EMPLOYMENT TRIBUNALS

Claimant: Mr N Pullar

First Respondent: Tangerine Holdings Limited

Second Respondent Vetplus International Limited

Third Respondent Vetplus Limited

Heard at: Manchester **ON:** 24, 25, 26 and 27 November 2020

Before: Employment Judge Leach

REPRESENTATION:

Claimant: Mr D Flood (counsel)

Respondent: Mr P Michell (counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claims against the second and third respondents are dismissed on withdrawal by the claimant.

2. The claimant was unfairly dismissed.

3. It is not just and equitable to make a compensatory award (applying section 123(1) Employment Rights Act 1996 ("ERA").

4. Having regard to the claimant's conduct before the dismissal, it is not just and equitable to make a basic award (applying section 122(2) ERA).

5. The claimant succeeds in his claim that he was not permitted to be accompanied to a disciplinary hearing, contrary to section 10 Employment Relations Act 1999.

REASONS

A. Introduction

1. This case concerns the claimant's dismissal from his employment with the first respondent ("respondent").

2. The respondent makes and sells nutritional animal products. The chairman and majority shareholder of the respondent is David Haythornthwaite (DH) who has held the position of executive chairman since 1995. The respondent's business was started by DH's parents and has grown considerably. It is active in Europe, Asia and North America and is starting to grow a customer base in South America. It directly employs around 250 people.

3. Before his dismissal, the claimant was one of the respondent's most senior employees, holding the position of divisional director of Vetplus, a business line of the respondent.

4. The claimant's employment with the respondent began in 2009. His promotion to the divisional director role was in 2015. Around this time the claimant relocated from Glasgow to move closer to the respondent's head office in Lancashire.

5. In April 2019, DH received information which, says the respondent, indicated the claimant was setting up a competing business.

6. The information was first received by an employee of the respondent called Katie Whish ("KW") and passed on to DH on 30 April 2019.

7. KW told DH that she had met up with one of her friends, a former employee of the respondents called Philippa Chadwick ("PC"). During their meeting, PC had said that she was annoyed with the claimant as they had been planning to go in to business together but she had recently learned that the claimant was no longer including her in his business plans. It was clear to KW, from the information received by her at this meeting, that the proposed business described by PC would compete with the respondent.

8. Once DH learned of this information he spoke with the claimant and decided to suspend him. Further investigations took place and a number of allegations of misconduct were made against the claimant. A disciplinary hearing took place on 12 July 2019 to consider and decide on the allegations; the outcome was the claimant's dismissal.

9. The claimant appealed against his dismissal. The appeal hearing took place on 16 August 2019. The claimant's appeal was unsuccessful.

B. The Issues

10. At the start of the hearing the following issues were identified:

(1) Whether the claimant was dismissed for a potentially fair reason under section 98(1) ERA. The respondent's position is that it dismissed the claimant for reasons of misconduct.

(2) Whether the respondent honestly and reasonably believed that the claimant had carried out the misconduct alleged and carried out a sufficient investigation.

(3) Whether the respondent's reason for dismissal was a sufficient reason for dismissal.

(4) Whether, if the claimant was unfairly dismissed, his conduct contributed to his dismissal.

(5) Whether any deduction to any award made should be made in accordance with the principal established in **Polkey v A E Dayton Services Limited** [**1988] A.C 344** ("Polkey")

(6) Whether there had been a breach of the ACAS code of practice on disciplinary and grievance procedures and if so whether there should be an adjustment to any award made, pursuant to s207A(2) Trade Union and Labour Relations (Consolidation) Act 1992**.**

(7) Whether the respondent breached the claimant's rights to be accompanied pursuant to section 10 Employment Relations Act 1999.

C. The Hearing

11. The hearing was conducted by CVP. At times connections were poor for various participants which did cause some delay. I am satisfied that the use of CVP did not prevent a fair hearing and for the most part, connections were good. Where connection was poor, time was taken to correct this so that all participants could see and hear what was going on.

12. There had been some dispute between the parties about some contents of the hearing bundle. However, those were resolved by the start of the hearing and I was provided with one, agreed, bundle with 390 pages. References to page numbers below are references to this bundle.

13. One matter in dispute between the parties was the status of a meeting between the claimant and DH on 4 June 2019. The respondent's position was that this meeting comprised pre termination negotiations within the meaning of s111A ERA and therefore (applying s111A(1)) evidence of the meeting was inadmissible. The claimant's position was:-

(1) That, although the meeting had been intended to be a negotiation, in fact it was not;

(2) Further, the respondent's conduct was improper and, applying section 111A(3)ERA, it would be unjust not to allow evidence about the

meeting or at least that part of the meeting that the claimant says amounted to improper conduct.

14. I am grateful to Mr Flood and Mr Michell agreeing how the dispute in relation to this meeting should be dealt with. It was agreed:-

(1) That I would consider the claimant's case on this issue at its highest, by assuming that the meeting happened as described by the claimant in his witness statement (paragraphs 79-90) and in the document he says he compiled shortly after the meeting (pages 101-3);

(2) If I decided, on the basis of the claimant's unchallenged witness evidence alone, that the meeting did not comprise a pre-termination negotiation then we would hear evidence from DH about the meeting. The evidence would be provided by DH responding to questions from Mr Flood.

(3) If I decided, on the claimant's witness statement evidence alone, that the meeting did comprise a pre-termination negotiation but that there was improper conduct then we would hear evidence from DH on those matters only to the extent that I did not consider it just to maintain admissibility (so applying s111A(4).

15. Both counsel made representations which I considered and were reflected in my findings which I provided at the hearing and I set out below.

16. I decided (on the basis of the claimant's unchallenged evidence) that the meeting was in the form of a pre-termination negotiation. On the claimant's evidence much of the time was taken up with DH telling the claimant what evidence there was against him and asking the claimant about that evidence. Negotiations often include a party putting forward their best position and telling the party with whom they are negotiating, the weaknesses of that other party's position. That matter did not in itself turn the meeting in to something that was not a negotiation.

17. Further, putting a proposal to the claimant that he could resign and leave with no settlement, is a proposal that an employer is entitled to put within a pre-termination negotiation.

18. I did decide, on the basis of the claimant's unchallenged evidence alone, that there was improper conduct. The claimant notes the alternative to the proposal put to him was that he would be dismissed and the respondent would fight him (which is clearly a reference to this and possibly other litigation) and that the claimant was provided with 3 days to decide whether to agree the proposal that he leave with nothing.

19. Generally, being given a choice of resigning or being fired (before an internal investigatory and disciplinary process had concluded) would amount to improper conduct within the meaning of s111A(4) and it would not be just to allow the

respondent to rely on the protection of s111A assuming that such a choice was provided. I decided that the evidence I should hear was evidence about whether such a stark choice was put to the claimant in the meeting and, if so:-

(1) whether it was improper conduct in the circumstances and having regard to evidence from both parties; and, if so:
(2) whether it would be just to have regard to the evidence or whether I should disregard it.

20. I made clear, for the avoidance of doubt, that this finding made at an early stage of the evidence, did not amount to a conclusion that there had been improper conduct or that the dismissal was unfair. I set out my findings of fact in the section below in relation to the meeting.

D. Findings of fact.

I make findings of fact as set out below.

<u>The claimant's employment with the respondent.</u>

21. The claimant was provided with various updates to his employment terms, during his employment with the respondent. The most recent terms are in a document called statement of terms and conditions of service dated 20 March 2017 ("Terms"). The claimant signed in agreement with the Terms.(pages 38-44).

22. The Terms include the following:-

(1) Job Title – VetPlus Divisional Director Distributors.
(2) Remuneration – as at 2017 it was stated to be a salary of £120,000 pa plus potential for bonus. The Terms also provided the claimant with a relocation payment of £24,000.
(3) A 6 month notice period – either way.
(4) Reference to the disciplinary and grievance rules and procedures in the Employee Handbook – but noting that these were non contractual.
(5) Reference to the Company Handbook, noting that certain parts were contractual when referred to as such
(6) Restrictive covenants applicable during employment and for the defined Restricted period of 9 months following termination of employment.
(7) An IT Acceptable Use Policy, contained in the Company Handbook which includes the following expectations of employees:-
    i. To be mindful of what constitutes confidential or restricted information and *"to ensure such information is never disseminated in the course of communications without express authority."*
    ii. *To "ensure that they do not bind themselves or the Company to any agreement without express authority to do so."*

23. The IT Acceptable Use Policy also includes instruction about the use of email, including:-

i. Users must not email any business document to their own or a colleague's personal web based email accounts
ii. Use of company email for personal matters is prohibited
iii. Users are not permitted to access their personal email accounts via Company communication systems. .

24. The claimant was one of the most senior of the respondent's employees. He was part of the respondent's senior management team ("SMT"). He was responsible for the respondent's international sales with strong connections to customers and distributors. Membership of the SMT meant that he was aware of and influenced the respondent's business strategies and other very confidential information. He was a senior employee with relatively long service. He was trusted by his SMT colleagues and particularly DH.

Information provided to Katie Whish

25. Katie Whish ("KW") is an employee of the respondent. In April 2019, KW was a personal assistant to DH. KW was a friend of Philippa Chadwick("PC") who had previously been employed by the respondent. KW and PC met for lunch on 13 April 2019. PC told KW that she had been planning to go into business with the claimant but the claimant now seemed to be proceeding without PCs involvement.

26. PC told KW that another former employee of the respondent, Emma Farrell ("EF") was also involved in these plans and that it was EF who had told PC that the claimant intended to proceed without PC.

27. KW was clear from the information provided to her at this meeting, that the business PC told her about was intended to be a competitor to the respondent's business. PC told KW that it was going to be a rival business. PC also showed KW a picture of some packaging for a proposed product. KW was clear that the picture was for a product which was, or was going to be, competitive. The picture was of packaging for pet chews containing health supplements. KW's evidence (which I accept) is that the picture of packaging she was shown was the same as or similar to the image at page 288. The packaging was for a product or intended product called "*Goody good chews."*

28. There is further confirmation that KW understood that the business was intended to be a competitor because she decided to inform her boss, DH about her discussion with PC. KW did this was because she understood that EF and the claimant were in the process of setting up a competitive business that may cause difficulties for her employer. KW acted out of loyalty to the respondent, her employer.

29. DH and KW initially spoke by telephone on 30 April 2019 and then met in person on 1 or 2 May 2019. KW could not recall the exact date and there is no note of either discussion.

30. KW waited until 30 April 2019 before speaking with DH about this because she had decided to wait for further information from PC. In their discussion on 13 April 2019, PC told KW that she was going to "*have it out*" with the claimant; in other words, that she was going to speak with him about his plan to cut PC out of the business plans.

31. On 29 April 2019, there was an exchange of text messages between KW and PC. This included the following:-

PC: Had it out with Neil!!!

KW: Really?? What happened?? You OK? X

PC: He got all angry and defensive.
Blamed Emma for telling me
Apparently "he needs to be selfish"
Yes – going to hand his notice in in 4 weeks apparently"

……..

KW: So can I tell David

PC: Hahaha bloody tempting how I feel.. (the remainder of this message is not in the bundle)

32. KW spoke with DH the following day.

33. KW was later interviewed as part of the respondent's internal investigation. She provided an account of these events which was set out at pages 77/8 and provided copies of the messages. KW also attended the Tribunal hearing as a witness. When giving evidence at the Tribunal hearing, KW noted some errors in the account. There are 3 dates inaccurately recorded and some typing errors in referencing names/initials.

34. I find KW to be a credible witness and, other than the errors noted above, I believe the account she gave. Whilst at some stage during internal disciplinary proceedings the claimant had suggested KW may have had a reason to be untruthful, he accepted during his cross examination in this Tribunal hearing, that had not been fair and accepted that there was no reason that KW would be untruthful.

<u>Events of 7 May 2019.</u>

35. DH decided to speak with the claimant directly about the information he had been provided by KW and arranged to meet him on 7 May 2019. DH did not inform the claimant in advance what the meeting was about. The claimant understood that it was about other, business related matters.

36. DH also arranged for another senior employee of the respondent, Lisa Minton (LM) to attend the meeting. At the time, LM was the respondent's finance director. LM did not know what the meeting was about, until she was in the meeting itself. DH did not tell her in advance.

37. Neither DH nor LM took a note of the meeting which is unfortunate. It was an important meeting. There is now some dispute about what was said in the meeting. The first written record of the meeting was made later, on 17 June 2019, as part of the formal investigation.

38. At the meeting DH asked the claimant a series of questions and considered the claimant's responses.

39. DH told the claimant that he had received information that the claimant was setting up in competition and asked for the claimant's response. The claimant denied that he was.

40. DH also asked the claimant about PC and specifically whether he was still in contact with PC. The claimant replied that he had not been in contact with PC in a long time. DH asked specifically about whether he was setting up a competitive business with PC. The claimant denied that he was.

41. A potentially important difference in the claimant's version of events of this meeting and the version of events of DH and LM is whether DH used the term "chews" when asking about a competitive business. I find that DH did use this term. There was not a discussion about an unspecific, competitive business. The respondent has a number of business lines. The business that PC had mentioned to KW and that DH questioned the claimant about was a business to provide health supplements to pets in the form of edible chews. The business, as described, would be competitive with the respondent. The claimant was specifically asked about whether he was setting up a "chews" business with PC. Throughout this meeting, the claimant denied that he was.

42. DH was not satisfied with the claimant's answers and wanted further information. He asked the claimant to hand over his laptop and phone. At the time he made this request DH understood that both the laptop and mobile phone used by the claimant had been provided by the company for his work use. The claimant agreed that he would hand both over.

43. The claimant asked to deal with some personal tax information from his laptop before handing it over. DH agreed to this. The claimant then left the meeting room. He did not return. After around 15 minutes, LM went to find the claimant who was still working on his laptop. LM waited a few more minutes for the claimant to finish but then told the claimant that he had been provided with enough time and now needed to hand the laptop over.

44. When the claimant handed the laptop over he did not inform LM that, in addition to closing down some personal tax information, he had also removed his "iTunes account" from the laptop. This term suggests that he may have removed music from the laptop. The claimant accepted, when questioned, that he had removed much more than music. He had removed his Apple ID account from the laptop, thus removing a considerable amount of information and disabling access to cloud based information that had previously been accessible from the laptop.

45. At the end of the meeting DH informed the claimant that he would be suspended on full pay. This was confirmed by letter dated 7 May 2019 (page 71). The reasons given in the letter were these:

> *"To investigate an allegation made against you, namely that you have acted in breach of an employee's implied duty of fidelity with regard to allegedly setting up a competing business, whilst still employed by the company. We reserve the right to change or add to this allegation as appropriate in the light of our investigation."*

Steps taken by DH after 7 May 2019.

46. The following day (8 May 2019) DH wrote to PC and EF asking if they would assist in the investigation (letter pages 73-74). Neither PC nor EF replied. Also on 8 May 2019, KW called PC. KW reported (and I find as a fact) that PC attempted to change her story during this telephone call. She told KW that she was angry about the situation and that the company she and the claimant were setting up was to sell cannabis oil and hand sanitiser. For reasons explained below, the references to hnd sanitizer at this stage is potentially important. In this call, further comments were made by PC which clearly indicated that the friendship between PC and KW was at an end.

47. Although the claimant provided his laptop, he did not provide the password for the laptop. Attempts were made to contact the claimant to obtain this. LM sent a text to the claimant on 10 May 2019 but there was no response to this. Also, on the same date, DH wrote to the claimant asking for the password. That letter was sent by a "signed for" service. DH received confirmation that the letter had been signed for the following day (11 May).

48. The claimant in his evidence stated that he did not receive the letter on 11 May and that it was his postman that had signed for the letter, and the claimant did not in fact see the letter until the following day or the Monday morning.

49. DH said this in the letter:

> *"We've tried to access your computer but without success. Please can you provide us with the password so that we can gain full access to the laptop and its content. We have sent you a text message to your personal mobile and left you a voicemail asking you to provide this information. However to date*

you have not responded to either message. Whilst we have no reason to doubt these messages have been received by you, we are sending you this letter to you just in case for whatever reason you did not receive the messages on your personal phone.

Please can you contact us by no later than 3.00pm on Monday 13 May 2019 and provide us with your password."

50. The letter informed the claimant that if the deadline was not met then the laptop would be sent to a forensic IT expert.

51. DH also took the unusual step of instructing a private investigator to report on whether the claimant was still in his home. The claimant's evidence is that he was aware his house was being watched and it was extremely intimidating for him and his wife. DH's evidence is that he was concerned about the serious allegations, that the claimant was not cooperating and may not be at his house, therefore not receiving correspondence. DH's evidence (which I accept on this point) is that he stood the investigator down as soon as he received a report that the claimant was still resident at his home address.

52. The claimant met the respondent's deadline by providing the password at around 2.30pm on 13 May 2019. However, DH had by that stage already decided to instruct forensic IT experts.

Meeting with the claimant and DH on 4 June 2019

53. The claimant and DH had exchanged emails before their meeting on 4 June 2019 and it is apparent from these that a settlement might be agreed between them.

54. DH's position changed when he received further information, which was being retrieved from the laptop before their meeting.

55. The respondent claims that the meeting of 4 June 2019 was a protected conversation. I have already noted my decision (based only on the claimant's written version of events) and the agreed way forward therefore for me to receive evidence on that part of the meeting that I considered may be improper.

56. My findings of fact are set out below, having considered the claimant's evidence, the evidence of DH and the claimant's contemporaneous account on pages 101:

(1) The claimant was provided with two options, one of which was to leave the respondent's employment without payment and without a notice period, and with the post termination restrictions intact;

(2) The other option would be that the claimant would be in a fight with the respondent and DH would ensure that the claimant did not receive a penny. It was accepted by the parties that the reference to "fight" meant that the claimant would be dismissed and the respondent would litigate aggressively. DH accepted on cross examination that he was

angry in this meeting. I find that the meeting was not one of discussion but was one in which DH told the claimant what the position was and gave him the "resign or be fired/fight" option.

(3) In his evidence, DH denied that he gave the claimant the option of resign or be fired/fight. He explained that he has been in business a long time and knows that he needs to go through a process of investigating and holding a disciplinary hearing before dismissing anybody.

(4) Whilst I am clear that DH does understand the need for an employment process, I find that DH did not choose his words carefully in this meeting. The claimant was given a "resign or be fired" ultimatum on 4 June and told he had until 7 June to decide and communicate his decision. DH was angry and upset about the situation and wanted it resolved quickly and on the basis that his business was protected and the claimant was out of the business.

DH's involvement in the investigation and disciplinary process following 4 June 2019

57. Following the meeting of 4 June 2019 DH took no active part in the disciplinary investigation and hearing process. DH was asked whether his mind was made up by 4 June meeting; had he decided that the claimant would be dismissed from the respondent. He denied that his mind was closed. His evidence was that if his mind had been truly closed, the claimant would have dismissed. Instead the respondent carried out a disciplinary procedure. DH's evidence was that, by 4 June 2019, from the evidence he had seen, the outcome of a disciplinary hearing was very likely to be the claimant's dismissal. The evidence was heavily stacked against the claimant. However, his mind was not closed.

58. Other senior employees of the respondent therefore became involved in the investigatory and disciplinary process.

59. The respondent had recently appointed Emma Channon ("EC") to a role as "Head of Legal." EC continued the investigation, undertaking a number of interviews including with the claimant. The disciplinary hearing was chaired by the respondent's director of Quality and Regulatory Affairs, Pam Mitchell (PM) and the claimant's appeal was heard by Sam Wright, Vetplus Divisional Director. EC, PM and SW were each very clear that DH did not seek to interfere with their role in the respondent's internal processes. PM was particularly forceful. She was insistent that she chaired the disciplinary hearing and reached the decision herself and that she would not have allowed interference by DH even had he tried to influence her decision making.

60. I accept this evidence from DH and from the respondent's witnesses. I find that, although DH told the claimant at the meeting of 4 June 2019, that he had a choice of resigning or being dismissed, he did so when angry and upset at the situation and in an attempt at a swift conclusion. However, the claimant was not dismissed; DH took himself away from the process and other senior employees of the respondent conducted the investigation, disciplinary and appeal hearings

Respondent's Investigation Process

61. DH ensured initial investigations were carried out soon after his meeting with the claimant on 8 May 2020. These initial investigations focussed on the laptop that the claimant had handed over for examination.

62. A company called Zentek were instructed on 13 May 2019. Zentek are a firm of forensic IT experts. Zentek were provided with the laptop on that day (13 May) and quickly took a forensic image, returning the physical laptop itself to the respondent just a few days later.

63. The respondent employed an IT manager, Jason Hodson("JH") who, on the instructions of DH, carried out his own review of the laptop. JH found a presentation on the laptop from an organisation called "Frame." The presentation was about setting up a new business with a project name of *"Project Woof."* JH also found that in 2017 the claimant had sent the presentation, via his personal email account, to another employee of the respondent called Gary Welsh. The presentation was sent to GW's personal email account. The email is at page 137. In it the claimant stated as follows:-

> *Here is the full presentation from Frame tor you to have a look at. I'm sure you will find it interesting.*
>
> *L know l don't need to say but outside of Lauren please tell no-one. I will speak to Philippa tomorrow and let her know you are in the loop.*
>
> I find the reference to "Lauren" to be GW's wife or partner and reference to Philippa to be a reference to PC.

64. JH also found that the claimant's laptop had 2 separate areas, being an area called "Vetplus" and an area called "Neil." JH scanned the laptop using a specialist application, to pick up details of deleted files. This informed JH that a great deal of information had been deleted from the laptop. JH was able to retrieve limited information about some of the deleted files. JH found:-

(1) Various confidentiality or Non Disclosure Agreements ("NDAs")

(2) A document containing very confidential information belonging to the respondent – being details of manufacturing of one of the respondent's products called Synoquin

(3) That various other documents of potential relevance to the investigation had been deleted all with the name "Neil Blackwood" in their title. These are listed at page 131. Examples of the names of these documents: *"Neil Blackwood Joint Soft Chews (Formulation 2) Pricing"* and "*Neil Blackwood Immune Soft Chews Formulation 1 pricing."*

65. As JH found that the majority of the content of the laptop had been deleted, he contacted Zentek to see if they could find anything further and provided relevant search terms. These search terms are noted at page 119.

66. The examination of the claimant's laptop by Zentek revealed that the items of potential interest/concern identified by JH as having been deleted (see para 64(3) above) above were all removed from the laptop on 7 May 20-19 (the date of the claimant's meeting with DH and LM) between 13.19 and 13.22pm. This was shortly before the meeting. (confirmation on this from Zentek in their emails of 31 May 2019 and 14 June 2019 at page 116 and 119).

67. EC interviewed a number of individuals before holding an investigatory meeting with the claimant on 24 June 2019. In advance of this investigatory meeting, the claimant was provided with information and copy documents. (the invitation letter is dated 20 June 2019 at pages 148-151). The letter notes that the claimant was provided with a number of documents, including an investigation summary document which EC had written, interview notes of meetings with KW, LM,JH, AS; documents recovered from the claimant's computer; details of documents which had been deleted and copy emails.

68. EC also wrote to both PC and EF (by letter of 13 June at pages 108-111) but neither replied to her.

69. The claimant was also informed of the allegations which EC had at that stage identified. They were, in summary:-

(1) That the claimant acted dishonestly in representations made to the company about whether the claimant had or was taking steps to set up a competing business

(2) That the claimant was dishonest when stating to DH/LM on 7 May 2019, that he was closing tax documents on his laptop, but he deleted various other documents but not tax documents.

(3) That the claimant behaved in a way to undermine DH

(4) That the claimant accessed/stored/misused the respondent's confidential information suggesting he was going to use the information to set up in competition.

70. The notes of the investigatory meeting that EC held with the claimant are at pages 153-158. I make the following findings of fact in relation to this investigation meeting:

(1) The claimant was asked whether he had ever discussed setting up a business with PC or EF and his response was that he was approached by PC about two years previously; the idea was hers and that it was not his idea and that he never moved forward with it. By this stage of course the claimant had seen that the respondent had retrieved documents concerning "Project Woof". He had also been provided with KWs account of her discussions with PC.

(2) It was put to the claimant that PC clearly believed that the claimant was about to start a chew business with her. The claimant responded that

there was no business and no agreements and that he could not control what PC wants to believe.

(3) In relation to whether Project Woof was/would be competitive with the respondent the claimant said that it was not and that he had taken advice from a solicitor to check that it was not competitive and was told that it was not competitive; that he was referred to the email that had been recovered from the claimant to Gary Welsh dated 24 May 2017 and responded that it had been sent to him for his overview.

(4) Whilst the claimant accepted that Project Woof had been sent to him, his response to being asked why he had not disclosed it at the meeting of 7 May 2019 was that chews had never been mentioned in that meeting nor had Project Woof. As he was not specifically asked those questions he did not provide the information. He stated that he did not have to volunteer any information. I note here that project Woof could not have been mentioned by DH at the meeting of 7 May 2019 because he was not then aware of that project name. I have already noted my finding of fact that the word “chews” was used at the meeting.

(5) In response to being asked about the deletion of documentation from his laptop, particularly on 7 May 2019, he responded that he took his iTunes account off but did not delete any files at the same time. He was asked if he could retrieve his deleted files and his response was “it’s too late now as 28 days have passed”.

(6) The claimant was asked about the list of deleted files (64(3) above) and did not provide an explanation about what they were. As noted above, he denied that he had deleted them and.

(7) The claimant referred to an individual called Simon Green. Emails recovered from the laptop and provided to the claimant in advance of the investigation meeting included emails between the claimant and Simon Green dated December 2018. The claimant claimed that this was the only current potential business plan and that it was about hand sanitizers.

(8) The claimant was also asked about NDAs (see below).

(9) The claimant was asked why PC would say what she did to KW and give a clear indication that the setting up of the chew business was current. The claimant could not offer an explanation except to note that perhaps PC was unhappy and that she had lost a baby.

71. The claimant followed the meeting up with some information by email of 27 June 2019 (pages 159-160). He was asked for Simon Green’s contact details and company information as well as a copy of the legal advice he had obtained which told him that the proposed pet chew business would not be competitive.

72. The claimant provided the name of a solicitor that he claimed (and still claims) provided him with that advice but did not provide a copy of the advice itself. In following correspondence, the claimant was asked again for a copy of the solicitor's advice His response was: *"legal advice is confidential and privileged. Can you please tell me on what legal grounds you seek it and I am required to provide it? For the avoidance of doubt I've done nothing wrong or in breach of contract*".

73. EC's response was that she accepted the advice was privileged but that the claimant could waive that privilege by disclosing it and that would be cooperative and helpful to the investigation. I note the following in relation to the advice:

(1) That it has not been provided although legal privilege would almost certainly attach to such advice;

(2) at the Tribunal hearing the claimant's evidence was that the advice was never in writing and that he did not pay for the advice. Therefore he could not produce a copy of any advice or even an invoice showing that the advice had been obtained;

74. I find that the claimant did not seek advice in 2017 as he claims to have done.

75. The claimant provided a contact number for Simon Green and the name of his business; "Agrismart."

76. I find that the following additional investigation steps were carried out:-

(1) 11 June 2019 - EC interviewed KW 2019. (104-5)

(2) 13 June 2019 – EC wrote to PC and EF requesting information/assistance in the investigation (108-111). Neither replied to EC.

(3) EC contacted Zentek and obtained details of their investigation (116-121)

(4) 17 June 2019 - EC interviewed LM, principally about the events of 7 May 2019 (draft and final version of notes at 122-126)

(5) 17 June 2019 - EC interviewed JH and obtained information (and copies) of documents JH retrieved from the laptop (127-141)

<u>Disciplinary Hearing</u>

77. The claimant was invited to a disciplinary hearing by a letter dated 28 June 2019 (pages 166-167). The allegations set out in this letter were as follows:

"(1) You acted dishonestly in representations made to the company about whether you had or were taking steps to set up a competing business.

(2) On 7 May 2019 you acted dishonestly in stating to David Haythornthwaite and Lisa Minton that you were closing tax matters on your computer when other documents were deleted.

(3) You engaged in conduct which undermines otherwise detrimental to the chairman of the company.

(4) You have acted in such a way to destroy the relationship of mutual trust and confidence between an employer and employee."

78. The letter also informed the claimant that allegations (1) and (2) were regarded as "gross misconduct" and allegations (3) and (4) were put into a class of "misconduct". It was made clear to the claimant that the possible outcome of the hearing was his dismissal without notice. An update to EC's investigation summary document was included with the letter. (pages 168-172). The claimant was also provided with a copy of the notes of his investigatory meeting with EC

79. The claimant informed EC that he wanted to attend the meeting with a work colleague, Chris Grayson ("CG"). CG was unable to attend (for work related reasons) the hearing that was arranged for 4 July 2019 and the claimant therefore requested a postponement until 11 July 2019. The meeting was rearranged for 12 July 2019. The claimant had been asked if there was anyone else that could attend with him but he was insistent on Chris Grayson.

80. Also on 7 July 2019 the claimant informed EC that he had arranged for his own analysis to be carried out on the laptop and asked for it to be sent back to him. The respondent did not reply to this.

81. The claimant also collected statements that had been obtained by his solicitors from the following individuals:

(1) Raymond Jeong, a distributor of the respondent's products in South Korea;

(2) A statement from Gary Welsh, former employee of the respondent;

(3) Statements from PC and EF;

(4) A statement from Craig White, another former employee of the respondent.

82. The claimant did not send these statements in advance of the disciplinary hearing, but handed them out individually to PM during the hearing.

83. As far as these statements are concerned I find as follows:

(1) The statement from Raymond Jeong does not assist in relation to the allegations. It notes that an American company started to be active in the Korean market that was competitive to the respondent and that the claimant was a main contact in finding possible solutions to counter the threat. The claimant provided this as evidence that he investigated the respondent's competitors;

(2) The statement from Gary Welsh confirms that the claimant sent to him (from the claimant's personal email address) a presentation concerning

a potential project (project Woof). The statement also confirms that the claimant had asked Gary Welsh for his opinion about this potential project. The potential project was not positioned as part of the respondent's business although Gary Welsh says this in his statement, *"To my knowledge the project was for online sales only and did not directly compete with Mr David Haythornthwaite's business at Vetplus. For clarity from what I saw the ideas which were mainly for online sales which Vetplus actively disliked and advertised this fact through marketing campaigns".*

(3) The statements from PC and EF raise more questions than answers. For example, PCs statement made no mention of her discussions with KW. PM noted that it was odd that these individuals had refused to help with the respondent's investigation yet provided short statements some months later.

(4) The statement from Craig White provided evidence that the respondent sometimes carried out research by telephoning a Veterinary Practice under an alias to try to obtain information about products that the Practice recommended. The statement also noted the respondent's interest in making products available in a chew format.

84. Shortly before the disciplinary hearing, PM contacted Zentek because she had some questions about their findings. During this discussion PM was told by Zentek that some 37000 files had been deleted from the claimant's laptop on 7 May 2019.

85. Notes of the disciplinary hearing are at pages 200-208. The meeting began at 10.05am. The claimant's chosen representative was not in attendance. The claimant informed PM that CG's appraisal meeting had been moved forward and that was why he was not in attendance. The claimant asked for the meeting to be put back until later that day, once CG's appraisal meeting had finished. PM left the meeting to call EC about this. The decision taken was to refuse the postponement.

86. The respondent's reason was that it was for the claimant to make the arrangements for his chosen representative to attend. The respondent had already agreed to postpone the hearing on 4 July 2019 in order that his representative could attend.

87. The claimant had of course made arrangements for his chosen representative to attend and it was the respondent's decision to re arrange CH's appraisal meeting that stopped CG attending.

88. The appraisal meeting was with DH.. DH was not aware that the disciplinary hearing was taking place on the morning of 12 July 2019. No one contacted DH to ask that CG's appraisal meeting be rearranged so that CG could attend.

89. PM considered the 4 allegations against the claimant.

Allegation 1 – acted dishonestly in making representations about setting up a competing business.

The claimant's response to this allegation is recorded at pages 201-3. In summary it was that:-

(1) He had never been asked about a "chew" business. He claimed the word "chew" was not used at the meeting on 7 May.

(2) He informed DH and LM about lots of opportunities he had been presented with

(3) Whilst PC worked for the respondent the claimant would discuss lots of ideas with her but nothing about a competing business.

(4) He did not agree that the Frame presentation and other information about "Project Woof" indicated that he had been in the process of setting up a competing business (so making his representations at the meeting of 7 May untrue).

(5) He provided PM with the short statements from PC and EF – see above.

(6) Being approached about ideas and listening to ideas is not a breach of his contract.

(7) the respondents have not presented anything which indicates that there is a competing business

(8) the reason that "Chew" businesses were investigated by the claimant was because the respondent's employees (including the claimant) are trained to find out about competitors using "covert" means. It was well known that the respondent business was looking to sell chews (the claimant referencing the respondent's 2017/18 business plan). The claimant provided examples of VetriScience and We-pharm as competitors he had investigated.

90. Although the notes of the hearing show the claimant provided information about investigating competitors when PM had stated she was moving on to allegations 2, I find it was the last point made by the claimant in response to allegation 1.

Allegation 2 - On 7 May 2019 the claimant acted dishonestly in stating to David Haythornthwaite and Lisa Minton that he was closing tax matters on his computer when other documents were deleted.

91. It was apparent from the information that had been obtained from Zentek that files had been deleted from the claimant's laptop on 7 May 2019 both before and after the meeting on that day. Whilst the wording of allegation 2 only related to deletions immediately after the meeting, PM's questions to the claimant related to deletions both before and after the meeting.

92. The claimant was asked about the deletion of the pdf files bearing the name "Blackwood" and "Chews." (64(3) above). When asked what these documents were, the claimant replied that he did not know (bottom of 214). He was asked about the deletion of these files at 13.22pm on 7 May 2019, which was shortly before his meeting with DH. The claimant's response was to ask (rhetorically) why he would delete files relevant to a meeting when he did not know what was going to happen at that meeting?

93. When asked how those files came to be deleted if he did not delete them, the claimant replied that he did not know.

94. The claimant again made the point that, as part of his role with the respondent, he had been investigating chews in 2017. When asked again what the deleted pdfs were, he replied that they would have been part of an investigation that was undertaken on a competitor.

95. The claimant denied having deleted anything on 7 May 2019, before the meeting.

96. The claimant made the same points when asked about NDAs that he had entered in to with third party companies using an alias of "Blackwood." He entered in to these whilst carrying out his role for the respondent, so that he could find out information about the respondent's competitors.

97. PM put to the claimant that Zentek had told her that 37000 had been deleted. The claimant had not previously been made aware that it was alleged that he had deleted such a large number of files and explained that he had deleted his iTunes account which would have automatically deleted all emails.

Allegation 3. The claimant engaged in conduct which undermined or was otherwise detrimental to the respondent's chairman

98. This allegation related to the claimant's disagreement with the respondent's expense policy. A number of internal emails were considered. There was concern that the claimant voiced his disagreement in methods which might undermine DH. The claimant's position was that he had not intended this but that he could understand the correspondence being interpreted in this way.

Allegation 4. The claimant acted in such a way to destroy the relationship of mutual trust and confidence between an employer and employee.

99. Whilst the claimant accepted that trust and confidence had been broken, he stated that this was due to the respondent's actions and gave a number of reasons why, including the retention of his laptop, the appointment of private investigators, possible hacking of his personal email account and DHs treatment of him in negotiations. The claimant stated that he was fortunate enough to know the Deputy Chief Constable of Merseyside Police and the computer hacking issue had been reported. The claimant also indicated that he would be making a complaint to the Information Commissioner's Office. I note that neither line of complaint has resulted in any action against the respondent.

The decision to dismiss the claimant.

100. PM decided to dismiss the claimant and wrote to the claimant by letter dated 15 July 2019 (but not sent until 16 July 2019) to inform him of this (page 221). PM's reasons for dismissal are set out in a follow up letter dated 19 July 2019 (page 222).

101. PM was provided with the notes of the meeting on 12 July 2019 and on the same day she made some amendments to these notes which she returned by email to the note taker. PM also set out her thoughts within the body of this email which was copied internally to EC and also and copied externally to the respondent's solicitors. PM raises some questions in this email:-

(1) PM noted that the versions of events set out in the statements from PC and EF that the claimant provided in the hearing, contradicted KWs account. PM stated that she recommends that the claimant's solicitor should be contacted to confirm that the statements are authentic. PM also notes

> *"It seems odd that neither of these people would come forward when we requested this information in the very early stages and have waiting 2 months before providing this information."*

(2) PM noted that the claimant denied deleting files from his laptop which contradicted the information received from Zentek. PM asked:

> *"Can any further information be obtained from Zentek on this or do we need to get further information?*

102. PM decided not to follow up on either of these queries or on any other issues raised. PM confirmed this when questioned by Mr Flood. PM explained that she went through all of the evidence that weekend (12 July 2019 was a Friday) and, having done that, she decided that she did not need to make any further enquiries or delay her decision. She noted that the information from Zentek was independent.

103. The email of 12 July 2019, was part of PM's decision-making process and included her thoughts as she went through a process of reaching her decision. It indicates a careful review and consideration of the issues. I find that the decision to dismiss the claimant was made by PM and that her reasons for dismissal are accurately set out in the letter of 19 July 2019. PM provided evidence that DH did not make contact with her about the disciplinary hearing or PM's decision. I accept that evidence.

Allegation 1 – PM's decision and reasons.

104. In her reasons, PM noted that the statements from PC and EF supported the claimant's position that he had not taken steps to set up in competition and cast doubt on the version of events put forward by KW. These are her conclusions:

> *There is a clear conflict of evidence here between your evidence, and that which the Company has gathered as part of its investigation. Ordinarily in this*

type of scenario, I would not be able to make a finding as to who is to be believed here, as it is one person's evidence against another. However, there are a few other factors, that, I have considered here, and to which I have made some findings of fact on:

a. Emma Farrell and Philippa Chadwick were, asked by the Company to co-operate with regard to its investigation. However, they chose not to do so, and further, chose not to respond to the Company's correspondence, but they have now decided to provide evidence at your request. From the Company's perspective, all it was seeking to do with regard to its communications with these individuals was ascertain some facts. I do find it interesting they were prepared to co—operate with you but not the Company. The timing of their involvement is also interesting. I believe now we have fully disclosed what the Company believes has been going on here, you have clearly spoken to them, and they have now put forward a version of events to support you, with them almost taking responsibility for the situation that you are, faced with. As they have not been prepared to co-operate directly with the Company as part of its investigation, their evidence has not been capable of being challenged or any questions put to them. I am also concerned about the authenticity of their statements, as they are not signed.

b. I have also viewed your answers given to Emma in the Investigation Meeting when you were question on your business activities. I have found them to be evasive and selective in your use of words. This has therefore raised some doubts in my mind about your activities, and whether you have been, open and transparent.

c. I have also concluded that you have deleted information on your laptop on the day you were suspended, the details of which I will set out below. The deletion of such information and the lack of a credible explanation from you on this issue is also very relevant here. Further details on this are set out under (2) below.

d. During the initial meetings you attended, namely those prior the formal investigation meeting with Emma, you did not disclose, that Philippa came to you about the business idea, despite being, questioned about discussions you had with Philippa on business ventures. I find this difficult to comprehend given the stance you took at the Disciplinary Hearing when you have now disclosed a statement from Philippa that says it was her idea. I would have expected you to, have confirmed this was the case earlier on in the process. This further supports my view, that I do not find your answers credible and that this information has only been provided when you have realised the severity of the situation and potential outcome.

Thus, when I take all of the above into account, I have concluded that on the balance of probabilities, I have decided to prefer the evidence of Adrian, Lisa, Katie and David. I found you have been dishonest towards the Company when you were, asked about whether you had or were taking steps to set up a competing business. Accordingly, I find that this allegation is well founded.

Allegation 2- On 7 May 2019 the claimant acted dishonestly in stating to David Haythornthwaite and Lisa Minton that he was closing tax matters on his computer when other documents were deleted.

105. PM concluded that this second allegation was not founded as the key deletions which occurred on 7 May 2019 were before the meeting, not after the meeting. However, PM also noted that it was clear to her that a significant amount of files were deleted on 7 May 2019; no one else had accessed the claimant's laptop on this day; that his responses had been evasive and selective when asked about the deleted documents; that specifically he could not provide any explanation during the investigatory meeting of 24 June 2019 of the documents with the terms "Neil Blackwood" and "Soft chews formulation pricing" in their names. PM concluded that the claimant had acted in a deceitful way and in a manner likely to destroy trust and confidence.

Allegation 3 – correspondence regarding the respondent's expense policy.

106. PM decided that this correspondence was undermining and that the claimant's conduct was deliberate.

Allegation 4 – claimant acted in a way to destroy relationship of mutual trust and confidence.

107. PM decided that the actions of DH had not destroyed trust and confidence (therefore dismissing the claimant's argument that it had) and, having made her findings under allegation 1-3, PM described the claimants conduct as follows:-

> *"dishonest, deceitful and potentially damaging to the Company. I have taken the view that your conduct was calculated and likely to destroy the trust and confidence necessary to continue the employment relationship.*

The claimant's appeal.

108. On 26 July 2019 the claimant informed the respondent that he wished to appeal the decision to dismiss him and provided a written statement setting out his reasons for appeal. (pages 230-234). In summary, they were as follows:-

(1) That it was not the claimant's fault that PC and EF would not cooperate with the investigation

(2) It was not reasonable to conclude that he claimant had been evasive in the investigation meeting – and that "chews" had not been mentioned in the meeting on 7 May 2019.

(3) There was no reasonable basis for the conclusion that he had acted deceitfully and deleted information from the laptop on the day he was suspended

(4) He had not been dishonest when, having been asked whether he had set up a business in competition or was about to, he answered no. he was not asked anything in relation to any specific business with PC.

(5) In relation to allegation 2, there was no prior knowledge of the allegation that he had deleted 37,000 files from the laptop. Further he had been denied the opportunity to arrange his own forensic examination of the laptop. The Zentek forensic investigation was unreliable.

(6) He did provide an explanation of the "Neil Blackwood soft chews formulation" documents in that he explained why he was investigating competitors and provided 3 statements to support this explanation

(7) He disagreed the finding in relation to the expenses claim issue. His conduct did not undermine DH.

(8) There was no reasonable basis to conclude that he had acted in a way to destroy trust and confidence. He had cooperated throughout the investigatory and disciplinary process. It was the respondent's actions that destroyed trust and confidence.

(9) The whole process was unfair as DH decided, on 4 June 2019, that the claimant should be dismissed. Further, the claimant had a purchase order dated 20 June 2019 which showed that the recruitment of the claimant's replacement had already started before he had been dismissed.

(10) The claimant was not allowed to be accompanied to the disciplinary hearing by his chosen representative.

109. The appeal hearing took place on 16 August 2019 and was chaired by Sam Wright ("SW") Divisional Director. Notes of the hearing are at pages 252 to 275.

110. SW upheld the decision to dismiss the claimant. His decision letter is dated 23 August 2019 (pages 276-278). I find the decision was SW's and the letter of 23 August accurately records the reasons why he decided to uphold the decision to dismiss the claimant. SW provided evidence that DH did not contact him about the appeal or SW's decision. I accept that evidence.

111. I summarise below, SW's reasons for rejecting the claimant's appeal:-

(1) the claimant had been asked about business activities with PC but that the claimant did not volunteer the information (Project Woof) until a later date. SW noted this part of the claimant's appeal was *"at best incorrect and at worst, dishonest."*

(2) The claimant did not inform DH of the "Frame" (or Project Woof) idea at the meeting on 7 May 2019. SW considered this did not demonstrate that the claimant had acted with transparency.

(3) SW considered the evidence provided by Zentek was credible.

(4) The claimant's actions in relation to his queries/criticism of the expenses policy did not *"display a United front and alignment with the chairman"*

(5) SW did not accept that the outcome was a "fait accompli." As for the Purchase Order:-

a. It was not signed and SW questioned the validity of it

b. PM was not aware of it and the decision to dismiss was hers.

(6) As for the non availability of the claimant's companion, SW considered that the claimant ultimately chose to continue on his own.

Appointing a successor to the claimant.

112. Benjamin Frew ("BF"), a former employee of the Respondent gave evidence. One of BF's responsibilities whilst working for the respondent, was to raise purchase orders. On 20 June 2019, Mr Frew was asked by DH to raise a purchase order He was asked to raise a purchase order. The purchase order (page 152) states as follows: "Recruitment of Head of International Business Development."

113. BF gave evidence that he asked DH what the purchase order was for and DH replied that it was for the claimant's replacement. DH was asked about this discussion. DH's evidence was that he could not recall the conversation but that he knew BF to be a friend of the claimant and that he may well have made a flippant remark as he knew it would get back to the claimant.

114. DH also stated that this was not to recruit the claimant's replacement. The respondent was looking for someone who would focus on and develop the business in South America particularly. It was specifically a senior sales business and the post holder would not form part of the respondent's senior management team.

115. DH noted that the respondent had more recently recruited another senior business development executive but that in the period following the claimant's dismissal DH looked after the respondent's Vetplus business in Asia and Europe (the areas for which the claimant had been responsible).

116. I find as follows:-

(1) The comment was made by DH to BF

(2) It was a flippant remark

(3) The recruitment was in to a new role primarily related to developing the respondent's business in South America. It was not a replacement for the claimant.

(4) Following the claimant's dismissal, DH became more involved in the Vetplus business in Asia and Europe until the respondent decided on a longer-term solution.

Confidentiality/Non disclosure Agreements

117. The claimant entered in to a number of confidentiality or non disclosure agreements ("NDAs) with third party companies. The claimant did not volunteer this information. Agreements (which had been deleted) were recovered from the claimant's laptop by Zentek. Copies of the NDAs recovered are at pages 57 to 59 and 60 to 64.

118. The NDA starting at page 57 is between Foodscience (a genuine company based in Vermont) and Neil Blackwood of NB Consulting. Neil Blackwood is an alias used by the claimant. Blackwood is the first name of the claimant's father. The address stated in the agreement for Neil Blackwood was "Redcrags" in Arbroath. Redcrags is the name of the claimant's parents house.

119. The NDA starting at page 60 is between HBH Enterprises (a genuine company based in Utah) and Neil Blackwood (also of Redcrags). Both agreements bind Neil Blackwood/the claimant in a number of ways including keeping information (as defined in the agreements) confidential.

120. The claimant was asked about these agreements at the investigation interview on 24 June 2019 (see particularly page 156). His responses were evasive. The claimant was asked (not just about the NDAs, the request was wider) if he would provide the respondent with access to deleted files. His response was that they could have been retrieved from icloud but as 28 days had passed it was too late. I note here that the claimant was asked for his Apple/iTunes password as early as 10 May 2019 but did not provide it). The claimant was asked specifically about the agreement with Foodscience. He noted that they were a competitor of the respondent and then, when stating that aliases are used in the respondent business, gave a different example.

121. At the disciplinary hearing, the claimant handed over a statement from Raymond Jeong (pages 187-8) which he claimed supported his position that this was a way that the respondent operated. RJ was one of the respondent's customers/distributors. I find that the statement provides no assistance to the claimant's position in relation to NDAs. It simply notes that RJ and the claimant considers how to investigate the activity of a competitor and their range of products, pricing etc. It does not state (or allude to) the use of aliases or other methods of deception. It describes a legitimate activity of collecting market intelligence on a business rival.

122. The claimant also handed over a statement of Craig White ("CW") a former employee of the respondent who had worked in sales. CWs statement refers to an activity of the respondent's area sales manager contacting veterinary clinics, using an alas name and making enquiries about the products they recommended and pricing. Whilst CW does provide evidence of the respondent's business activities including the use of alias names, it is a very different activity to the NDAs. Notably, it

did not involve entering in to any sort of binding agreement and deceiving a business in to disclosing their confidential information, believing it to be protected.

123. CW's statement also comments on the "chews" market and confirmed that in 2017, DH confirmed that the respondent would be moving in to delivering their healthcare products using chews.

124. I also note that DH gave evidence that he did not have any knowledge of the NDAs. I accept this evidence.

125. In relation to the NDAs I find as follows:-

(1) The claimant was not instructed or in any way encouraged by the respondent to enter in to the NDAs.

(2) The NDAs were entered in to by the claimant but using an alias. They were entered in to because the claimant was obtaining information relevant to a proposed business which was intended to be competitive with the respondent.

(3) The claimant's activity of entering in to these NDAs by using an alias was dishonest and deceptive.

(4) The claimant hid this activity from the respondent by attempting to delete the NDAs from his computer.

<u>The claimant's contact with PC</u>

126. I find that the claimant had been in more recent contact than he had stated at the meeting on 7 May and subsequently. This finding is based on the following:-

(1) That is what PC said in her meetings with KW – including a reference to a discussion between the claimant and PC when she "had it out" with the claimant in a discussion at the end of April 2019

(2) PC's reference to hand sanitizer in her discussion with KW on 8 May 2019 (that being the business idea that the claimant claimed to have with Simon Green and claimed it be current)

(3) The fact that the point is not dealt with in the written statement provided by PC to the claimant's solicitors (page 191).

<u>The Laptop</u>

127. The laptop provided by the claimant on 7 May 2019 belonged to him personally. The claimant handed the laptop over voluntarily although the claimant did not then provide the password for the laptop and had also deleted his account from the laptop.

128. The laptop was almost identical to a laptop that the respondent had bought for the claimant for work purposes. Both were Apple Macbook Air laptops.

129. When the laptop was handed over to the respondent, the respondent believed it to be the one it had bought for the claimant.

130. The claimant used the laptop for both work and personal purposes.

131. The claimant claimed that he did not use the laptop that the respondent bought for the claimant's work use because there was not enough storage on the laptop.

132. By the time of the appeal, the respondent recognised that the laptop was not the one purchased by the respondent and returned the laptop to the claimant.

133. The claimant had asked for the laptop to be returned earlier and one of the reasons the claimant had was that he wanted to carry out his own forensic examination of the laptop.

134. At the Employment Tribunal hearing the claimant stated for the first time (in response to a supplementary question put by his counsel) that, when the laptop was returned to the claimant at the appeal hearing, the whole of the laptop had been deleted/wiped. This new information anticipated and dealt with a potentially obvious question on cross examination – why the claimant had not arranged for the laptop to be forensically examined as he had previously been so insistent on. I find that the laptop was not returned to the respondent having been completely deleted/wiped.

<u>Was the proposed "Project Woof" business intended to be competitive with Vetplus/the Respondent?</u>

135. The claimant's position is that it was not intended to compete. The basis for this position is:-

(1) Project Woof would have focussed its sales via the internet and general retailers.

(2) Vetplus products on the other hand were always via veterinary surgeons. That was the basis of their business. They were not interested in other sales outlets.

136. This argument did not stand up to much scrutiny. If a dog owner wants to buy a product to help his pet with arthritis he could buy a Vetplus product from his local vet or he could buy another product which promised the same results, from a pet shop or supermarket. Clearly, the products would be competitive with each other

137. It is also highly relevant to note that the provision of products via chews was being actively explored by the respondent in 2017 (the year that the claimant was secretly involved in Project Woof). In his role with the respondent, the claimant sought legal advice from the respondent's solicitors about whether EF(who had then just left the respondent's employment) might be in breach of post termination restrictions. The advice letter from solicitors, addressed to the claimant, is at pages 329-333). That letter makes clear that the respondents strategy for its care product, Synoquin, was to develop a chew product.

E. Submissions

138. Mr Michell and Mr Flood provided written submissions. I summarise Mr Flood's submissions and then Mr Michell's. The points below are just a summary. I have taken in to account all submissions made. I refer to a number of the cited authorities in the section following this.

139. Claimant's submissions

(1) there were a number of procedural irregularities; no warning of the meeting of 7 May 2019 and no notes, no statements from the claimant or DH about the 7 May meeting, inadequate investigations in to the Frame proposal (no contact with frame, with GW), no attempt to contact Simon Green and other individuals, no prospect of the claimant undertaking his own computer analysis (particularly as the computer was not returned to the claimant until the Appeal stage).

(2) it was unfair to put to the claimant, for the first time at the disciplinary hearing, the allegation that as many as 37,000 files had been deleted from the laptop. Also in relation to this, it is clear that additional information was provided by Zentek. This was not made available to the claimant and should have been.

(3) insufficient or no weight was given to those witness statements provided on behalf of the claimant, being the statements of PC, GW, Raymond Jeong and Craig White. Further and unjustifiably, PM doubted the authenticity of PCs statement as it was unsigned.

(4) it was only allegations 1 and 2 in the letter inviting the claimant to the disciplinary hearing (page 166) that were described as potentially "gross misconduct" (with allegations 3 and 4 described as "misconduct") and yet the claimant was dismissed for gross misconduct in relation to his actions against 4 of the allegations. Mr Flood submitted that this matter alone is sufficient to render the dismissal unfair.

(5) Further, PM amended charge 2 in the course of the disciplinary hearing without properly putting the amended charge to the claimant.

(6) In any event the decision to dismiss had been made by DH on or before 4 June 2019

(7) In relation to the NDA's, Mr Flood characterised these as "Black Ops" activities carried out by the claimant with the approval of the respondent and in accordance with his role for the respondent.

(8) when considering the reasons for dismissal, these activities (NDAs) did not form part of the reasons for dismissal and it would be wrong to take these activities into account when considering contributory fault by the claimant. Further, the respondent did not contact any of the companies with whom the claimant (by using an alias) had contracted.

It should have done so and this was another factor to take in to account when considering fairness

(9) In relation to project Woof, Mr Flood submitted that there was no consideration of the claimant's restrictive covenants and whether the activities relating to Project Woof had breached these.

(10) Mr Flood also made submissions on contributory fault and Polkey.

(11) In response to a question about whether the claimant was a fiduciary, Mr Flood did not concede the point but accepted that it was arguable.

140. Respondent's submissions.

(1) Whilst Mr Michell had expected the claimant to put forward a long list of concerns about the disciplinary process, I should consider the process by applying the band of reasonable responses test (Sainsbury's Supermarkets – see below) and by viewing the whole picture. There were some points in relation to the investigatory and disciplinary process that arguably should have been done differently, but the respondent had done enough to satisfy the test under s98 ERA.

(2) the claimant was clearly a fiduciary and had accepted as much in cross examination. However, whether a fiduciary or not, the claimant owed a duty of fidelity to the respondent. If asked a question by his employer, an employee should provide a straightforward, honest answer. Further, he was bound by the implied term of trust and confidence.

(3) The claimant's action in relation to the NDAs was a "flagrant act of dishonesty/deception" and Mr Michell described the NDA action as a "headshot" as far as the claimant's case was concerned. If the dismissal was not unfair then the issue of the NDAs itself should lead to 100% reduction under Polkey or a finding of 100% contributory fault. In addition and having regard to the extent of the wrongdoing in relation to the NDAs alone, applying just and equitable principles, no award should be made.

(4) DH had not decided to dismiss the claimant. He was upset at the claimant and considered that the claimant was probably guilty (suspicions which were shown to be correct) but he left matters to be investigated by EC and for PM to determine.

(5) The meeting of 4 June 2019 was a pre-termination negotiation under s111A ERA.

F. The Law

<u>Unfair dismissal, misconduct.</u>

141. In a case such as this, a respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) ERA. If the respondent fails to persuade the Employment Tribunal that it had a genuine belief in the reason and that it dismissed him for that reason, the dismissal will be unfair.

142. The reason for dismissal is a set of facts known to the respondent or a set of beliefs held by it, which caused it to dismiss the claimant.

143. If the respondent does persuade the Employment Tribunal that it held that genuine belief and that it did dismiss the claimant for one of the potentially fair reasons, the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of that dismissal, applying section 98 (4) ERA.

144. Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

145. In considering the question of reasonableness of a dismissal, an Employment Tribunal should have regard to the decisions in *British Home Stores v. Burchell [1980] ICR 303 EAT*; Iceland **Frozen Foods Limited v. Jones [1993] ICR 17 EAT; Foley v. Post Office, Midland Bank plc v. Madden [2000] IRLR 827 CA** and **Sainsbury's Supermarkets v. Hitt [2003] IRLR 23** ("Sainsbury)

146. In summary, these decisions require that an Employment Tribunal focuses on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged and whether it had a reasonable basis for that belief having carried out as much investigation in to the matter as was reasonable. A Tribunal should not however put itself in the position of the respondent and decide the fairness of the dismissal on what the Tribunal itself would have done. It is not for the Tribunal hearing and deciding on the case, to weigh up the evidence and substitute its own conclusion as if the Tribunal was conducting the process afresh. Instead, it is required to take a view of the matter from the standpoint of the reasonable employer.

147. The function of the Tribunal is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses. This band applies not only to the decision to dismiss but also to the procedure by which that decision was reached.

148. In relation to the adequacy of investigation, I note the following guidance :-

(1) *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and*

to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole" **Shrestha v. Genesis Housing Association Limited [2015] IRLR 399;**

(2) In relation to a misconduct dismissal *"the employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for which it may lack the means."* **Santamera v. Express Cargo Forwarding [2003] IRLR 273.**

149. I also note (and have taken account of) the ACAS Code of Practice on Disciplinary and Grievance Procedures and the ACAS Guide on Discipline and Grievances at work 2015.

150. When determining compensation for unfair dismissal, employment tribunals must apply s123 ERA

"s123(1) ….the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant n consequence of the dismissal iin so far as that loss is attributable to action taken by the employer.

….

S123(6) 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."

151. Compensation is reduced under just and equitable principles under s123(1) in 2 broad categories of cases:-

(1) Where the employer can show that the employee was guilty of misconduct which would have justified dismissal, even if the employer was not aware of this at the time of the dismissal.

(2) Where it is just and equitable to apply a "Polkey" reduction (applying the case of **Polkey v. AE Dayton Services Limited 1988 AC 344)**.

Both categories potentially apply here.

152. Provisions providing for an adjustment to the basic award are at section 122(2) ERA which requires a tribunal to reduce the amount of a basic award where it is just and equitable to do so, having regard to the claimant's conduct before the dismissal.

Right to be accompanied.

153. Section 10 of the Employment Relations Act 1999 (ERelA) provides a worker with a right to be accompanied to a disciplinary or grievance hearing.

154. Under section 10, where a chosen companion is not available for the disciplinary hearing at the time proposed by the employer and the worker proposes an alternative time in accordance with section 10(5) then the employer must postpone the hearing to the time proposed by the worker.

155. Section 10(5) requires the alternative time to be reasonable and to fall within the end of 5 working days beginning with the first working day after the day proposed by the employer.

156. Section 10(6) requires the employer to permit a worker to take time off during working hours for the purpose of accompanying another worker to a disciplinary or grievance hearing.

157. Section 11(3) provides a remedy to a worker who has not been afforded the right to be accompanied under s10, of up to 2 weeks' pay (the amount of a week's pay being capped under s227(1) ERA).

Pre Termination negotiations.

158. S111A ERA provides that evidence of pre-termination negotiations is inadmissible in proceedings on a complaint of ordinary unfair dismissal. This is subject to s111A(4) which states that this protection against disclosure only applies to the extent that the tribunal considers just *"in relation to anything said or done which in the tribunal's opinion was improper or was connected with improper behaviour"*

159. I also note (and have taken account of):-

(1) the 2013 ACAS code of practice on settlement agreements. I note particularly paragraphs 17 and 18 of the code. Included in the non exhaustive list of examples of improper behaviour is

"(e) Putting undue pressure on a party. For instance:-

(i) *Not giving the reasonable time for consideration set out in paragraph 12 of this Code*

(ii) *An employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed."*

(2) The judgment in the case of **Faithorn Farrell Timms LLP v. Bailey [2016] IRLR 839**, which Mr Michell referred me to.

G. Discussion and Conclusions

The discussion of 4 June 2019

160. I have considered the evidence relating to this discussion and decided that the "resign or be fired" comment made by DH was improper within the framework of a pre termination negotiation under s111A. I have decided that it would not be just to allow the respondent to rely on the terms of s111A(1) and so deny the claimant the opportunity to put forward evidence indicating that the respondent's mind was closed and a decision had been made to dismiss the claimant, well before the disciplinary hearing and outcome. The claimant is entitled to put that case forward and for the evidence on the matter (including relevant comments made by DH on 4 June) to be tested.

161. Having allowed that evidence to be tested, I have decided that whilst DH was angry and upset, whilst it appeared clear to him on 4 June 2019 that the claimant had not been truthful in his responses on 7 May, was hiding information from the respondent and was setting up in competition, his mind was not closed and he did not influence the investigation and disciplinary procedure that followed. DH wanted the matter resolved quickly and tried to make this so. He did not succeed and at that stage handed matters over to EC and PM, taking no further part in the process.

Right to be accompanied.

162. The respondent did not allow the claimant's chosen companion time off in order to attend the disciplinary hearing on 12 July 2019. Instead it required that he attend an annual review meeting which had been rearranged to a time which made it impossible for the companion to also attend the disciplinary hearing.

163. That was in breach of Section 10(6) ERelA. The effect of this, and in breach of section 10(2A), was that the respondent did not permit the claimant to be accompanied by his chosen companion.

The dismissal.

164. I have considered the criticisms of the process as put forward on behalf of the claimant.

(1) I do not find that the claimant should have been provided with advance notice of the meeting of 7 May 2019. At that meeting he was asked a series of legitimate questions and should have provided answers truthfully and to the best of his ability.

(2) The respondent should have kept a record of the meeting. it is very unfortunate that no record was kept. This was an evidential issue. It made fact finding more difficult at the disciplinary hearing.

(3) It was not necessary to allow the claimant to carry out his own computer analysis. It is for an employer to ensure that a reasonable investigation is carried out. This respondent instructed independent forensic IT experts as part of its investigation. I have no criticism of the respondent in this regard.

(4) All relevant information provided by Zentek in advance of the disciplinary hearing should have been provided. There has been

reference to large folders of information retrieved from the laptop. However, there is no indication that any such information was relevant. The information that required an explanation from the claimant was disclosed to him including the "Blackwood Chews" information, emails Synoquin manufacturing information and NDAs.

(5) However, PM had a discussion with Zentek shortly before the disciplinary hearing. This was when she learned of the supposed 37000 deleted files. A note of this discussion should have been taken and the information should have been shared with the claimant in advance of the disciplinary hearing. The claimant should also have been told that the allegation 2 was amended so that it referred to files deleted from the laptop on 7 May 2019, both before and after the meeting with the claimant, DH and LM.

(6) As there had been no note taken of the meeting of 7 May 2019 and there was a dispute about what was said in that meeting, consideration should have been given to taking a statement from DH.

(7) I note that a full investigation meeting was held with the claimant and he was asked about the meeting of 7 May 2019.

(8) I do not accept that no weight was given by PM to the statements provided by the claimant. Just because particular evidence is not referred to in the dismissal letter does not mean that it was not considered.

(9) I do not find that the decision to dismiss the claimant had been made by the respondent by 4 June 2019. See my findings of fact above.

165. As for the reasons for dismissal, I note the clear findings under allegation 1 – which was (reasonably) categorised as potentially gross misconduct.

166. Allegation 2 –that information was deleted from the computer when he told LM and DH that he was deleting tax information. Whilst PM did not find that the claimant had dishonestly deleted information in the short window he had been provided to delete his tax information, the claimant had deleted information from the computer at some stage on 7 May 2019. Relevant to the findings was the information that was deleted (including documents with titles such as "Neil Blackwood joint soft chews formulation); that the deletions occurred on 7 May 2019; that no one else had access to the claimant's computer on that day; the significant number of files deleted (with the figure quoted of 37,000). Again, this was clearly (and reasonably) categorised as potentially gross misconduct. The fact that PM found the deletions occurred on 7 May before the meeting rather than just after the meeting, did not diminish the seriousness.

167. I do not agree with Mr Flood's submissions that "lumping together" the findings in relation to allegations 3 and 4 when deciding that the claimant's actions (taken as a whole) amounted to gross misconduct renders the dismissal unfair. The

claimant's actions in relation to allegations 1 and 2 had been categorised as gross misconduct.

168. I do not accept that the respondent should have undertaken further investigations. The respondent had the key information from its investigations. The person with information that was potentially decisive was PC. I note the respondent made at least 2 attempts to contact her. I also note the statement from PC provided via the claimant's solicitors, only raised more questions than answers. It was clear that PC was not going to make contact with the respondent to provide answers and was only prepared to provide limited and untested evidence via the claimant.

169. In relation to PM's decision to dismiss the claimant:-

(1) I find that she had an honest belief that the claimant had deliberately misled DH in the meeting of 7 May, that he had taken steps to delete information from his laptop on 7 May 2019 in an attempt to "cover his tracks" in anticipation of an investigation and so was deceitful; that he had engaged in correspondence which undermined DH and that he had destroyed the relationship of mutual trust and confidence.

(2) I find that belief to be based on reasonable grounds; for example PM chose to accept KWs account over PC's short and untested statement, PM considered the claimant to have been evasive and selective on being questioned about other business activities, PM had information confirming deletions that had been made from the claimant's laptop of documents with names that clearly pointed to the claimant being involved in setting up a competitor. Other documents were recovered which also pointed to the claimant taking steps to set up in competition, contrary to the claimant's denials on 7 May 2019.

(3) I do not find that the respondent had carried out as much investigation as was reasonable in all the circumstances. The claimant should have been provided with the additional information from Zentek obtained by PM on the morning of the disciplinary hearing. The claimant should then have had an opportunity to consider that evidence. The claimant should also have been informed that allegation 2 was an allegation that information had been deleted from the laptop on 7 May 2019, whether before or after the meeting.

170. I have considered the investigation as a whole. I have taken care not to have considered the extent of the respondent's investigations as if I was looking at a forensic or quasi-judicial investigation. My decision is that the failure to provide the claimant with the information provided by Zentek on the morning of the hearing (including reference to 37000 deleted files), the failure to amend the terms of allegation 2 as well as the failure to allow the claimant to be accompanied by his chosen representative, make the dismissal unfair under s98(4) ERA. Each of these 3 steps is clearly required under the ACAS guide. Further, making sure that an employee is aware of the allegation against him is an essential element of natural justice and fairness.

My Decision in relation to Polkey reduction and 123(1)ERA.

171. I am satisfied that the claimant would have been fairly dismissed had the respondent followed a fair procedure and that it would not be just and equitable to make a compensatory award. I note here:-

(1) The claimant was not hampered in his ability to respond to the allegations by the absence of his representative at the disciplinary hearing. No points were missed by the claimant that would have been made had the representative been present

(2) The reference to 37000 deleted files was not relevant to the decision. Key to the decision was the fact that files had been deleted on 7 May 2019, the claimant was unable to provide a credible explanation about what the files were and how they were deleted if not by the claimant himself.

(3) A short delay and/or presence of a representative would not have added anything to the evidence that PM had in relation to PC, what she said to KW and her activities with the claimant.

(4) A short delay and/or presence of a representative would not have changed PMs views and conclusions about the evasiveness of the claimant's responses at the investigatory meeting.

172. Separately, I refer to my findings about the NDAs. Those findings are such that it would not be just and equitable to provide either a compensatory award to the claimant.

My decision in relation to s122(2)

173. Section 122(2) requires that I make findings about the claimant's conduct before the dismissal. I note here:-

(1) My findings about the NDAs

(2) The deletion of files shortly before the meeting of 7 May 2019, including the "Blackwood-chews" files.

(3) The claimant's refusal to provide an explanation about what those Blackwood Chews files were (and also to provide copies with the respondent).

(4) The presence of the Synoquin document on the claimant's personal laptop and a lack of credible explanation for this (in breach of the IT Acceptable Use Policy).

(5) The claimant's ongoing denial of recent contact with PC.

(6) The steps taken to set up a competing business in 2017, with other employees of the claimant.

(7) The claimant's lack of honesty when asked about this even though he was asked specifically about setting up, with PC, a competing business in chews.

(8) The claimant's breach of his fiduciary duties to the respondent. On balance, even though the claimant was neither board director nor shareholder of the Respondent, I find that the seniority of his role and the extent of trust placed in him by the Respondent, was such that he was a fiduciary.

H. Remedy

174. A remedy hearing is listed for 14 May 2021. Under Section 11(3) ERelA the remedy for a failure to permit an employee to be accompanied by a relevant representative is limited to an amount not exceeding 2 weeks' pay. The amount of a week's pay is capped at £525. On that basis the remedy is anything from nil up to £1050.

175. I have already decided that the claimant is not entitled to a remedy for the unfair dismissal.

176. In the event that the parties are unable to resolve matters between them, having considered this judgment, I will hear evidence and submissions on the remedy available to the claimant under the ERelA.

Employment Judge Leach

Date 21 December 2020.

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

7 January 2021

FOR THE TRIBUNAL OFFICE