claimant, Mr Jowett, Mr Reeves, Mr Parker, and Elizabeth Foster who had recently been appointed as the respondent's Finance Manager. Mr Reeves and Mr Parker said words to the effect that it was proposed that Elizabeth Foster and Alistair Jowett, a long-standing manager within the business, should each be given a 10% shareholding in the business. They explained that the effect of this would be a dilution in the shareholding of the claimant and Mr Thompson. Both the claimant and Mr Thompson objected to this proposal since they wished to protect the integrity of their own shareholdings.

25. The claimant believed that after that meeting her relationship with Elizabeth Foster, with whom she had previously been on good terms, deteriorated. She believed that she was excluded from meetings where business decisions were taken which might have affected her shareholding. The respondent's case was that the claimant was not excluded from any meetings, there were some management meetings to which she was not invited but this was because she was not in a managerial position within the business. Ms Foster's evidence was that, in so far as the relationship deteriorated then it was because of misconduct on the part of the claimant. On balance, the Tribunal preferred the evidence of the claimant and held that the relationship had deteriorated prior to the allegations of misconduct made by the respondent which, in part at least, was caused by Ms Foster's animosity toward the claimant after she had resisted attempts by Mr Reeves and Mr Barker to issue Ms Foster with shares. The claimant was a good witness and remained calm and consistent throughout her cross examination. While Ms Foster also appeared, in the main, to be a credible witness her evidence was not entirely consistent with the

documentary evidence and she appeared to have retained some animosity toward the claimant, which manifested itself in particular towards the end of her cross-examination when she spent some moments disparaging the claimant in a rather aggressive manner.

26. In June 2018, the claimant submitted a request for a week's holiday to take place in September 2018. The claimant's case was that she had accrued 80 hours of overtime and that it was common practice that overtime could be accrued during busy periods and later taken as time off in lieu with the prior permission of a director. Upon receiving this request, Ms Foster said that she looked at emails and timesheets (pages 170-179) and concluded that the claimant had already been paid for that overtime. She formed the view that the claimant was "*double claiming expenses in line of the Claimant booking a holiday to go away where she was requesting unpaid leave*" by which the Tribunal assumed that she meant that the claimant was seeking paid leave by way of "time off in lieu" since, if she was requesting unpaid leave, there would be no attempted fraud.

27. Having formed the view that there was "double claiming", Ms Foster's said that she the requested a meeting with the claimant. Her account of that meeting was very brief: "*I asked to meet with her and did issue her with a Final Warning. That was around June 2018. I understand the current staff at the respondent have checked to locate a copy of the warning letter issued but that cannot be located."* It was also said that the claimant did not "*seek to appeal or raise a grievance.*" The claimant said the meeting in question took place on 29 June 2018 and that both Mr Jowett and Ms Foster were present. It was alleged that she was seeking to claim for hours which had already been paid by way of overtime and that there was proof of emails in which she had claimed for the hours. She asked for her brother to attend with her and asked to see copies of the emails but these were not shown to her. It was common ground that the claimant was told she was issued with a warning in respect of the hours claimed. The claimant's case is that she was informed that she would receive a written warning, not a final written warning, and that she would receive confirmation of the outcome in writing but no such letter was ever received.

28. The respondent's case was that the claimant was issued with a final written warning and this was confirmed in writing. No copy of the letter was produced the Tribunal, nor was any note or minute of the meeting provided to confirm the nature of the warning that was issued. The Tribunal found on the balance probabilities that no letter was issued since, if a letter had been issued, it is difficult to ascertain why a copy of the letter did not exist. Ms Foster said that the respondent was taking advice from an external HR consultant at the time and therefore, even if the respondent did not retain a copy of the letter, it seemed unlikely that a draft copy of the letter would not at least be available from the HR provider. Given that it was not produced, the Tribunal concluded that no such letter was issued to the claimant and also held that she was only informed at the meeting that she was receiving a warning rather than a final written warning. Further, the Tribunal accepted that the claimant was not given any proper opportunity to respond to the allegations relied upon, nor given any opportunity to examine any of the documents relied upon. The Tribunal accepted her evidence that she was simply called to the meeting and informed of the warning and the reason for it, which was in fact consistent with Ms Foster's perfunctory description of that meeting.

29. On 14 August 2018 Ms Foster accessed the claimant's computer after, she said, she noticed the claimant's computer page was left open with a Skype

conversation between her, Mrs Wolfenden (her mother), and Mr Thompson on the screen. Ms Foster believed that these messages showed the claimant had been listening into a confidential meeting she had with Mr Reeves and said that the messages "*demonstrated to me that the claimant could no longer be trusted as our employee."* Ms Foster met with Mr Reeves, Mr Barker and Mr Jowett that evening and they reviewed the Skype messages. After some discussion, a decision was made to terminate the claimant's employment.

30. The claimant attended work the following day, 15 August, and upon arriving at work noticed that her computer had been accessed the previous evening by Ms Foster, and that Ms Foster had sent herself emails from the claimant's works email account and printed off some Skype conversations from the claimant's personal Skype account.

31. Shortly after 4:00pm on 16 August, Ms Foster approached the claimant and asked her to attend a meeting. The claimant attended a meeting in the boardroom with Ms Foster and Mr Jowett. Anticipating a further disciplinary hearing, the claimant requested that Laura Marples, a work colleague, attend with her. Ms Foster then informed the claimant that her employment was to be terminated with immediate effect and the following reasons were cited:

a) dishonesty in respect of overtime received up to September 2017 and later claimed;

b) carrying out non-work related tasks in work time, a reference to the Skype conversations which it was alleged showed that she had been carrying out work for her mother; and

c) undermining Ms Foster by releasing purchase orders for a customer, PdotWolf, which Ms Foster had put on hold for credit control reasons.

32. The claimant asked to see evidence in relation to those allegations but Ms Foster refused. The claimant, who had previously carried out some human resources work for the respondent, said words to the effect that she should have been invited to a disciplinary hearing in line with company procedures and had a chance to respond to the evidence. Ms Foster said words to the effect that the was no such requirement. The meeting was brief and Ms Foster told the claimant that she should not go "*sounding off" or "gobbing off to everyone*" on the way out of the building. The claimant left the premises immediately afterwards.

33. It was common ground that the respondent failed to follow any form of fair disciplinary procedure. The claimant was called to a meeting and told that she was dismissed, she had no opportunity to respond to the allegations upon which the dismissal was based and the decision to terminate her employment had in fact already been taken two days earlier. The reason the respondent dispensed with any due process was that it believed the claimant had less than two years service. Ms Foster explained that she was taking advice from an external HR consultant and the advice was that no procedure was required since the claimant did not have sufficient service to bring an unfair dismissal claim.

34. The claimant did not receive any written confirmation of the reasons for dismissal, only a brief letter dated confirming that she had been dismissed with immediate effect on 16 August 2018 (page 291 of the bundle). She was not informed of any right of appeal.

35. The respondent accepted that the dismissal was procedurally unfair. The Tribunal held however that this was more than a purely procedural unfair dismissal. The nature of the allegations against the claimant were such that a reasonable investigation would have involved providing her with the documentary evidence of alleged wrongdoing, including the Skype messages and the credit control information, and to have given her a reasonable opportunity to respond. Having failed to take that basic step, a reasonable investigation was not carried out and it could not be said that the respondent had a genuine belief in misconduct based on any reasonable investigation. In those circumstances, the Burchell test was not met and the Tribunal find that the dismissal was both procedurally and substantively unfair.

36. The reasons relied upon for dismissal, which were briefly outlined at the dismissal meeting, were expanded upon within these proceedings and they fall in to three categories: the allegation of fraudulent claiming of overtime; the Skype messages; and the allegation that the claimant took a customer off a "credit stop" without authorisation and to the detriment of the respondent. The respondent relied upon these matters to seek to reduce any compensation which would otherwise be awarded to the claimant and submitted that any award should either be extinguished, in full or substantially, by way of contributory fault and a Polkey type reduction. The Tribunal was therefore required to examine the evidence in respect of each of those three reasons in some detail.

Alleged dishonesty about overtime

37. The respondent's case was that the claimant had already claimed and received overtime for hours prior to September 2017, hours which the claimant then sought to take off as holiday by way of time off in lieu. In support of this allegation, the Tribunal were referred to timesheets at pages 170-179 of the bundle but it was not properly explained how these timesheets were said to show that the claimant had been paid the overtime which she later requested as holiday. Ms Foster's said, at paragraph 7 of her statement, "*When I looked at the emails and timesheets (pages 170 to 179) the claimant had been paid for the overtime and indeed had sent the instruction to payroll for her own overtime to be paid*." Later in the same statement, and in response to the claimant's unauthorised deduction wages claim for unpaid overtime, she said that the claimant "*was not in the habit of regularly being paid for overtime*" and then (at paragraph 13), in direct contradiction to her earlier statement, "*If you examine her timesheets at pages 170 to 179…and compare that to her wage slips in the same period (pages 192-195) no overtime was paid out to her.*" The respondent could not have it both ways.

38. The respondent's evidence in this regard was less than satisfactory and the Tribunal were not persuaded that the Claimant had double claimed, or otherwise fraudulently claimed overtime. Further, the Claimant had already received a warning in relation to this allegation two months earlier and it was not suggested that any fresh evidence had come to light since that time which had contributed to the claimant's dismissal on 16 August 2018.

39. The Tribunal did not find that this issue was a substantive cause of the claimant's dismissal, or that there was any evidence to show blameworthy conduct which contributed to her dismissal in the manner envisaged in Nelson v BBC (No.2) [1979] IRLR 346, CA. Nor could this be a basis for making a Polkey type reduction since the respondent was seeking to rely on matters upon which were already dealt with and upon which it had drawn conclusions two months earlier when it decided to issue a warning.

The Claimant removing a "stop order" on an account for PdotWolf

40. PdotWolf was the name of a company set up by Ms Anne Wolfenden, the claimant's mother and the former director and part-owner of the respondent. PdotWolf was a customer of the respondent and had credit terms with the respondent for the supply of certain garden products.

41. On about 19th July 2018 Ms Foster placed a "stop order" on the PdotWolf account since the company had fallen behind in respect of payments due to the respondent (page 296). An email was sent from Ms Foster to Anne Wolfenden on 25 July informing her that the sum of £2245.73 was outstanding and stated, "*I have had to put your account on stop until these are paid.*" One of the reasons relied upon for the dismissal of the claimant was that she had released the stop order from the PdotWolf account without authorisation on or about 28 July 2018, and that this "*was a risk to the business…as we may never have received payment for the arrears*".

42. In cross examination, Ms Foster was shown entries on the respondent's accounts on 27 July 2018 which showed payments made in the sum £256.33, £778.64 and £1210.76 which amounted to the full sum of £2245.73 owed by PdotWolf to the company (page 282). Ms Foster accepted that these were payments made by PdotWolf on that date to settle the outstanding account. It followed therefore that, when the claimant released the "stop order" on 28 July 2018 PdotWolf had brought their account up to date. It was suggested by Ms Foster during her cross examination that the monies might not yet have reached the respondent's account since their might have been a delay in the BACS transfer but there was no evidence to that effect before the Tribunal. As far as the claimant was concerned the accounts system was showing that the account had been settled and the Tribunal accepted that, as credit controller, she had authority to release the stop order.

43. Ms Foster said that she had also verbally informed team members that the account was on stop and that it required her authorisation to remove it and so, by removing the stop order, the claimant was undermining her authority. The Tribunal preferred the evidence of the claimant that she did not receive any such verbal instruction, it did not appear rational that the credit controller should be forbidden from removing a credit freeze from an established customer who had settled their account in full.

44. The Tribunal were not therefore persuaded that this incident constituted blameworthy conduct such that it contributed to the claimant's dismissal, nor did it justify a Polkey type reduction.

The Skype Messages

45. The Skype messages took place between the claimant and, in the main, her brother, Harry Thompson, who also worked for the respondent. They were on a private Skype account but were messaged at various times during the working day. The messages fell in to two categories: those which the respondent was aware of before the dismissal, which Ms Foster accepted were only those at pages 267 to 281, and those which were discovered afterwards, at pages 118-158.

46. While pages 267 to 281 of the bundle were referenced in the witness statement of Ms Foster, the Tribunal were not drawn to any specific pages, message or messages within those pages which were said to have been relied upon and it was not explained precisely how these messages were said by Ms Foster to show that the

"*claimant had been carrying out work for her mother and her mother's other companies in LBS working hours."* Having reviewed the messages the Tribunal found that the conversations in the main focused upon personal issues relating to the claimant's mother's property and alleged bankruptcy and to an alleged fraud relating to a particular individual (not a person involved with the respondent at that time). There were only two exchanges which appeared to support the respondent's case.

47. Firstly, the last two pages (pages 280-281) contain a conversation between the claimant and Mrs Wolfenden. These suggest that the claimant carried out some work for her mother in the preparation of accounts which Ms Foster said related to her mother's partnership accounts. There was no evidence however that these accounts were worked upon during the claimant's contractual hours with the respondent, and no other evidence that the claimant was using her works time to work for any other business. Nor was it explained how this work on the part of the claimant infringed or in any other way damaged the interests of the respondent.

48. Secondly, there is an exchange between the claimant and her brother, the key part of which was:

Claimant: "*I wish I could listen in Beth* [Ms Foster] *is explaining why porous stock is out 104K, better not be blaming it on me, she said it was across the board as were been valued when no one used them."*

Mr Thompson: *"does look like she is getting a grilling?"*

Claimant: *"absolutely I think she has defo got porous costing wrong from what I can hear"*

Mr Thompson: *"excellent we can say in that the board meeting if you want help with the costing mum has done it for years"*

Claimant: *"no we don't mention it Beth said she was to learn how to do it but I could of got it wrong mum has told Peter everything"*

Mr Thompson: *"what do you mean everything she hasn't dropped us in it has she"*

Claimant: "to do with porous costing."

49. It appears that it was principally that exchange from which Ms Foster concluded, "*Those Skypes showed that the Claimant had been listening into a private and confidential meeting I was having with Peter Reeves and also these demonstrated to me that the Claimant could no longer be trusted as our employee."* The conclusion reached by Ms Foster did not accord with the Tribunal's reading of that exchange. The claimant does not say, "*I am listening in*" to the conversation but rather says, "*I wish I could listen in*" which suggests she has overheard part of the conversation rather than having deliberately set out to eavesdrop on a private and confidential conversation. The remainder of the claimant's contribution to the exchange appears to be comparatively mild, she observes that Ms Foster is "*getting a grilling*" and has got some costings wrong. There is a suggestion in the comment of her brother "*what do you mean everything she hasn't dropped us in it has she*" that there is something more damaging in the background that might be disclosed but there is no clue as to what it might be. The Tribunal held that there was not enough in that exchange from which the respondent could have concluded, without further evidence, that the claimant could no longer be trusted as an employee.

50. The Tribunal were not therefore convinced that the Skype messages available to the respondent prior to the claimant's dismissal were sufficiently blameworthy to

contribute in any meaningful way to a fair dismissal. They were relatively brief, the comments made by the claimant appeared to be mild and they did not suggest that she was deliberately listening in to a confidential conversation. Nor was there any confirmation that she was working against the respondent's interests either in works time or otherwise. These were the only messages available to the respondent prior to the dismissal and so it follows that there shall be no reduction to the compensatory award for contributory fault.

51. Following the claimant's dismissal, Ms Foster recovered other Skype conversations from the claimant's account and these were reproduced at pages 118-158. The Tribunal were drawn to specific emails within that evidence in which the claimant made disparaging remarks about the respondent's management and which the respondent alleged showed that the claimant was working to make a competitor of the respondent a success. These messages are relevant when assessing any Polkey type reduction.

52. The specific messages to which the Tribunal were drawn were as follows:

Page 119 - "*Beth is a little snitch*", a reference to Ms Foster.

Page 119 – "*Wish I didn't call Maurice what I did in front of her*" [which was] "*an arrogant bastard*", a reference to Maurice Parker.

Page 128 – "*She has zero people skills*"

Page 130 – "*I think Beth just wants to prove you wrong to have power over you.*"

Page 137 – "*don't always believe what he says*", a reference to Mr Reeves

Page 138 "*I know I should excuse his behaviour* [a reference to another employee] *but he probably didn't get the right costing together because look at the shambles that was doing the accounts…Andrew and Martin…jas lol"* These last three were also members, or former members, of the respondent's staff.

Page 139 – "*They are all fucking spoilt brats*", "*why I even bother is beyond me*." It is not clear who is being referred to here it is assumed that assumes it is the entire management team. There is then a specific reference to Geoffrey Wolfenden, another director, "*I don't care much about keeping Geoff sweet*".

Page 150 – "*Alistair has a lot of management experience…he just isn't a salesman and there's no rush in him*". A reference to Mr Jowett, a senior manager within the business.

53. The messages the Tribunal were referred to which were said to be evidence of the claimant working to make PdotWolf, a competitor of the respondent, a success and providing information that same business were as follows:

Page 139 – "*Logical thinking is setting up on our own*" and "*well if Gro Garden is making money we can use that as an investment*", "*we just can't have LBS as big.*" Gro Garden was the trading name of PdotWolf at that stage. Mr Thompson responds "*indeed we need to help them grow Gro garden and then we can use that money to buy shares*" to which the claimant replies, "*exactly*" and "*we can have our cake and eat it if we do it right.*" She then concludes, "*fuck all of them over ha ha.*"

54. There is a final exchange to which the Tribunal were referred, at page 141, which follows a discussion about allegations of fraud having been made against the claimant's mother. The claimant says, "*I have found out cos I have been snooping on his emails*" which appears to be a reference to Mr Wolfenden's emails. She then

states, "*I will get sacked for that*" to which Harry replies, "*No you won't*" The claimant states, *"harry that is so bad of me to do but I wanna know whats going on."* Harry replies, "*Pete would want to know this as well."* The claimant says, "*Peter would support this*" to which Harry replies, "*I don't think he will."*

Conclusions on Liability

55. In conclusion the Tribunal held that the dismissal was unfair. The working relationship between Ms Foster and the claimant had deteriorated after the claimant and Mr Thompson effectively blocked the distribution of shares to Ms Foster and Mr Jowett. Ms Foster then dismissed the claimant following the discovery of some private Skype messages which she believed to be disparaging toward her and contrary to the respondent's interests. The respondent failed to conduct any reasonable investigation and dispensed with any form of fair procedure in the mistaken belief that the claimant had less than two years service. The Tribunal did not, on the balance of probabilities, find that any of the matters relied upon by the respondent at the time of the dismissal were blameworthy conduct on the part of the claimant that contributed to her dismissal. In summary, the Tribunal found the evidence that she had allegedly claimed "double overtime" to be unpersuasive and contradictory; that the claimant was entitled to remove a credit stop from PdotWolf in circumstances where it had satisfied its outstanding account; and that the Skype messages at the time of the dismissal were mildly critical of Ms Foster and did not show any breach of contract on the part of the claimant. Accordingly, there could be no reduction to the compensatory award for contributory fault.

56. The Skype messages discovered after the claimant's dismissal fall into a different category. There were undoubtedly some disparaging comments about the respondent's management among those exchanges. These are principally directed at Ms Foster who, the claimant, describes as having "*zero people skills*", "*a little snitch*" and alleges that she wanted to "*have power over you.*" Maurice Parker is described as "*an arrogant bastard*", and in respect of Mr Reeves it is said "*don't always believe what he says."* There is also some evidence that the claimant is working contrary to the interests of the respondent, or at least its current shareholders and management team, with the suggestion that they are seeking to grow the business of PdotWolf (Gro Garden) and, in some way, to use the benefits of that growth to buy shares in the respondent. The claimant concludes this exchange by stating, "*fuck them all over*". Finally, there is the claimant's confession that *"I have been snooping on his emails*" a reference to Geoff Wolfenden's emails who was a director at that time, and she says, "*I will get sacked for that*".

57. The Tribunal find that, if a fair and proper investigation had been followed then those Skype messages would have been available to the respondent. If the respondent had been aware that the claimant had two years service, then the claimant would probably have been suspended whilst the Skype messages were reviewed in full, the respondent would at least have been careful to fully collate the evidence before inviting her to a disciplinary hearing. The Tribunal estimate that a proper investigation and disciplinary procedure would have taken about two weeks by which time the respondent would have had sight of all of the Skype messages which were put before the Tribunal.

58. The Tribunal was required, following the principles in Polkey, to assess the percentage chance that the claimant would have been fairly dismissed upon the

conclusion of a fair procedure and then to reduce compensation accordingly. This was not as easy a task as the respondent's representative suggested in his submissions. Despite the content and nature of the Skype messages, it was not a case in which the Tribunal should leap immediately to a 100% reduction. Firstly, the Skype messages had to be viewed in the context of a private conversation between three family members. Secondly, the respondent had trawled the claimant's private Skype messages over a three month period and presumably picked out the conversations which were deemed to be the most damaging. Thirdly, the most disparaging comments were directed against Ms Foster rather than the directors and shareholders, and the Tribunal's view was that Ms Foster should therefore have been excluded from any fair procedure, particularly given her evident animosity toward the claimant. Finally, the Tribunal did not accept that PdotWolf were a competitor of the respondent, they were in fact an established customer, and was not persuaded that any confidential information belonging to the respondent was disclosed to that company.

59. Nevertheless, the claimant's comment about Ms Foster were damaging, and describing another senior manager as an "*arrogant bastard*" and stating that Mr Reeves should not always be believed was hardly likely to endear her to the directors. There was a definite indication that the claimant's long-term aims were contrary to the interests of the main shareholders and directors and, even if the "*fuck them over*" comment was likely to be flippant, at the very least it further indicated a lack of regard for the respondent's management. More importantly, the admission that she had "*snooped on emails*" of a director meant that there was a fairly strong possibility that the respondent would have concluded that the claimant had committed a gross misconduct offence. The claimant indicates in her messages that Mr Reeves would support that course of action, but that seemed unlikely.

60. In all the circumstances of the case, the Tribunal held that there was a 70% chance of a dismissal following a two week investigation and disciplinary process. In other words any compensatory award should be reduced by that percentage allowing for a two week period before any reduction is made.

Remedy

61. It was agreed that the claimant's gross weekly pay was £384.62. She had two complete years of service and was 24 years old at the date of her dismissal. The basic award therefore amounted to £769.24. While a deduction cannot be made for contributory fault for conduct discovered post-dismissal from a compensatory award (section 123(6)), such a deduction can be made from a basic award (section 122(2)-(3)). The Tribunal took the view that a deduction of 70% should be made from the basic award.

62. Turning to the compensatory award, the Tribunal awarded a figure of £500 for loss of statutory rights.

63. It was agreed that the claimant's net weekly pay was £316.98. It took the claimant six weeks to find new employment. For the first two weeks of that period the claimant was to be compensated in full to reflect the time it would have taken to conduct a proper disciplinary procedure, which gives a figure of £633.96.

64. Thereafter the claimant commenced new employment as a paralegal on a part-time basis. She earned approximately £178.84 a week in that role, a loss of £138.14 a week on her earnings with the respondent. The respondent put it to the claimant that she had carried out work in other roles, including with her mother at PdotWolf, but the

claimant denied that she had received any income from other employment and the Tribunal accepted that response in the absence of any evidence to show she had worked elsewhere. The respondent submitted that the claimant had failed to mitigate her loss since she had applied for only a few other roles since finding a new job, about four by her own admission. The claimant was not very proactive in seeking new employment once she secured the new job because she was happy with the role and she wanted to stick with it for a period of time to ascertain whether she could progress upon a new career path.

65. The Tribunal held that it was not unreasonable for the claimant to remain in her new role for a period of time to ascertain how it developed and whether it might develop into a full-time role. However, if she had taken reasonable steps to mitigate her losses the Tribunal held that after about six months, when it would have been apparent that she could not move to a full-time contract, she should have taken steps to find suitable alternative work on a full-time basis or otherwise to have taken on additional part-time work to make up the shortfall from her previous salary. The Tribunal estimated a further three months as a reasonable time period for the claimant to find alternative employment to make up the shortfall. It followed that the claimant should have mitigated her loss in full nine months after commencing work in the alternative role. The total period of compensatory loss is therefore, with the addition of the initial six weeks, approximately 45 weeks. The calculation for the compensatory award is complicated by the fact that the claimant got a slight pay increase in April 2019 such that her weekly loss reduced to £132.27.

66. The other issue in dispute was whether an adjustment to the compensatory award should be applied under section 207A TULR(C)A 1992 for a failure to comply with the ACAS Code of Practice. The claimant sought an increase of 25% in light of the respondent's failure to follow any fair procedure, the respondent on the other hand sought a reduction of 25% in light of the fact that the claimant did not appeal her dismissal. This latter submission had no merit given that the claimant had been dismissed without any due process based upon a pre-determined decision and was not informed of any right of appeal. Further, the respondent's reason for not following a fair procedure, that it was mistaken as to the length of the claimant's service, was not good mitigation. The Tribunal therefore applied the maximum of uplift of 25%.

67. The calculation of loss can be summarised as follows:

<u>Basic Award</u>	
£384.62 x 2 (years of service)	£769.24
Reduction for contributory fault @ 70%	(£443.77)
<u>Total Basic Award</u>:	<u>£230.77</u>
<u>Compensatory Award</u>	
Loss of statutory rights:	£500.00
2 weeks loss of earnings x £316.98	£633.96

- This figure is not subject to the Polkey reduction since it represents the time taken to conduct a fair procedure during which time the claimant would have remained employed. The remainder of the

4 weeks loss x £316.98	£1267.92
26 weeks x £138.14	£3591.64

13 weeks x £132.27	£1719.51
Total Compensatory Award subject to Polkey reduction	£7079.07
Polkey reductions at 70%	(£4955.35)
Add sum excluded from Polkey reduction	£633.96
Sub-Total of Compensatory Award:	£2757.68
Uplift under section 207A TUL(C)A 1992 at 25%	£689.42
Total Compensatory Award:	£3447.10
Total Basic and Compensatory Award:	**£3677.87**

68. Accordingly, the Tribunal find that the claimant was unfairly dismissed. The respondent is ordered to pay the claimant the sum of £3677.87.

Employment Judge Humble

25th November 2020

SENT TO THE PARTIES ON

25 November 2020

FOR THE TRIBUNAL OFFICE