EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100852/2020 (V)

Held by CVP Hearing on the 21st, 22nd and 23rd of October 2020

Employment Judge Hendry

Ms F Finlayson	**Claimant** **Represented by** **Ms N Moscardini - Solicitor**
Diamond Financial (Scotland) Limited	**Respondent** **Represented by** **Mr William Lane - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal finds:

1. That the Claimant was unfairly dismissed.

2. That the Claimant was wrongfully dismissed.

3. That in respect of the Claimant's dismissal the Respondent shall pay to the Claimant a monetary award amounting to Thirty One Thousand Five Hundred and Ninety Nine pounds and Eight One pence (£31,599.81) consisting of a basic award of Five Thousand Two Hundred and Fifty Pounds (£5250) and a compensatory award of Twenty Six Thousand Three Hundred and Forty Nine pounds and eighty one pence (£26,349.81) made up of loss of earnings to the

date of the hearing (£16,305.91), future loss of earnings (£7855.66), loss of pension rights (£1888.24) and loss of statutory rights (£300).

REASONS

1. The claimant in her ET1 seeks findings that she was unfairly dismissed from her position as a Senior Accounts Manager with the respondent company which is accountancy practice. She also alleged that she had been dismissed as a result of a public interest disclosure.

2. The respondent denied that the claimant had been unfairly or wrongfully dismissed arguing that the dismissal was fair on the grounds of her conduct.

The Issues

3. Parties had lodged with the Employment Tribunal an agreed List of Issues (JB p441). The issues can be summarised that the claimant contended that her dismissal was predetermined and that the respondent dismissed her because of her intention to set up her own accountancy practice. The respondent took the position that it dismissed the claimant for a reason relating to her conduct namely acting in competition with them and breaching policies in relation to keeping business information safe.

4. The Tribunal had to ascertain whether or not the dismissal was fair or unfair having regard to the reasons shown by the respondent taking into account (i) whether in the circumstances (including the size and administrative resources of the undertaking) the respondent had acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant and (ii) and the substantial merits of the case. The Tribunal then had to determine that if the claimant had been unfairly dismissed how much compensation, if any, the respondent should be ordered to pay. The claimant

sought an ACAS uplift but the respondent contended that compensation should be reduced on the grounds of sums earned by the claimant in mitigation following her dismissal. They also sought a "Polkey" deduction and also argued that any award should be reduced on the grounds of the claimant's contributory fault. In relation to wrongful dismissal the respondents contended that the claimant had committed a repudiatory breach of contract entitling the respondent to terminate the contract without notice.

Evidence

5. Parties had lodged an agreed Joint Statement of Facts (JB p443). These have been incorporated in the findings. The Tribunal allowed a supplementary bundle of documents to be lodged on the morning of the hearing (SB 1-3). Their lodging was not opposed.

6. The Tribunal had the benefit of witness statements and oral evidence from the following: Gillian Fox Director and owner of Diamond Financial (Scotland) Limited (''DFS''), Tracy Blair, Client Manager ; Fiona Finlayson, claimant; Toby Douglas, client of DFS; Catriona Casey, claimant's cousin; Karen Murray a friend of the claimant.

Findings in Fact

7. The claimant was employed as a Client Manager and latterly worked as a Senior Accounts Manager with DFS from the 23 April 2009 until termination of her employment on the 30 October 2019. The claimant was the most senior employee. She prepared accounts for limited company businesses, sole traders, partnerships and charities along with VAT returns. She also provided advice on tax. The claimant principally worked in the Duns office. The work was busy and demanding and the claimant often worked overtime. The claimant latterly found the work onerous. She had a long standing ambition to have her

own business to enable her to moderate her workload concentrating on bookkeeping work.

8. The respondent company are an accountancy practice with offices in Edinburgh and Duns. They employ 12 staff and have a substantial turnover Ms Gillian Fox was the sole Director and owner. She is a Chartered Certified Accountant.

Contractual Provisions, Policies and Agreements

9. The claimant received a copy of an updated Statement of Main Terms of Employment in October 2018 (JBp52-54). They made reference to the respondent's Capability and Disciplinary procedures which were contained in a separate Handbook (JB p60-100).

10. The claimant also entered into a Confidentiality agreement with the respondent on the 10 October 2018 (JB 55). In terms of the agreement (clause A) the claimant was required to keep confidential information obtained during the course of her duties relating to members of staff and clients. She was required to treat it in a *"discrete and confidential"* manner. The Agreement provided:

> " A1. All documentary or other material including any downloaded data onto a laptop or PC, USB drive or any other storage device containing confidential information must be kept securely at all times when not being used by a member of staff and must be returned to us at the time of termination of your employment with us, or at any other time upon demand.
>
> 4. You are reminded that all information that:

(a) is or has been acquired by you during, or in the course of your employment, or has otherwise been acquired by you in confidence,

(b) relates particularly to our business, or that of other persons or bodies with whom we have dealings of any sort: and

(c) has not been made public by, or with our authority:

shall be confidential, and (save in the course of our business or as required by law) you shall not at any time, whether before or after the termination of your employment, disclose such information to any person without our prior written consent

5. You are to exercise reasonable care to keep all documentary or other material containing confidential information, and shall at the time of termination of your employment with us, or at any other time upon demand, return to us any such material in your possession.

6. Any breach of confidentiality may be regarded as misconduct/gross misconduct and be the subject of serious disciplinary action which may result in your dismissal."

11. The Employee Handbook also contained rules relating to Social Networking and for limited use of the Internet while at work.

12. The claimant also entered into a Restrictive Covenant Agreement on the same date (JB p56-59). In terms of that agreement the claimant agreed to be bound

by the restrictive covenant. She was restricted for a period of 6 months after the date of termination of her employment from acting directly or indirectly on account of the clients of DFS or conduct business or canvas or solicit their business.

13. The Employee Handbook (JBp83) contained the following clause regulating use of telephone calls and mobile phones:

> "**Friends and relatives contact/telephone calls/mobile phones**
>
> You should discourage your friends and relatives from calling on you in person or by telephone except in an emergency. Personal use of our business phones are not permitted under any circumstances.
>
> Personal mobile phones should be switched to silent during working hours. Phones should be kept with your personal belongings and not on your person. Reasonable use of your personal mobile phone is permitted during authorised breaks only.
>
> It is illegal to use a mobile phone without a hands free set whilst driving. It is our policy that you should not use any mobile phone whilst driving. You should pull over to the side of the road in an appropriate place before making or receiving any telephone calls. In the event of being unable to pick up a call because you cannot find a safe place to park, you must return the call as soon as conveniently possible."

Background

14. The claimant was not provided with a mobile telephone by her employer. She used her own 'smartphone' when she was out of the office or when using WhatsApp. She did this with the respondent's knowledge. The claimant was

aware that office calls were recorded and would use the office system during working hours to conduct business particularly when giving advice. She would not give advice when using her mobile telephone. The claimant was given a laptop computer which allowed for remote access to the company servers. She would use that laptop when preparing and saving client work. She would generally not take the laptop home with her but leave it in the office overnight and at weekends. The claimant would periodically carry out some work from home and had done so for many years with the respondent's knowledge.

15. The respondent took the confidentiality of their clients seriously and took steps to protect personal data. The claimant's laptop was fitted with remote monitoring and an ability to 'wipe' the memory if lost or stolen. The claimant used her own laptop for her bookkeeping work and for personal use. She had a Hotmail account which she secured using passwords. Her laptop was fitted with up to date antivirus protection and was password protected. She would occasionally send emails to herself as a reminder to carry out some particular task. She would regularly delete these emails. She did not keep company work on her laptop. She would prepare accounts and returns on her company laptop. She took the utmost care when handling confidential information.

16. For many years the claimant enjoyed good working relations with Ms Fox. The claimant had a clean disciplinary record. She had been promoted and given considerable responsibility. She had made no secret of the fact that she wanted to have her own accountancy practice at some point in the future or become a Director of the company. She frequently raised the question of her professional development at annual appraisal meetings.

17. Prior to these events in July 2017 the claimant was offered a small share in the business but declined. The claimant was concerned that Ms Fox would retire and sell the company. She told Ms Fox that she would not want to be an employee of DFS if the company was sold but would set up her own business.

She felt that Ms Fox took her refusal badly and that their relationship did not recover.

18. In order to become a self-employed accountant the claimant required to have Practising Certificate (‘‘PC’’) from the Association of Chartered Certified Accountants or ACCA which would allow her to sign off accounts. She had not applied for a PC in the past and was not fully aware of the process. To obtain a PC an applicant had to demonstrate they had three years supervised post qualifying experience. The claimant asked Ms Fox to act for her in this supervising capacity which she agreed to do. This involved her agreeing that the claimant had gained experience in carrying out the recorded work and commenting on that work. The claimant had recorded relevant evidence for her application for some time before starting to work on the application in around November 2018. She would record work she had undertaken but not client’s names. Ms Fox was aware from this that the client intended applying for her PC which she did not need to carry out her duties with DFS.

Police Investigation

19. In December 2018 the claimant became aware that one of the company’s former clients was subject to Police investigation. She was aware that the client’s files were being recalled from storage. On 1 April 2019 Ms Fox contacted the claimant and told her that she was at a meeting two Police Officers regarding this matter. She asked for some information about the client. The claimant was asked by the Police to attend a follow up meeting on the 5 April which she did. At that meeting the claimant confirmed that she was unaware that the client had overseas accounts. Following that meeting the claimant was asked by the Police Officer undertaking the investigation to meet him again without Ms Fox being present. She agreed to do so and met him around the 3 May at which meeting she gave a witness statement.

20. Ms Fox returned from holiday on the 8 May. She asked the claimant to request a copy of the statement she had given. The claimant did as instructed and was told that her employer could not see the statement. The claimant met the Police Officers again on two further occasions on the 14 and 28 June and 9 August. At the last meeting she was asked about transactions where the client's money came in and out of the DFS client account. She told the Officer that she did not think that Ms Fox would have sanctioned such transactions as it was a potential misuse of the client account. The principal investigating Officer asked to meet the claimant again at the end of August but Ms Fox told her that the claimant was too busy to meet and asked her to reschedule for September. The claimant did not believe she was too busy to have such a meeting but it was rescheduled for the 20 September. The meeting did not take place as the claimant was later suspended.

Bookkeeping work

21. Ms Fox had a longstanding client, Toby Douglas, who she had known for many years. He had a number of business interests. He had instructed DFS for over 18 years. He had a good relationship with her. In about 2012/13 Ms Fox had agreed that the claimant could privately carry out administrative and book keeping work for him and his associated businesses, Sovereign Diving Ltd and NLU limited. The latter company operated a small Industrial Estate. The claimant would often report to Ms Fox what was happening with these clients if it impacted work being carries out by DFS.

22. The claimant was also the main contact between DFS and Mr Douglas. They were regularly in contact. Mr Douglas was often busy and slow with producing information and paperwork. Ms Fox was aware of the arrangement and knew that the claimant dealt with day to day queries from Mr Douglas both for bookkeeping work and DFS work. He continued to contact Ms Fox for more important accountancy advice. Mr Douglas during the summer operated boat

tours to the Farne Islands. When he was at sea it was often difficult to contact him because of poor telephone reception. Mr Douglas found that using WhatsApp, an internet based system, to speak to the claimant was the most effective way of keeping in contact. He would also contact her by email.

23. Periodically the claimant would visit Mr Douglas in Northumberland where he lived to discuss both DFS business and his other bookkeeping needs. She would be paid £500/600 annually for her bookkeeping services. No particular arrangements were put in place or instructions given to the claimant by Ms Fox to regulate this relationship. The claimant would often ask Mr Douglas to telephone her about ongoing matters. She would not use her firm's laptop for bookkeeping work and did not take it to meetings with him which usually took place at weekends. She would take her own laptop on which her bookkeeping work was done.

Tax Return 2013

24. The claimant has a first cousin called Fiona Casey who lived in the USA. She owned rental property in Edinburgh and found a few weeks before the deadline that she required to complete a UK Tax Return by the 31 October 2013. She had not had to do this before. She completed the Tax Return and asked the claimant to check it and submit it for her which she did. She did not pay the claimant. In the future she instructed a Tax Attorney to complete her Tax Returns. The claimant did this as a favour.

25. Ms Karen Murray is a close friend of the claimant and has known her for many years. She is employed by CNBC. She usually prepared her own Tax Returns. At no point did she ever instruct the claimant to carry out accountancy or tax work for her or paid her fees for doing so.

26. On the 27 January 2017 Ms Murray was travelling with her work away from her home. She was anxious that her Tax Return might not be lodged in time

because of poor internet connection or if there was some other unforeseen difficulty she was not on hand to resolve it. She texted the claimant for help. She asked her if she would check over her Tax Return as she was ‘‘in transit’’. She had completed it online and it was due to be lodged by the 31 January. The claimant looked over the Return in her own time and pressed ‘Submit’ on her behalf sending the Return to the Revenue. She did this at the respondent’s premises using their computer system but after the working day had finished at 5pm. The time of the receipt of the Return was recorded.

Events leading to Suspension and Disciplinary Proceedings

27. On 8 July 2019 the claimant met Ms Fox and advised her that she was preparing to lodge her application for a PC. She asked if she could to pass the evidence of work she had done so far to Ms Fox to allow her to check it and support her application. This was done. She confirmed that she was not resigning but she would wait until she received her PC before arranging to set up on her own. She said she wanted to leave on an amicable and arranged basis and would provide a proper handover and sufficient notice. She said that she wanted to be transparent in her actions and to allow time for the respondent to recruit a replacement. She suggested a meeting with the respondent’s HR advisers to work out leaving details. Ms Fox took the news badly.

28. The claimant did not initially realise that she did not need to set up a company and obtain business insurance to apply for her PC. In anticipation of receiving her PC she set up two limited companies on the 23 July. Soon after she told Ms Fox that she had done this.

29. Ms Fox was anxious that the claimant might leave and take business with her. Her fears were heightened when the claimant advised her by email on the 30 July that she had incorporated two companies for the purpose of setting up

her own business. In that email the claimant said that she did not know the timescale for getting her PC but wanted the application sent as soon as possible (JBp103). The claimant was aware that she was subject to a Restrictive Covenant of three months duration.

30. The claimant was asked to meet Ms Fox on the 31 July which she did. At that meeting she was asked by Ms Fox for her resignation. The claimant was taken aback. She refused. She had hoped for an amicable parting of the ways. The clamant was concerned that Ms Fox had not yet completed her application and would not sign it off if she resigned. Ms Fox confirmed that she would look at the PC application and 'sign it'. The claimant later emailed Ms Fox on the 2 August confirming she did not want to resign at that point until she had her PC. She wrote that she was *"committed to facilitating any transition"* (JBp104)

31. On the same date the claimant mentioned to Ms Fox that she had telephoned Mr Douglas but on making enquiries Ms Fox could not find a record of the call having been made from the office landline. Ms Fox had it reported to her by other staff that the claimant had spoken to someone on her mobile telephone. Ms Fox later searched through recorded calls and became aware that the claimant had been in contact with Mr Toby Douglas on the office line when he had said he had difficulty hearing her (this was recorded). The call was about VAT queries being handled by DFS. The claimant agreed to telephone him back but no subsequent call was recorded.

32. The claimant asked Ms Fox on a number of occasions as to whether she had signed the PC application and following a discussion with her on 27 August she believed it would be returned by the 29 August to allow her to submit it. She chased the matter up on a number of occasions but was told by Ms Fox that she was too busy.

33. On the 6 September the claimant asked if Ms Fox needed anything else before completing the PC application as she was ‘‘*very keen to get this away*’’(JBp106)

34. On 7 September the claimant unexpectedly received a text from a former Director of DFS indicating that he had heard she was moving on. The claimant was surprised as only Ms Fox knew about her plans. She did not respond to him and was curious why he had contacted her. The claimant had only told her close friends and parents of her intentions.

35. The application was eventually retuned signed by Ms Fox and was submitted but rejected on the 24 September as Ms Fox had failed to comment and make observations on the claimant’s work experience as she was required to do. The application was later resubmitted and finally granted on 23 March 2020.

36. At this time Ms Fox had become aware that the claimant had written on a notepad the name of a prospective employee that was being recruited although she was not involved in the recruitment as it was for another department. In addition, a staff member gave Ms Fox a copy of an email sent by the claimant to her own Hotmail email address.

37. Ms Fox chose not to speak to the claimant about her concerns but contacted Peninsula Services who provided DFS with HR support and asked them to conduct an investigation into whether the claimant was competing with DFS.

Investigatory Meeting 17 September 2019

38. The claimant was at work in the Edinburgh office when late in the afternoon Ms Fox came into her room and asked her to follow her. She assumed it was to have an informal chat with her about work. The claimant was led to a meeting room where a woman introduced herself as Saragh Reid from Face2Face (Peninsula Services). Ms Fox did not stay. The claimant asked if it was a formal meeting and was told that it was an informal ‘‘chat’’ to discuss the company’s

concerns in relation to her leaving the business. The meeting then commenced and was recorded. The claimant felt ambushed. A transcript of the meeting was prepared at a later date (JBp119-127)

39. Ms Reid began asking the Claimant questions about her intention to leave. The claimant was asked when she intended starting her own business. She responded (JB p122): *"Well, in an ideal world it would be the 1st of November, but I'm not sure if that's going to happen now (? 05.20) because I need a practising certificate. So I've done all my write up (ph 05.25) I'm waiting for Gill to do her part of it."*

40. During the meeting Ms Fox took the opportunity of accessing the claimant's work laptop. This led to her identifying information that she had lodged a Tax Return for Ms Murray in 2017 and she had received apparent referral for work which was not passed to DFS. It was not the claimant's role to complete a list of possible clients but she was aware that there was such a system in place.

41. Ms Fox reviewed the transcript provided to her. She suspended the claimant from work by letter dated 18 September. It was stated that this was to allow investigation into confidentiality and data breaches and acting in competition *''resulting in a breach of trust and confidence"* (JBp113). The letter also stated: *''if there is anyone whom you feel could provide a witness statement which would help in investigating the allegtions then please contact me and I will arrange for them to be interviewed"*

Disciplinary Hearing

42. The claimant received a letter on 1 October 2019 inviting her to a disciplinary hearing on 4 October (JBp129/130). The following "matters of concern" were raised:

(1) It is alleged that you have been sending company information to your personal email. This includes GoProposal information and the Diamond IT Infrastructure information

(2) It is alleged that these actions are in direct contravention of the Confidentiality agreement signed by you on the 10th of October 2018

(3) It is alleged that you accessed information pertaining to interviewees for a role within the Tax Department, information which you were not given by your employer

(4) It is alleged that you had been making client calls during work time, using your mobile phone

(5) It is alleged that you had been in competition with your employer, Diamond Financial (Scotland) Limited, which is in direct contravention of the Restrictive Covenant Agreement agreed and signed by you on 10th October 2018

(6) It is alleged that you have been preparing tax returns for a Karen Murray, during working time, this person is not a client of Diamond Financial (Scotland) Limited

(7) It is alleged that you received referral information for potential work on 16th of April 2018 however you did not discuss this referral with your employer neither is this person a current client of Diamond Financial (Scotland) Limited

43. The letter enclosed various emails, a photocopy of the claimant's note pad and a copy of the Face2Face investigation report recommending disciplinary action.

44. The claimant was very upset and stressed at the unexpected events that had occurred. She instructed solicitors, Morton Fraser, to write to her employers on her behalf. They wrote on the 2 October 2019 (JBp183-184). The letter indicated that the claimant was suffering from stress and anxiety which she attributed to her treatment at work and was too unwell to attend a disciplinary hearing at that point. The letter accepted the need for a disciplinary hearing and asked for permission for the claimant to be represented at any hearing by Ms Moscardini her solicitor. Ms Fox ignored the letter. She did not respond to it nor did she advise the claimant that she did not intend doing so. Ms Fox did not ask the claimant to confirm that the solicitors were acting on her instructions.

45. The claimant contacted her employer and advised that she was signed off work and too unwell to attend the disciplinary meeting. Ms Fox wrote to her on the 4 October rearranging the proposed disciplinary meeting for the 11 October and changing the venue to the office of Peninsula Services (JBp185). The claimant was told that if she was too unwell to attend she could send written representations, send a representative to speak on her behalf as long as they were a Trade Union representative or employee or she could participate by telephone. The claimant felt too unwell to participate in a telephone hearing. The claimant was not in a Trade Union and did not have any employee to speak for her. She was also hampered from contacting any employee to ask for representation by the terms of her suspension letter which prevented her from speaking to fellow employees (JBp113).

46. The claimant's solicitors wrote again on 7 October (JBp186) following receipt of a letter from the claimant confirming they were instructed by her in relation to her current employment situation. They made reference to the latest letter from the respondent and requested that the claimant should be accompanied by her friend Isla Craig at the disciplinary meeting. They said that she was not fit enough to attend unaccompanied and that in the absence of a Trade Union

representative or suitable employee this was a reasonable adjustment to make given the claimant was suffering from severe anxiety. Ms Fox responded by email (JBp188). She rejected the request for the claimant to be accompanied by a friend suggesting it would create a precedent.

47. The disciplinary hearing was rescheduled. In anticipation of the disciplinary hearing Ms Moscardini emailed Ms Fox on the 9 October (JBp191). She wrote:

> *"In order for my client to have a fair hearing it will be necessary for statements to be taken from Suzanne Hogg, Toby Douglas and Mohsen Abed to confirm the following:*
>
> 1. *Toby Douglas – whether Ms Finlayson does anything other than bookkeeping and VAT returns for this company NLU Limited outside of work hours?*
>
> 2. *Suzanne Hogg –*
>
> (i) *Whether she has ever formally instructed Ms Finlayson to provide advice for which Ms Finlayson received remuneration;*
>
> (ii) *whether she has had any correspondence with Ms Finlayson since April 2018*
>
> (iii) *Mohsen Abed – why he contacted Fiona Finlayson on 3rd October 2017 and whether he had spoken with Ms Finlayson since October 2017*
>
> 3. *I would be grateful if you would arrange this. I appreciate that it may not be possible for these statements to be taken*

in advance of the hearing on 11 October. If it is not possible to obtain these prior to Friday then it will be necessary to proceed on Friday but then part adjourning the hearing to allow for these statements to be taken as this evidence is central to the allegations against our client".

48. Ms Fox responded on 10 October (JBp193):

"As you are aware from previous correspondence, there will be full opportunity for Fiona to present a response to the allegations during the disciplinary hearing process either in person or by written representation. This would include any questions or statements they wish to put forward in relation to the allegations, the evidence, and the previous investigation. It is Fiona's responsibility to provide and organise any witnesses/witness statements in support of a response to the allegations and these can be presented at the hearing.

As detailed in previous correspondence, the consultant will listen carefully to Fiona's response to the allegations and determine if any further investigations are necessary to be undertaken by him/her in order to produce recommendations and their report."

Disciplinary Hearing

49. The disciplinary hearing took place on the 11 October 2019. It was recorded and a transcript prepared (JBp196-248) It lasted from 11.11 am until 2 pm. The claimant arranged for a fellow employee to attend with her. She confirmed what her position and role was with DFS. The background to her work was discussed and the way work was arranged including the use of a laptop and email and the fact that there was no work mobile telephone provided. She said that she only accessed client files though her work laptop. The introduction of

clients was discussed. The various issues that were contained in correspondence together with the documents obtained by the respondent were put to the claimant for comment.

50. The first matter raised was the claimant's relationship with Toby Douglas. She explained that for some time it had been agreed that she would carry out Book keeping work for his businesses. She was asked if she had personal clients before Mr Douglas and responded: *'' I'm not interested in doing work outside of work. I work enough overtime, and I do like a social life.*'' and *"I did this because he was a longstanding client, he was getting stressed, and he was getting busy. And I did it to be nice"*.

51. The claimant was asked about an email from a Michael Wilson an employee of DFS in February 2018 (JBp131) with queries for Mr Douglas which she forwarded to her personal account. She said that there was some cross over of work between handling the accountancy work for the businesses and the book keeping work. She explained that she met Mr Douglas monthly at his premises as he was often difficult to get a hold of by telephone. At such meetings she would clear up any outstanding matters including work for DFS. She sent the email to remind herself to raise matters at the next meeting. She would report this all at the regular weekly meetings namely that she had met Mr Douglas over the weekend and asked him about outstanding queries. The queries in the email were urgent as the submission of returns had to be made to the Revenue by the 7 February. The claimant stated that Ms Fox was fully aware of how the work had been managed in this way over many years. The claimant also suggested that the issues had only been raised after she had told Ms Fox she intended leaving. She had used the same process on the 14 April which was a Friday as she had before and would meet Mr Douglas over the weekend.

52. The claimant went over the circumstances around the third email dated 19 July (JBp133) explaining that she was finishing at four that day and the email was about queries for Mr Douglas. Ms Fox was going to visit him to discuss his

personal tax. He lived in Northumberland and was also involved in his brother's businesses. The claimant had only received a query list on a Friday and contacted him that day. She assumed he might be away but in case he wasn't she forwarded the email to her own account in case he contacted her over the weekend. The claimant reported the information about the purchase of the property as soon as she could at the following Monday meeting when discussing workflow with Ms Fox. She had deleted her copy of the email.

53. The claimant was asked about an email from Kerri Fyfe (JBp135) and Collette (JBp136) advising her that Mr Douglas wanted her to telephone. The claimant at this time was preparing annual accounts for Mr Douglas's businesses. He was often at sea and out of contact especially during working hours. The telephone reception was poor. Because of this the claimant would often receive a WhatsApp message from him and she would then respond.

54. On the 2 August the claimant's time sheets showed that she was in a meeting until 1.pm when she went for lunch. She had been working on Mr Douglas's VAT Return that morning. During her lunch Mr Douglas had telephoned her on WhatsApp. On her return she was told by Collette that he had telephoned. This was subsequently reported to Ms Fox by the claimant. The claimant indicated that she would not telephone clients on WhatsApp but use the landline but this was Mr Douglas's method of contacting her when offshore.

55. The claimant stated that Ms Fox was aware both of the content of calls from Mr Douglas and that he would call her on occasion using WhatsApp. There was no alternative way of communicating with him at times and she believed that her employer had not given her adequate tools to do her job (JBp212).

56. The claimant pointed out that her solicitor had asked for a statement to be taken from Mr Douglas. Ms Lilley responded: *"..it's not down to the company to decide who needs spoken to as part of this process, it's down to me, because obviously I am in charge of the disciplinary process"* and later *" If I feel other*

people need to be investigated, as I said to you at the beginning….I'll determine that though I may not need to because I may decide that there's sufficient with what I've already got and I don't need to make that judgment call'' (JBp212) The claimant did not believe that the consultant was either impartial or truly independent as the respondent was paying for her services.

57. The claimant agreed that there had been a conversation in July with Ms Fox about calls going through the DFS telephone line. The claimant indicated that she tried to send Mr Douglas emails as he was often out of telephone contact. She said that Ms Fox was aware that he couldn't call a landline when out on his boat around the Farne Islands. Mention was made of using WhatsApp and the claimant told her that she did not call him but he would call her. She was not instructed to not answer the calls but was reminded, following an informal discussion at the end of July with Ms Fox that if possible calls should go through the company telephone line. This was to ensure that there was a record of any advice given in case issues arose about the advice given. The claimant confirmed that she believed that there was a legitimate business reason for acting as she did.

58. The claimant was asked about emails from an Ian Finlayson in 2014. She explained that he lived in America and was her cousin. She had been asked to do his Tax Return. She told him she wouldn't but agreed a reduced rate with Ms Fox for the Tax Department at DFS to do it (JBp215). The claimant was asked about a tax return for 2015/16 attached to an email dated 30 January to the claimant's Hotmail account. The claimant explained that she had never used her employers software. At that point she had had moved house and had no broadband so had sent the return from the office after hours. She showed the HMRC receipt at 5.11.pm. She had sent a copy of her Tax Return to her Hotmail account. She was asked why she did a Tax Return and said that at this point she had some rental income which she no longer had and that she 'ticks' the box for 'Other Income' now and this is subject to an exemption of £1000 which is more than the fee she receives from NLU for bookkeeping work.

59. The Consultant then turned to an email (JBp141) to a Karen Murray on the 30 January 2017 (JBp218) which the claimant had also copied to her personal account. She advised the Consultant that Ms Murray was a longstanding friend who prepares her own tax documentation. A Return was submitted at 5.58 pm after work by the claimant as a favour as Ms Murray was working away from home and concerned that she might not be able to submit the return herself. It was the same day she had lodged her own tax return and she did not have broadband at home. The claimant indicated that over the years she had carried out many hours of overtime.

60. The questioning turned to Document 11 which was an email from a Suzanne Hogg on 16 April 2018 and others which came to the DFS email account but which were forwarded by the claimant to her Hotmail account. The claimant told the Consultant that Mrs Hogg was a long-standing friend of Toby Douglas and the emails related to NLU. She took the Consultant through the emails. The claimant had been down at Mr Douglas's business on the 14 April to help with NLU's bookkeeping. She met Ms Hogg through Mr Douglas. She was upset because her mother had recently died. Ms Hogg's mother had a small B&B business. Ms Hogg thought that she would have to make a Tax Return for the B&B income as it was April. The claimant told her that she didn't need to do this at that point and that in any event she could do this herself and contact DFS if she needed help. The claimant gave her an Excel template to record income and expenditure. She believed that she had mentioned these events to Ms Fox. The claimant did not record Ms Hogg as a potential client because she though it unlikely that she would need accountancy services in the future but if she did then she would be grateful for the help given and contact DFS. In the event she did not require such services.

61. The claimant said that she was quite happy for the Consultant to contact Ms Hogg and she responded: *"Like I say, I think I'll decide if it's required, I'm not entirely sure it is, you know. The whole point of today is for you to give me*

your responses and then I'll weigh them up against the evidence that's there"(JBp223)

62. Matters turned to the email numbered 11 from a Mr Mohsen Abed dated 3 October which the claimant forwarded to her Hotmail account. She explained that he had been a client of a previous Director of DFS. About two years earlier he had indicated that he was struggling to pay the DFS fees. The claimant spoke to Ms Fox and the fees were dropped slightly. Sometime later the claimant heard that he was being chased for records to allow a VAT return to be lodged but the firm was getting no response. The claimant tried to call him from work but couldn't get him. She forwarded the email to her Hotmail account as she was aware that he was a Salesman and might be busy during the day so she intended to telephone him in the evening from home which she did. He told her that he could not afford the fees and would do the work himself. The claimant had no further contact with him.

63. Questioning then turned to Document 13 which was a template of a draft letter of engagement (GoProposal) (JBp224) forwarded by the claimant to her Hotmail account in September. This was a new online system to generate letter of engagement. It had been discussed earlier in the year but had not yet been implemented. It covered the various services DFS provided. The claimant had been asked to review the document. She had lost her original notes she had made about the template so she looked at it again on the 27 and 28 September to finish revising it before she left. This was recorded on the time management system and shown to the Consultant. She said she had spoken to Collette about her comments on the document. Nothing much had happened over the summer She recalled it being discussed in about August as outstanding work. The actual template document had been deleted by her after she had worked on it. Her position was that nothing on the document was sensitive as it was a generic template.

64. Document 14 was an email to the claimant dated 4 February 2019 of the proposed new IT infrastructure for her to look at before a meeting on the 7 February where it was to be discussed. February was an exceptionally busy time at work and she did not have time to look at it during office hours. The claimant forwarded it to her Hotmail account to look at it at home. She had told Ms Fox that she was too busy to look at it and would look at it in her own time. She did not recall that it contained any sensitive information just different options for new IT. It appeared to have the names of staff members and their telephone numbers. This information was available on the DFS website. The clamant was asked why she sent it to an unsecured account and she responded: *'Hindsight's great'.* She said she read it and then deleted it.

65. Document 15 related to the claimant being sent a copy of the company's Employee Handbook which she had then forwarded to her Hotmail account. The claimant pointed to the fact that he statement of terms and conditions of employment referred to the handbook which was said to form her contract. She believed she was entitled to a personal copy. She was asked if she had sought permission to send herself a copy of the handbook and said she believed she was entitled to a copy.

66. Document 16 was a link to a Government website 'gov.uk' which was sent to the claimant and which she then forwarded to her Hotmail account. She explained that the matter was not sensitive and was freely available that she wanted the link to use when setting up a digital system for NLU which she would have done in her own time. She was asked if she had sought permission and explained that it was a link to government website and not sensitive or confidential information.

67. The next issue (document number 17) was a free HMRC ''Webinar'' which the claimant sent to her own email account on the 14 August. The claimant wanted a record of the matter for CPD purposes. The claimant gave the same explanation for other links (18 and 19) and this was not explored further.

68. Issue 20 was that the claimant had added her personal email to the Xero book-keeping software account run by DFS as an alternative recovery contact. The claimant explained that she had been asked to set up a two-step authentication process by her employer. There was no guidance or internal procedure provided to her. An employee, Kerri Fyfe was in charge of the system. The claimant couldn't recall but she accepted she must have put her personal email in as an alternative to allow access if there was a problem. Part of the process was to put an ''App'' on her mobile telephone which other staff had done. Her representative confirmed that she had done this (JBp237). She believed that the App had generated her email automatically as the alternative from her mobile's stored data.

69. Document 21 was an email from Ms Fox headed 'Annoyances' that the claimant had forwarded to herself in September 2018. The email contained a number or requests from Ms Fox beginning *''Could you please…''* which the claimant found sharp in tone and upsetting. The claimant had felt unfairly treated at work from the time she turned down the offer of a share in the business in 2017. She had begun suffering from work related stress. She had consulted her G.P. There was no one she could complain to about Ms Fox's behaviour. She had sent the email to herself to mark a turning point in her relationship with Ms Fox. It had helped her come to the view that her working environment stressful was not healthy for her.

70. The claimant was asked about why she had told Ms Fox in July that she intended leaving. She explained that she wanted to be transparent (JBp241). There was a discussion about the matter and she explained that she had suggested leaving in September but had been told by Ms Fox she couldn't be replaced by then. The claimant suggested October and Ms Fox suggested the end of January being the end of the tax year. She was clear that she could not resign until she had her PC. The claimant had emailed Ms Fox on the 30 July

to tell her she had incorporated a company. At that point she was asked for her resignation but declined.

71. The final issue raised related to a copy of a page from the claimant's notebook with workings on it and the name of a prospective employee for the business. The claimant referred back to the Investigatory Meeting with Ms Reid and pointed out that the allegation at that time had been she had accessed information about 'interviewees' for a bookkeeping role. The claimant had responded that she didn't know the business was looking for a bookkeeper. She had been puzzled by the allegation and didn't know that had been the name of a candidate. The claimant would look at an office dairy to check meetings that were coming up and make sure that if she was working on that client's work it was up to date. She clicked on an entry and noted a meeting between Ms Fox and the person who she was unaware was being interviewed and noted the name to ask if it was a potential client and if she needed to prepare anything.

72. The claimant's position over the various issues and documents was summarised. It was clarified that the allegation was that she had been in competition with her employer and had breached the restrictive covenant. The claimant denied the allegations. The claimant produced a Statement summarising her position and supporting documentation (JBp249-272).

Aftermath

73. Following the hearing the claimant's lawyers wrote on the 16 October to Ms Fox, copying the email to Ms Lilley, noting that it had been said at the hearing that it might not be necessary to take statements from the three people the claimant had identified. The email stated: *"Given the nature of the allegations against my client, I consider obtaining these statements to be critical…"*

74. The claimant raised the use by a former employee Mr Wilson of his own mobile and iPad accessing personal email addresses. On the 23 October Ms Fox was in contact with Ms Lilley giving details of the reasons why an iPad had been purchased for a former employee. (JBp276) It had been securely set up and she was unaware of him using it to send emails to anything other than company addresses. He used the iPad to access emails for both DFS and a related company. She said that the employee had been allowed to keep the device as it was of negligible value and he had confirmed that company records had been deleted. The email response did not refer to the suggestion that he used his personal mobile telephone both for work and personal use.

Consultant Report

75. Ms Lilley prepared a Report dated 25 October outlining the process, documents considered and her understanding of the evidence. Apart from the claimant, both before and after the disciplinary hearing she only spoken to Ms Fox in relation to the disciplinary matters. She carried out no further investigations. She made the following findings:

- Allegation (1) was upheld as the claimant had sent information to her Hotmail account on a number of occasions in breach of the Respondent ’s policies.
- Allegation (2) was upheld as the claimant had emailed herself a copy of the Company Employee Handbook contrary to the Confidentiality Agreement and GDPR.
- Allegation (3) that the claimant wrote down an interviewee’s name was not upheld.
- Allegation (4) that the claimant had been making calls during working time on her mobile was upheld.
- Allegation (5) that the claimant had been in competition with her employers was upheld.

- Allegation (6) that the claimant prepared Tax Returns for Karen Murray was partially upheld as *"…whilst there is evidence that the submission was done outside working hours, Fiona may have completed some of the work during working time"*
- Allegation (7) which was not disclosing referral work was upheld.

76. The author of the Report recommended dismissal on the grounds of gross misconduct. Ms Fox accepted the terms of the Report.

77. The claimant received a letter from the respondent on 30 October 2019 (JB p299/300) in the following terms:

"Dear Fiona,

As you know, we engaged a third party consultant to conduct the Disciplinary hearing on 11th October 2019. Please find attached their report. Having carefully reviewed the circumstances and considered your responses in the report, I have decided that your conduct has resulted in the fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. The appropriate sanction to this breach is summary dismissal. I have referred to our standard disciplinary procedure when making this decision, which does not permit recourse to a lesser disciplinary sanction. ***It is alleged that you have been sending company information to your personal email. This includes GoProposal information and Diamond IT Infrastructure information in December 2018.***

Allegation 1 is upheld on the grounds that you clearly breached the company Handbook by using the company equipment for personal use when sending company information to your personal email account

which is uncontrolled and unsecure. This could have an impact on the secure network which the company strive to maintain.

It is alleged that these actions are in direct contravention of the Confidentiality agreement signed by you on 10th October 2018.

Allegation 2 is upheld as it is found that you have not abided by the company Confidentiality agreement due to the fact that you sent confidential information to your personal account. Due to the position you hold within the business you are fully aware of GDPR and the importance of security of such information. You have not taken into account the impact this could have to the company which could be detrimental to all within the business.

It is alleged that you have making client calls during working time, using your mobile phone.

Allegation 4 is upheld as it is highlighted that you are aware the requirement is for all calls to be on the company landline as this is recorded and retained for training purposes and using your own mobile phone to make such calls for business purposes is another breach of company policy. You have admitted that you have used your mobile for the purpose of contact with Toby Douglas via WhatsApp which is not authorised by the company. All contact with Toby should be through the company systems.

It is alleged that you have been in competition with your employer, Diamond Financial (Scotland) Limited which is in direct contravention of the Restrictive Covenant Agreement agreed and signed by you on 10th October 2018.

Allegation 5 is upheld as you have made it clear that you wish to set up your own business in direct competition to us which again breaches the Restrictive Covenant that you signed.

It is alleged that you received referral information for potential work on 16th April 2019 (2018) however you did not discuss this referral with your employer and neither is this person a current client of Diamond Financial (Scotland) Limited.

Allegation 7 is upheld as you have clearly demonstrated the process for new clients but you willingly decided not to follow this procedure and contact the client via your own personal account. Again this is a clear breach of company procedures.

You are therefore dismissed with immediate effect. You are not entitled to notice pay or pay in lieu of notice.

78. The claimant was 39 years old at the date of dismissal.

Appeal

79. The claimant was given a right of appeal which she exercised (JBp303/304).She set out five grounds of appeal.

- The decision to dismiss was taken in the absence of key witness statements from Toby Douglas, Karen Murray, Suzanne Hogg and Mohsen Abed.
- The claimant had been transparent throughout and had never been made aware of any issues over the use of telephone calls, emails and other procedures.

- The claimant denied not following the procedures relating to new clients and there was a failure to obtain a statement from the alleged new client.
- The dismissal was in response to the expressed intention to leave.
- The dismissal was unfair as the claimant had long service and a clean disciplinary record.

80. Mrs Tracy Bair a longstanding employee of the respondent and their Client Manager was asked by Mrs Fox to conduct the appeal. Mrs Blair was aware of the allegations against the claimant and Mrs Fox's views on the claimant's conduct. She was apprehensive about dealing with the matter and had no experience or training in such matters. The conduct of the appeal were passed to a Consultant from Peninsula to prepare a report.

81. The initial appeal hearing date was postponed because of the claimant's health but finally took place on the 26 November 2019. The claimant was accompanied by a Client Manager of the business Ms Nurgis Hassan. Ms Connie Kypta a consultant from Peninsula attended for the employers. The meeting was recorded and a transcript was prepared at a later date.

82. The appeal was recorded and a transcript agreed. (JBp326-376) Ms Kypta prepared a report listing the documents she had reviewed, setting out her findings and recommendations (JBp314-325). During the hearing the Consultant alleged that sending emails to her own Hotmail account could have compromised the DFS system. This allegation had not been made before in these terms.

83. Mrs Blair did not meet the Consultant Ms Kypta to discuss the report. She did not meet the claimant and consider if her answers were credible in the light of her own knowledge of the business nor did she listen to the recording. She was given an email with the findings after the hearing which she accepted in full and without raising any queries. Mrs Blair did not ask questions or seek clarification

on any matters. She accepted the recommendations in full that the witness statement evidence provided by the claimant would not have altered the decision to dismiss.

84. Mrs Blair during cross examination agreed that the witness statements provided by the claimant Toby Douglas, Mohsen Abed, Karen Murray and Suzanne Hogg did in fact demonstrate that the claimant had not been acting in competition with the respondent. She advanced no reason why they should not be believed. She accepted that they contradicted the reason for dismissal. She further accepted that the finding that the claimant had been undertaking work privately for Catriona Casey was based on an email that was not sent to the claimant in advance of the appeal hearing, nor was it discussed during the appeal hearing. She also accepted when it was put to her that the respondent could have sought a witness statement from Catriona Casey to determine whether there was any truth in the assumption that the claimant was undertaking work privately for her. She could not answer why Ms. Kypta included in her appeal outcome reference to an email from a Nadia Awad which had not been provided to the claimant or discussed with her.

85. The claimant from the date of her suspension suffered poor health having developed anxiety and depression. She was signed off sick with stress and anxiety from 20 September 2019 until 16 October 2019. She was unwell with stress following her dismissal. By the date of the Tribunal hearing she continued to suffer from anxiety and stress was still taking medication to help with low mood and insomnia. This impaired her ability to work. She continued to carry out bookkeeping work as before.

Witnesses

86. I did not find the respondent's witnesses credible on crucial matters although Ms Fox was a reasonably reliable historian of events. Unfortunately, for whatever reason she seemed to have approached this matter with a closed

mind and in the absence of any tangible evidence concluded that the claimant must be competing against her firm. Mrs Blair became a slightly more a credible witness in that when put to her she accepted the patent defects in the appeal process. It was apparent ,however, she did not engage with the role she had been given as Appeals Officer at the time and had accepted the Consultant's Reports uncritically despite the obvious defects in that report. I had considerable doubts that she had actually read the report or material attached to it.

87. The claimant was a credible and reliable witness who gave her evidence in a mostly clear, careful, straightforward and detailed manner. Mr Douglas was at points a difficult witness who was clearly uncomfortable being in the middle of a dispute between the claimant and Ms Fox both of whom he knew well and respected. Considering his evidence overall I found it honest evidence which supported the claimant's version of her relationship with him and his businesses and how that operated. It turned out that he had put Ms Hogg in touch with the claimant because they were friends and although he had doubted at the time if she could afford the fees charged by DFS had suggested she contact the claimant. This also gave support to the claimant's evidence on this matter.

88. The other witnesses for the claimant (Karen Murray and Catriona Casey) contributed brief evidence. They were both were credible and reliable witnesses who gave straightforward and clear evidence on which I chose to rely.

Submissions

Respondent's Submissions

89. Mr Lane submitted that the claimant had been fairly dismissed on the grounds of her misconduct. He asked the Tribunal to accept the evidence of Ms Fox and Mrs Blair. His position was that the respondent had been alerted to the

telephone call with Mr Douglas and that this had led to an investigation which uncovered the conduct complained of. The respondent had reasonable grounds for believing that the claimant had failed to comply with its rules on confidentiality and information security. He referred to the Confidentiality Agreement and the provision of secure devices and systems.

90. At the time it held that belief, the respondent in his view had carried out as much investigation as was reasonable (in terms of the "range of reasonable responses" test referred to in **Sainsbury's Supermarkets Limited v Hitt, [2003] ICR 111**). The respondent genuinely believed that the claimant had acted in competition with it during her employment. The respondent had various pieces of evidence such as the e-mail from Mohsen Abed requesting a call back (page 146), which the claimant forwarded to her personal e-mail address; the claimant using her personal mobile telephone for calls with the respondent's clients; and the claimant repeatedly forwarding the respondent's company information to her personal e-mail address, despite having a work laptop equipped for remote access.

91. In respect of the allegations that the claimant acted in competition with the respondent during her employment, the sanction of dismissal was within the range of reasonable responses (with reference to Iceland Frozen Foods Limited). The respondent operated a fair procedure, in keeping with the ACAS Code of Practice on Disciplinary and Grievance Procedures (the "ACAS Code"). They had:

1.1. carried out an investigation to establish the facts of the case;
1.2. given the claimant advance notice of the allegations against her;
1.3. held a disciplinary meeting, and allowed the claimant to be accompanied;
1.4. advised the claimant of its decision in writing; and
1.5. provided an opportunity to appeal.

92. The claimant had alleged that the respondent did not have grounds to suspend her on 18 September 2019 and did not explain to the claimant why the investigation could not be carried out fairly without suspending her. This allegation of unfairness was denied. Given the serious nature of the respondent's concerns about the claimant's conduct, suspension was reasonable in the circumstances. The reasons for the claimant's suspension were clearly communicated to her. The claimant alleged that there was no fair notice of the investigatory meeting that took place on 17 September 2019. This allegation of unfairness is denied. The meeting was an investigatory meeting, which the respondent hoped would provide reassurance about the genuinely-held concerns they had.

93. Turning to the issue over obtaining witness statements Mr Lan's position was that the claimant was "*given a reasonable opportunity to ask questions, present evidence and call relevant witnesses*", in keeping with paragraph 12 of the ACAS Code. Furthermore, in the circumstances, particularly as the claimant was professionally represented by solicitors, it was within the band of reasonable responses for the respondent to suggest that the claimant should arrange to take the statements she wanted and then submit them. In any event, the respondent had access to the statements during the appeal process curing any defect (**Taylor v OCS Group Limited,** [2006] ICR 1602).

94. Mr Lane continued that the claimant's solicitors had raised the issue of exculpatory evidence. This allegation of unfairness is denied as his client had carried out as much investigation as was reasonable (in terms of the "range of reasonable responses" test referred to in **Hitt**). The respondent gave the claimant a reasonable opportunity to explain her position.

95. The claimant had alleged that the respondent failed to arrange for an independent person to hear the claimant's appeal against dismissal, and that the appeal was not dealt with impartially. The respondent had followed the

Code. The appeal was dealt with impartially "*by a manager who had not previously been involved in the case*", in keeping with paragraph 27 of the ACAS Code.

96. An issue had been raised by the claimant's lawyer about who had been chosen to deal with the disciplinary and appeal meetings. The decision makers reviewed a full transcript of the relevant meetings, as well as the recommendations of the individual conducting the meeting, before making their decisions. The claimant also alleged that the respondent put her at a disadvantage as she could not provide a response to documents enclosed with the appeal outcome letter. This allegation of unfairness is denied. The documents enclosed with the appeal outcome letter did not have a material bearing on the claimant's dismissal.

97. The respondent's position was that the claimant breached her contractual obligations to the respondent by failing to comply with the respondent's rules on confidentiality on information security, and competing with them. Those breaches were repudiatory breaches, taking into account the terms of the confidentiality agreement and the restrictive covenant agreement. The respondent was entitled to accept the claimant's repudiatory breach, and terminate the contract of employment without notice.

98. If (which was denied) the claimant was unfairly dismissed, the respondent contended that any compensation should be reduced on grounds of firstly the sums earned by the claimant in mitigation and secondly following the principle set out in **Polkey v AE Dayton Services Limited**, [1988] AC 344 in respect of any procedural unfairness the award should be reduced to reflect the possibility that a fair procedure would have resulted in dismissal in any event. The claimant would have in any event been fairly dismissed due to a breakdown in the relationship between the claimant and the respondent as the respondent had completely lost trust in the claimant. The award should be further reduced

on the grounds of the claimant's contributory fault which was significant in his view.

Claimant's Submissions

99. The claimant's solicitor in her lengthy and detailed submissions first of all set out the background to the claim, the issues and made suggested findings in fact. The chronology of meetings had been agreed with the respondent and reflected in the Agreed Statement of Facts. Ms. Moscardini then looked at the meetings that had taken place in July between the claimant and Ms. Fox and the claimant's application for a ACCA practicing certificate. She noted that Ms. Fox did not tell the claimant that she was able to submit her PC application form as an individual without setting up her own company. If Ms. Fox had told her that then the claimant would not have set up her own company at that point which action seemed to precipitate events. She took the Tribunal through the important events intertwined with the application for a PC and Ms. Fox's reaction.

100. The claimant believed that Mr. Thomson a former Director had been asked to contact her by Ms. Fox and see what she was planning as she had told no one about her plans other than Ms. Fox and her close friends and parents. The delay in getting her PC caused her a great deal of stress and anxiety. She submitted her PC to the ACCA within days of receiving the application back from Ms. Fox. The claimant did not hear from the ACCA until 20 January 2020 when they confirmed that they had rejected the PC because Ms. Fox had only provided her signature but had not left any comments on her PC write up as she was required to. This appears deliberate. The claimant's PC was not completed by Ms. Fox in full until 23 March 2020 as a result of which the claimant was not able to obtain her PC and set up her own accountancy practice within 3 months of leaving employment.

101. Ms. Moscardini then considered the evidence around the Police Investigation and what the Tribunal could infer from the timing of these events and the start of disciplinary action. She then turned to the Investigatory meeting in September and the fact that the claimant received no warning of that meeting which resulted in her suspension. She asked the Tribunal to note that the respondent wrote to the claimant to confirm that she was suspended prior to receiving Ms. Reid's report following the investigation. Her client's position was that the respondent did not have grounds to suspend the claimant and knew that. It was also not explained why the investigation could not be carried out fairly without suspending her.

102. The solicitor then took the Tribunal through the disciplinary hearing and the seven allegations made. In their email dated 9 October 2019, the claimant's solicitor confirmed that in order for her to have a fair hearing, it would be necessary for statements to be taken from Suzanne Hogg, Toby Douglas and Mohsen Abed. The requested witness statements had not been taken by the respondent in advance of the disciplinary hearing. Nor was the disciplinary hearing part adjourned for witness statements to be taken. The claimant had to arrange for statements to be taken and made available for the appeal hearing.

103. On 7 November 2019, the respondent's Mrs. Blair wrote to the claimant (Joint Bundle, Page 303) inviting her to an appeal hearing on Friday 15 November 2019, which would be conducted by a Face2Face Consultant from Peninsula. No documents that the respondent intended to rely upon at the appeal stage were enclosed with this letter. Mrs. Blair was not a suitable decision maker as she had been involved in the investigation. She submitted that it was not appropriate for the appeal hearing to be heard by another Face2Face Consultant from Peninsula, particularly in view that Peninsula's fees were being paid by the respondent and Peninsula had also been involved in the earlier disciplinary hearing. The claimant's solicitor had at the time suggested that the appeal hearing be heard by an ACAS representative to ensure the requirement of following an impartial appeal process was upheld.

104. The claimants solicitor then considered the various allegations made by referring to documents which were considered as part of the Disciplinary Appeal Procedure namely an "Email from Andrew Casey/ O'Neill Property" and the "Email from Nadia Awad dated 24 April 2019". (Joint Bundle, Page 318) These emails had not been sent to the claimant prior to the appeal hearing and she had not been given an opportunity to comment on these documents at the appeal hearing. Ms. Kypta also stated in her Report that the claimant *"was alerted that incoming emails from her Hotmail account to her work email address had been marked as spam and probable junk*" (Joint Bundle, Page 321, paragraph 24). A copy of this email was enclosed with Ms. Kypta's report (Joint Bundle, Page 377). The claimant was not given a copy of this email in advance of the appeal hearing nor was this email discussed with the claimant at the appeal hearing.

105. It was submitted that the claimant was a credible and reliable witness. The claimant's evidence in cross-examination was consistent with the evidence contained in her written statement and in the documentary evidence within the bundle. She had maintained that she had not acted in competition with the respondent, nor did she ever have any intention of acting in competition with them. She also maintained that she exercised reasonable care to keep safe all documentary or other material containing confidential information, in accordance with the Confidentiality Agreement.

106. The solicitor submitted that the other witnesses for the claimant, namely, Toby Douglas, Catriona Casey and Karen Murray were all credible and reliable witnesses. In respect of Toby Douglas, he confirmed during evidence that he had confirmed in an email to Ms. Fox on 12 November 2019 that the claimant had his permission to use her personal email address in relation to anything connected with any of his businesses. When challenged in cross examination, he categorically did not accept that Ms. Fox was not aware of the means by

which he would contact the claimant. This reflected the evidence contained in his witness statement.

107. The respondent's witness Ms. Fox was not a credible or reliable witness in her submission. She did not seek to discuss her concerns with the claimant incorporating her own company. She did not tell the claimant that she did not need to incorporate her own company to be able to obtain a Practicing Certificate. She did not complete the application correctly causing significant delay in the claimant getting her PC. She had accepted that no witness statements were taken in advance of the disciplinary hearing, despite these being requested nor did she ask Mr. Douglas about the allegations wrongly telling the claimant's lawyers that he did not want to give a statement. She accepted that she had no evidence that the claimant was conducting client telephone calls on her personal mobile phone.

108. It was submitted that when cross examined Mrs. Blair was not able to provide cogent evidence to show that the decision to dismiss Ms. Finlayson was procedurally or substantively fair.

109. Ms. Moscardini then turned the legal position that she believed applied. The starting point for consideration of this case is section 98 of the Employment Rights Act 1996. The respondent is under an obligation to demonstrate that it had a potentially fair reason for the claimant's dismissal. The respondent needs to have a genuine belief in the employee's misconduct to establish this as the reason for dismissal but this belief does not need to be based on reasonable grounds (*Maintenance Co Ltd v Dormer [1982] IRLR 491*).

110. The claimant contended that the respondent did not dismiss the claimant because they genuinely believed her guilty of gross misconduct but because the claimant had informed the respondent of her intention to, in the future, resign and set up her own accountancy firm. The reason was not conduct but

rather because the claimant had indicated she would be leaving at a future point to start her own business.

111. It was submitted that the respondent trawled through historic email correspondence to try to find a pretext to dismiss the claimant because the claimant told the respondent about her future plans to one day set up her own company, and the respondent was concerned about the claimant potentially acting in competition.

112. The claimant submitted that the respondent had failed to discharge its burden of proof and demonstrate that it had a potentially fair reason for dismissing the claimant or that the belief was genuinely held. If the Tribunal accepted that such a belief was genuinely held then the next stage is to consider the tests in ***British Home Stores v Burchell 1980 ICR 303.***

113. The Tribunal was referred to the case of **Scottish Daily Record and Sunday Mail Ltd v Laird** [1996] IRLR 665 and urged to consider it when assessing if there was any real conflict in the claimant acting for Karen Murray and Catriona Casey in the limited way she had. In this case Mr. Laird was the deputy editor of the Sunday Mail and became involved in publishing two free newspapers. He did not disclose this activity to the Sunday Mail and once it found out he was dismissed. Mr. Laird was successful in his unfair dismissal claim which found its way to the Court of Session. The Lord President at the time, Lord Hope stated as follows in relation to applying the *Burchell* test to the facts:

"*We agree with the Employment Appeal Tribunal that the industrial tribunal were entitled to hold in the light of the evidence that the second and third branches of the threefold test were not fulfilled in this case, and that that finding was sufficient in itself to justify the finding that the respondent's dismissal was unfair. It seems to us that this point is, in the end, a relatively simple one. Mr. Taylor very properly accepted that, in the light of the findings of fact by the industrial tribunal, he could not maintain that the respondent's involvement in the Castlemilk Free Press created any conflict or the risk of any conflict with the business of the appellants' company. Yet Mr. Cassidy made it clear both at the*

disciplinary hearing and in his subsequent letter that it was his view that the respondent's involvement in both of the two free newspapers was a clear breach of contract, because the publishing of both of these newspapers was against the interests of the company. ….In the present case, therefore, the application of the threefold test was not a mere formality. It went to the root of the question whether Mr. Cassidy had a sound basis for the allegations which he was making in order to justify his decision to dismiss the respondent ." (Paragraph 19)

114. In this case, even if the respondent had a genuine belief that the claimant was acting in breach of the Restrictive Covenant Agreement 2018 and the Confidentiality Agreement, a reasonable amount of investigation into the facts would have demonstrated that the claimant had not been acting in competition, had no intention of acting in competition, and had not been in breach of the Confidentiality Agreement. Interviewing the relevant witnesses, namely, Toby Douglas, Mohsen Abed, Suzanne Hogg, Karen Murray and Catriona Casey would have confirmed this. It was accepted that what amounts to a reasonable investigation is very much dependent on the facts of the case (**Sainsbury's Supermarket Ltd v Hitt** *[2003] IRLR 23)*. However, the degree of inquiry and investigation required of a reasonable employer would depend upon the circumstances of the case against the employee. Where the issue is one of pure inference, the amount of inquiry and investigation required is likely to be greater (**ILEA v Gravett** [1988] IRLR 497).

115. In respect of the claimant's case, dismissal was not she suggested within the band of reasonable responses even if the allegtions were proven. The claimant had been a loyal employee of the respondent for over ten years, with a clean disciplinary record. She had been open and transparent with the respondent throughout the investigation and disciplinary hearing.

116. The dismissal was, she submitted, in any event procedurally unfair. The importance of a Tribunal considering whether an employer has followed their own internal procedures in a disciplinary procedure when considering the

fairness of a dismissal was made clear by the Court of Appeal in **Stoker v Lancashire CC** *1992 IRLR 75*. The respondent's disciplinary procedure confirms that staff will only be disciplined after careful investigation of the facts and the opportunity to present their side of the case. There were a number of procedural failings on the part of the respondent which, even if the Tribunal is not persuaded that the dismissal was substantively unfair, would render the dismissal unfair.

117. The claimant's lawyer concluded that this was a factually complex matter and a number of allegations were being made against the claimant. By failing to obtain the necessary witness statements at the disciplinary stage and also further witness statements on appeal (namely, witness statements from Nadia Awad and Catriona Casey), and also by failing to provide the documentary evidence (namely, the email correspondence relating to Nadia Awad and Catriona Casey) which was said to support the respondent 's findings the claimant was put at a disadvantage as she could not properly challenge the basis for the findings. In addition, the ultimate decision makers were not present during the disciplinary or the appeal hearing. Ms Fox was not present at the investigatory meeting or the disciplinary hearing to test the credibility of the claimant against her own knowledge of the business. Mrs Blair was not present at the appeal hearing to test the credibility of the claimant, nor did she listen to any recording of the appeal hearing. If they had truly thought that the claimant was acting in competition they could have asked for access to her computer, tax returns and checked her mobile usage by asking for a copy of her statements.

118. The claimant set out her remedy in the Schedule of Loss (**JBp390**). The claimant contended that compensation should be uplifted by 25% to reflect the respondent unreasonably in failing to follow the ACAS Code. Considering the issue of mitigation Ms. Moscardini submitted that the onus was on the respondent to show that the claimant has failed in her duty to mitigate her loss

and in doing so what has to be proved is that the claimant acted unreasonably as opposed to showing they acted reasonably (**Cooper Contracting Ltd v Lindsey** *UKEAT/0184/15*). In Cooper Mr. Justice Langstaff also made the point that the court or tribunal in deciding the issue must not be too stringent in its expectations of the claimant (**Wilding v British Telecommunications Plc** *[2002] IRLR 524, paragraph 37*).The claimant had not unreasonably failed to mitigate her losses. After being dismissed by the respondent, the claimant obtained a payment of £11,685 by providing bookkeeping services and business support via Acorn Bookkeeping during the period from 1 November 2019 to 31 May 2020 (JBp395 - 411).

119. Ms. Moscardini accepted that the claimant was required to comply with the restrictive covenants set out in her Restrictive Covenant Agreement (JBp56) and this she took as preventing her from working in competition during the period from 1 November 2019 until 31 January 2020. The only income the claimant received during this period related doing bookkeeping for NLU Limited. In addition, the claimant was also unable to carry out any work via her company Acorn Accounting Limited until she received her practicing certificate from the ACCA which she did not receive until April 2020.

120. The claimant suffered from anxiety and depression since she was suspended from work in September 2019. She was signed off sick with stress and anxiety from 20 September 2019 until 16 October 2019. She continued to suffer a significant amount of stress following the termination of her employment in October 2019. Over the course of the last year, she has been taking medication to treat acute anxiety and she has been taking antidepressants and sleeping tablets to help her low mood and insomnia. She did not feel fit enough to work properly after the termination of her employment due to symptoms of her anxiety and depression, although she felt able to do some work as a bookkeeper. Up until the hearing she was still dealing with stress and anxiety that was triggered initially by the incidents surrounding her suspension and the termination of her employment. (JBp422).

121. Finally, in the event that the Tribunal concludes that dismissal was unfair for any procedural reason then it is submitted that no deduction should be made under *Polkey v A E Dayton Services Limited 1988 ICR 142*. It was submitted that had the employer followed a fair process of having an impartial independent individual hearing the appeal hearing then the same outcome would not have been reached. It was also submitted that had the respondent carried out a reasonable investigation, including looking for exculpatory evidence, then the same outcome would not have been reached.

Discussion and Decision

122. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). If the reason demonstrated by the employer is not one that is potentially a fair reason under section 98(2) of the Act, then the dismissal is unfair in law.

123. Conduct is a potentially fair reason for dismissal. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined by section 98(4) of the Act which states that it: "*depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in 30 accordance with equity and the substantial merits of the case."*. That section was examined by the Supreme Court in **Reilly v Sandwell Metropolitan Borough Council** [2018] UKSC 16. In particular the court considered whether the test laid down in **BHS v Burchell [1978] IRLR** 379 remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it was not concerned with that provision. He concluded that the test was consistent with the statutory provision. Tribunals remain bound by it.

124. The Burchell test remains authoritative guidance for cases of dismissal on the ground of conduct. It has three elements (i) Did the respondent have in fact a belief as to conduct? (ii) Was that belief reasonable? (iii) Was it based on a reasonable investigation?

125. Tribunals must also bear in mind the guidance in **Iceland Frozen Foods Ltd v Jones** [1982] ICR 432 which included the following summary: *"in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer…….the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.*"

126. The way in which an Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was also considered and the law summarised by the Court of Appeal in **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387.

127. Lord Bridge in **Polkey v AE Dayton Services** [1988] ICR 142, a Judgment of the House of Lords, referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct: *"in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation*."

A fair investigation should be even-handed and take into account evidence that could be in the employee's favour (**A v B** [2003] IRLR 405, EAT), **Leach v OFCOM** [2012] IRLR 839). 67.

128. Guidance on the extent of an investigation was given by the EAT in **ILEA v Gravett** 1988 IRLR 497, that *"at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be 15 situations where the issue is one of pure inference*. *As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.*"

129. The focus is on the evidence before the employer at the time of the dismissal rather than on the evidence before the Tribunal. In the case of **London Ambulance Service v Small** [2009] IRLR 563 Lord Justice Mummery in the Court of Appeal warned: *"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is 30 carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."*

130. The band of reasonable responses has also been held in the case **Sainsburys plc v Hitt** [2003] IRLR 223 to apply to all aspects of the disciplinary procedure. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

131. Tribunals are required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. They are not bound by it. The following provisions may be relevant: *"5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the 10 facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing….. 9. If it is decided that there is a disciplinary case to*

answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification… 23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence…."

132. The Code of Practice is supplemented by a Guide on Discipline and Grievances at Work, which is not a document that the Tribunal is required to take into account but which gives some further assistance in considering the terms of the Code of Practice. Under the heading "Investigating Cases" the following is stated: *"When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. It is not always necessary to hold an investigatory meeting….." Under the heading of "Preparing for the meeting", which is a reference to a disciplinary meeting, is included "Copies of any relevant papers and witness statements should be made available to the employee in advance."*

133. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. The test for gross misconduct is a contractual one based on an objective analysis of the evidence.

134. An appeal is a part of the process for considering the fairness of a dismissal. The importance of an appeal in the context of fairness was referred to in **Taylor v OCS Group** [2006] ICR 1602 in which it was held that a fairly conducted appeal can cure defects at the stage of dismissal such as to render the

dismissal fair overall. That case also emphasised that the whole procedure is not looked at in a vacuum, but that the fairness of a dismissal is looked at in the round having regard to all the circumstances.

135. In this case it was argued that there had been a breakdown of trust and confidence. In such situations regard should be had to the useful guidance contained in the Court of Appeal case **Leach v Offcom** 2012 EWCA Civ 959. The Tribunal upheld the dismissal of an employee in a situation where there was no actual evidence of abuse but the circumstances were relied on to dismiss for a breach of trust and confidence. Underhill J, in the EAT upheld the result but expressed some unease about 'the growing trend among parties to employment litigation to regard the invocation of "loss of trust and confidence" as an automatic solvent of obligations' and whether dismissal purely to protect the respondent reputation could be justified: on balance it was in this case. At appeal Mummery LJ echoed Underhill J's comments saying that:

> *"The legislation is clear: in order to justify dismissal the breakdown in trust must be a "substantial reason." Tribunals and courts must not dilute that requirement. "Breakdown of trust" is not a mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal.''*

The Reason for dismissal

136. The first issue, therefore, is whether the respondent has demonstrated a potentially fair reason for dismissal. In this case they relied on misconduct. This matter gave the Tribunal some difficulty. It was clear that before any disciplinary issues arose Ms Fox had asked the claimant to resign. It was also clear that she wanted the claimant to leave the company and quickly when the claimant indicated that she did not want to stay until January of the following year. The claimant's role in speaking to the Police about a client and also about

the respondent's actions and her expressed views on the proper processes that should have been observed in relation to what appears to be a possible money laundering issue were almost certainly unwelcome to Ms Fox. These events gave further pause for thought especially as their timing coincided with the start of disciplinary action.

137. The way in which that action was itself carried out gives some insight into Ms Fox's mindset at that time. It was apparent in Ms Fox's attitude that she did not approach these matters with an open mind nor did she have any real evidence of competition simply an apparent suspicion. It raised the inference that the disciplinary action was a convenient way to achieve her purpose of getting the claimant to leave and in an way that might hamper her future business ambitions. Nevertheless, the discovery of serious wrongdoing at this juncture might have been a coincidence.

138. Ms Fox's approach was, however, apparent from her evidence and from the way the disciplinary process was handled particularly the lack of any interest in speaking to potential witnesses that might corroborate the claimant's position. It should also be borne in mind that the core allegation was acting in competition with DFS. From an early stage Ms Fox seems to have asked staff, including Mrs Blair, to watch the claimant and report anything suspicious to her hence the fact that the claimant had spoken to Mr Douglas by telephone being reported to her.

139. There was in this case a clear unwillingness to look for and consider any evidence that might allay her suspicions that the claimant was in fact in competition against her, her acceptance of the disciplinary charges and in particular the principal one of being in competition on what we will see are flimsy or non-existent grounds and finally her seeming reluctance to accept that any that innocent explanation might exist for any matter or at any early stage consider such explanations.

140. However, considering the matter broadly I have come to the conclusion with some hesitancy that the respondent did by the point of dismissal dismiss on the grounds of alleged misconduct. As submitted by Ms. Moscardini a respondent needs to have a genuine belief in the employee's misconduct to establish this as the reason for dismissal but this belief does not need to be based on reasonable grounds (*Maintenance Co Ltd v Dormer [1982] IRLR 491*). Although the underlying position was clear that Ms Fox had decided prior to any disciplinary action that as the claimant might take business with her when she left it was best and that she leave quickly the disciplinary process was the convenient route chosen: she approached the issue of dismissal with that objective in mind and seems to have convinced herself that the claimant had committed misconduct.

Whistleblowing

141. The claimant argued that telling the Police that the client account should not have been used in a particular way was capable of amounting to a protected disclosure. The Tribunal began by considering whether the claimant made a protected disclosure. To be protected, a disclosure must be a “qualifying disclosure” within the meaning of Section 43B of the Employment Rights Act 1996 (“ERA”) and must be made in the manner and to the person or body specified in Sections 43C to 43H of ERA. Section 43B(1) of ERA defines a qualifying disclosure as “any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following: (a) that a criminal offence has been committed, is being committed or is likely to be committed; (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (c) that a miscarriage of justice has occurred, is occurring or is likely to occur; (d) that the health or safety of any individual has been, is 15 being or is likely to be endangered; (e) that the environment has been, is being or is likely to be damaged; or (f) that information tending to show any

matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

142. This was one aspect of this otherwise hotly contested and argued case that received little attention in submissions. The basis of the disclosure seems to be contained in paragraph 41 of the claimant's statement which relates to a meeting with Police on the 9 August when she was shown evidence of certain transactions being recorded in the DFS client account. At which point she made an observation that putting client funds into the firm's own account was an improper use of the account. The evidence comes close to a suggestion of possible money laundering but two difficulties arise. The first is that the information that these transactions have occurred appears already to be in the hands of the Police (and therefore not disclosed) and secondly the claimant's observation does not seem to go as far as suggesting either a crime or some other unspecified obligation has been broken. Indeed the claimant says *"I do not think that Ms Fox would have sanctioned the use of the client account in this way.."* Even if not sanctioned there may have been a breach of obligations or good accountancy practice or some professional obligation and I do not wholly discount that this could amount to a protected disclosure but crucially there is no evidence to show that Ms. Fox was actually aware of this conversation and the nature of the possible protected disclosure in coming to her decision to dismiss.

Wrongful Dismissal

143. I do not find it necessary to set out different facts in relation to this aspect of the case. The test is a contractual one as to whether the claimant breached her contractual terms, in this case the implied term of fidelity was relied upon, principally by being in competition with her employers and by doing so acting against their interests.

144. Being in competition broadly means competing for business for remuneration often acting secretly for the employer's business clients. (The Restrictive Covenant sets out the meaning and ambit of acting in competition after termination). There was ultimately no basis for such a suggestion in the evidence and attempts to portray events such as submitting a tax return as a favour for a friend and one for a relative (both some years earlier) gave the impression of some desperation on the part of the employers to demonstrate such a breach. There was no evidence to suggest that the claimant was taking clients from DFS or secretly 'moonlighting' in her own time.

145. The second basis for alleging that the claimant was in breach of her contractual obligations related to allegations around breach of the Confidentiality Agreement which I also rejected for the reasons given later in the Judgment.

Disciplinary Process

146. The first issue to consider in relation to the disciplinary process was whether or not the respondent was entitled to suspend. If the allegations were genuinely held and there was a basis for them then suspension could be reasonable. However, we need to examine the matter further to ascertain if these two preconditions are fulfilled.

147. An employer has a wide discretion on how to approach a disciplinary investigation as Mr Lane observed in his submissions. However, they must approach the matter in an even handed manner. As noted earlier the evidence strongly suggested that Ms Fox was not really interested in exploring the basis for the main underlying allegation which was that the claimant was working in competition to her business. There was very little material available to her to conclude that the claimant was working in competition with her but just enough in my view to justify suspension pending an investigation.

148. We must now turn to the investigation and how the respondent assessed the evidence they found.

149. The background lends itself to the principal allegation being perhaps unlikely. The claimant was a busy employee in a busy firm. There was no suggestion that the claimant did not work hard and her evidence of often working overtime in a busy practice was not challenged. It might have appeared improbable to some employers that she would have had much time to devote to providing services privately to other businesses or that doing so would not have quickly come to Ms Fox's attention. There was no evidence that clients left to follow her even after she left.

150. The evidence also indicates that Ms Fox was initially very reluctant to engage with the claimant's lawyers. Crucially she did not seek to investigate herself or to instruct her HR advisers to investigate the witnesses named by those solicitors in their email dated 9 October (JBp191) despite the terms of the disciplinary policy or the claimant being hampered from doing so by the terms of the suspension. There was some evidence that at some point Ms Fox telephoned Mr Douglas, a longstanding client with whom she enjoyed a good relationship, but no note of the call was made produced and no written request was made to him to clarify if the claimant was carrying out additional work for him or his associates or friends. Surprisingly, no contact was made with Mr Abed despite him being a recent client to ascertain if the claimant was carrying out work for him or asking for work. The response was that it was the claimant's responsibility (JBp193). Such an approach causes real difficulties for a claimant and is also inconsistent with the obligations on an employer (**A v B** [2003] IRLR 405, EAT, **Leach v OFCOM** [2012] IRLR 839).

151. It should be recalled that in terms of the claimant's suspension she was precluded from contacting anyone involved in the investigation including clients (JBp113). As seen earlier it is up to an employer to seek not only evidence that is capable of proving guilt but evidence that is exculpatory. A view not

seemingly shared by the HR Adviser who unfortunately was not called to give evidence to explain how she arrived at this view. (see Finding 61). The claimant's solicitors protested over the position being taken (JBp272). It was also apparent that on occasion documents were relied on which were not copied to the claimant or put to her for comment (see Finding 84)

152. The Appeal process is dealt with separately.

Disciplinary Allegations

153. There were essentially two underlying grounds that the respondent used to justify dismissal the first was that the evidence showed that the claimant was or had been in competition with them and was thus in breach of the duty of fidelity and secondly she had breached her contractual terms particularly the Confidentiality Agreement.

154. Before looking at the allegations it is important to consider the ambit of the claimant's obligations of confidentiality. Clearly there are written terms here which we have to consider as the obligations are contained in the Confidentiality Agreement. The Agreement was interpreted by Ms Fox and also her HR Advisers to provide, in effect, that all information from a company source was confidential even where it not really confidential at all for example widely and freely available HMRC links. Little effort seems to have been made to carefully consider the purposes behind the Agreement and to construe it's proper construction with that in mind. This was of real significance as the claimant said in evidence and in the disciplinary process not only did she challenge the confidentiality of some documents but maintained that she had always exercised reasonable care as provided for in Clause 5 of the Agreement (p55).

155. The claimant also has professional obligations which were not the subject of criticism rather the respondent relied on the contractual obligations. It is important to in considering what these are to look at the whole background and

what the document would convey to a reasonable person having the necessary background knowledge. (**ICS v West Bromwich Building Society (1998) 1AER 98(HL**). That agreement starts out by indicating that it is in place to protect confidential information gained in the course of employment relating to members of staff and clients. This makes sense as it is that information that is properly to be seen as sensitive. Reference to the GDPR doesn't appear to add anything. Yet throughout the investigatory and disciplinary hearing and indeed in at the hearing the position taken was that any information of any sort was covered. To justify this interpretation the agreement was not considered as a whole but particular clauses used to justify a sort of ''zero tolerance'' position covering any information emanating from the respondent. If that was to be the position, and it could be envisaged that in some workplaces dealing with very sensitive work requiring high such blanket ban might properly be put in place with clear policy guidance and training for staff.

156. That was not the situation here where the obligation was in my view to exercise reasonable care to treat as confidential information about clients and members of staff that is truly confidential. There was no effort made to judge how confidential some documents were. They were taken as all being confidential. No such exercise was undertaken by the two Consultants who seem to treat all information emanating from the company as being confidential. If there was to be a blanket ban for example on any downloading of any information at all and from any source from the Internet then this is not stated and does not in any event seem necessary for the purposes of this business.

157. I noted that in the Employee Handbook the use of the Internet and Social Networking sites were regulated but not banned and that there were references to returning downloaded material (Clause A1) in the Confidentiality Agreement. This seems to support the claimant's understanding that there was no absolute bar to downloading or possessing such material. I also concluded that any warnings given by Ms Fox about the use of the internet has to be seen against this written contractual background and professional understanding of the need

to exercise care when dealing with business and personal information that is truly sensitive/confidential.

158. The Report prepared by Ms Lilley sets out the evidence relied upon for dismissal (JBp284 onwards). The first documents relied on related to emails about Mr Douglas that the claimant had forwarded to her Hotmail account. The parties seemed to accept that there was a 'blurring' of lines between the fact that Mr Douglas was a client of the respondent and the claimant also carried out private bookkeeping work for him. Under cross examination Ms Fox accepted that there was such a crossover and that the claimant was entitled to use her Hotmail account on occasion. This gives support to the claimant's position that Ms Fox knew perfectly well that when the claimant was visiting Mr Douglas or otherwise in contact with him. It was in the interest of respondent company that she would take the opportunity of getting up to date instructions from him which she would report to Ms Fox.

159. The claimant also confirmed that she had copied information about her own Tax Return and that of Karen Murray to her Hotmail account and had submitted Ms Murray's Return though her work laptop. It is difficult to see why any of this was objectionable. There was also reference to an email with a mobile number for Mr Abed sent to her Hotmail account. The claimant indicated that this was done as an aide memoir to remind her to try and telephone him in the evening as she had been unable to get him in office hours to ask if he still wanted them to act for him. In the event he did not. Ms Lilley found '*no business reason'* for the claimant to contact him outside office hours. This seems a rather odd finding as on the face of it there was a clear business reason to contact him and ascertain if he was still requiring their services. The finding was made without the benefit of any Statement from Mr Abed who later corroborated the claimant's position.

160. The contractual obligation appears therefore to be a requirement to take reasonable care of confidential information (Clause A5 p55) and to return downloaded information on termination of employment. Interestingly the Agreement refers to documentary information held on a laptop, PC or USB drive and does not specify further.

161. The first and second allegations that were upheld are linked. The first was having two documents on her personal laptop and the second by doing so breaching the Confidentiality Agreement. The claimant sent a copy of the GoProposal template to herself as we have seen and also of the company IT Infrastructure proposal.

162. I must record that I struggled a little with the respondent's agent's suggestion that the GoProposal document would be helpful to the claimant setting up her own business. It was a template. It appears that the respondent accepted that the claimant was asked to work on it (it was not yet ready to use and had not been tailored to the business). No investigations were made with other staff to counter the suggestion. Accordingly, we have a generic document that the claimant had in her possession for work purposes and no suggestion that it was either particularly sensitive (having been bought 'off the shelf'') or that the claimant had failed to take reasonable steps to keep it confidential. There was no evidence she had used it improperly. She was entitled as an employee in these circumstances to know what it contained and had been asked to comment on it and help revise it's terms.

163. Another document relied on was the draft IT Infrastructure plan which the claimant had forwarded to her own account as a PDF file. There seems to be no basis for rejecting her explanation that she had limited time before a scheduled meeting, all of which is evidenced, to consider it so she sent it to her laptop at home to read. She could have printed it off or made notes of the contents and presumably this would have been uncontentious. l also struggled somewhat with the description of this document as being particularly sensitive.

It was not spoken to in any detail in evidence. It does not seem to be referred to by the HR Consultant in the list of documents considered by her in her report (JBp283). What was said was that it related to plans for purchasing computer equipment and how that IT would be structured.

164. It was put to the claimant that this document would be of use to her if she was setting up her own business. That seems frankly a little fanciful. If anyone was purchasing IT equipment and software then potential sellers would be happy to provide details of what they thought might be needed by a prospective customer. It also seems odd to suggest that an IT infrastructure proposal designed for an established busy accountancy practice with tow offices and 12 staff would be of any use to someone planning on becoming a sole practitioner. There was no evidence of any unique or unusual features of the Infrastructure document or of information that was sensitive to the business.

165. In any event, even if the document can be described in a wide sense as confidential there is no evidence that the claimant had not taken reasonable care of it. Her explanation that she had sent it to her home email address to allow her to consider it at home, and given her position as the second most senior person in the company appears unobjectionable.

166. There was reference in the letter dated 30 October dismissing the claimant (JBp299) to a breach of the GDPR. Those Regulations were not explored nor was it clear to me what the personal data was supposed to consist of. It was disappointing to note that the Consultant that dealt with the appeal (p319) when challenged that there was no GDPR component did not try and refute this, investigate further or remove the reference from the allegation but just repeated ‘‘nothing should be sent’’. Even if correct there is a distinction between sending something of little or no sensitivity to sending something containing with much more confidential information.

167. There may have been a suspicion that the claimant might not have returned documents on termination of her employment but that was simply a suspicion and not evidence of wrongdoing. There was no basis in allegations 1 and 3 on which a reasonable employer would have dismissed.

168. There was also an allegation concerning the Employee Handbook a copy of which the claimant sent to herself. The respondent's representative arguing that she was not entitled to have a copy of the Handbook was not without irony. The suggestion made that it contained sensitive and commercially valuable information were not backed by any evidence or examination of any unique features of this document. The Handbook which was produced seems to be a general style and it is not apparent that it is in any way tailored to the respondent's business or why it would have had any separate commercial value.

169. In addition, I do not accept that any reasonable employer would discipline a staff member for forwarding a copy to themselves of a Handbook that forms part of that employee's contract of employment. As was pointed out during the hearing the claimant could have copied the document and removed a paper copy without criticism.

170. The Consultant opined that any activity whatsoever could allow hacking of the respondent's account. There was no evidence produced to demonstrate the basis for this suggestion and it is somewhat undermined by Ms Fox conceding that there could be bona fide email traffic between the claimant's work computer and her own one in relation to Mr Douglas and his companies.

171. This claimant was also criticised for sending a link relating to a free webinar from HMRC to her own laptop. Her explanation was that she wanted to use this when evidencing her CPD requirements. This seemingly innocuous behaviour was criticised and it was suggested that she should have registered herself separately as an individual to obtain it. This webinar was freely available. It

contained no information confidential or otherwise about the respondent company or their clients. It was not their property in the sense that was free to anyone who wanted it. No reasonable employer would have been concerned at this. If there was some concern (and what it could be remains unclear) they could readily give an instruction or put in place a policy regulating such matters. This also applies to the two technical updates from HMRC that the claimant forwarded to herself (JBp288 Evidence 18-19).

172. Although allegation 3 was dropped it is noteworthy that such a flimsy allegation was made in the first place. The claimant was alleged to have written down a potential employee's name on her notepad. This rather unusual allegation was explored and raised again at the hearing suggesting that the claimant had some ulterior, but unknown, motive for doing this. The person concerned does not seem to have been contacted to investigate if there was any illicit contact with them. There could, of course, be many reasons, in a busy office, why someone would write down someone's name for example taking a call or noting it for another or even out of curiosity. The claimant explained that she had seen the person's name in the global diary to which she had access and wanted to confirm if it was a new client. If it had been then she might have been asked to prepare some work. Although there were no other facts known to the respondent that might make this innocuous act seem sinister it was subject to the formal disciplinary investigation. It was not proceeded with although the writer of the report records that she would *"question Fiona's motives for looking though the diary"* We do not know why she made such a comment displaying suspicions about the second most senior person in the office keeping tabs on work coming into the firm. I regret I was drawn to the conclusion this was another situation where wrongdoing was being alleged with no proper basis for doing so.

173. Under the heading Evidence 20 the claimant was criticised for using her own email account as part of a two-step authentication process to software being

used in the business. The claimant had not been provided with any guidance as to how it should be set up. She said she had used it by default. It is not clear how this relates to the allegation 1 or 2 but seems unremarkable. There was no evidence that the claimant had used or misused the software application for her own benefit. There was no basis for disciplinary action. If the respondent was concerned they could have changed the system and instructed the use of different default contacts.

174. The claimant accepted that she had sent an email to her own account on 25 February 2019 (Evidence 21) headed 'Annoyances' because she felt unfairly treated by Ms Fox. The email was a reminder to carry out certain tasks. She was accused of sending information from the company without permission. There was reference to a team meeting on the 25 February at which Ms Fox reminded those present about GDPR (JBp289) ''*we have to be careful about where it's going. If it's in the Company it's in the Company. So nothing should be sent out to personal email addresses''*.

175. The claimant's position was that the email was sent to her own account as she wanted think about it and the work situation she was in. There was no evidence that the email had been transmitted or access by anyone other than the claimant who deleted it shortly after this. It was not clear what information was said to be sensitive.

176. The fourth Allegation which was upheld related to contacting Mr Douglas by WhatsApp. The background was not explored to get an understanding of Mr Douglas's position. In any event I accept that on the balance of probabilities that given the uncontested evidence that Mr Douglas is often at sea and uncontactable by telephone that the use of this system to contact him was of longstanding and likely to be well known to Ms Fox despite her denials. No distinction was drawn, as a reasonable employer would between chasing a slow responding client, as Mr Douglas seemed to be, for documents to allow

completion of his tax returns using a recognised system such as WhatsApp and the much more sensitive information involved in giving advice which should be recorded though company systems. In any event this Allegation was not ultimately founded on the appeal against it having been successful.

177. The fifth Allegation was that the claimant had been in competition with her employers contrary to the Restrictive Covenant. The evidence found by the Consultant was that here was evidence of underhand behaviour and that the claimant had personal contact with clients (presumably Mr Abed and Mr Douglas) and potential clients. She states '*the suspicion is…*' that she had been conducting work for others. It is noteworthy that in the letter of dismissal there is no reference to any evidence giving rise to the assertion. It is put thus: *''upheld as you have made it clear that that you wish to set up your own business..''* That really sums up the respondent's position. There was no basis on which a reasonable employer would have come to this finding even if such a finding was based solely on inference.

178. I would observe that as an accountant Ms Fox would be aware that the claimant would have had to declare any income from providing private services in her Tax Returns. She was never asked to disclose these. (Nor was she asked to allow her own laptop to be examined to check if emails had been deleted as she had alleged). There was no prior issue as to the claimant's honesty having been previously approached to buy into the business yet she was not asked to disclose this evidence even to a third party.

179. Allegation seven was upheld. This related to an alleged failure to pass on possible business to the respondent . Once more there was a reluctance to explore this matter and discover if the company actually lost any business though the claimant's actions. It has to be recalled that the claimant was the second most senior person in the firm and the allegation related to events in April 2018. It is difficult to understand why she might have turned away possible work for DFS at that point. The evidence, which I accepted was that it

turned out that the person concerned did not need the respondent's services. The background was confirmed by Mr Douglas who knew the person concerned. The claimant was in a position to assess this matter professionally which she did and in doing so prevented time being wasted. The situation appears run of the mill and has only been given a sinister character by the respondent because of much later events. There was in the end no factual basis to conclude that the respondent lost work though the claimant's actions. In passing the claimant's actions would have been likely to have engendered goodwill towards both the claimant and DFS.

Appeal

180. An appeal can cure problems with the fairness of earlier disciplinary processes. Mr Lane urged me to accept that the appeal was fair and that I should take account of the respondent's size when considering that there was no one else available to take the appeal but Mrs Blair. I would firstly comment that although the respondent's have a smallish number of staff (12) they are professionals and have the resources to employ skilled advisers which they did. They are not a small concern in the way a small corner shop might be. As an appeal is usually part of a fair process and to be expected if the decision is adverse to the employee it is perhaps odd that Mrs Fox didn't keep herself in reserve for that part of the process and instead asked Mrs Blair to do it. However, I accept that there can be a real problem for small employers with hierarchical structures of management as we had here in arranging a fair appeal.

181. The claimant was in effect the number two in the company. This placed Mrs Blair in a very difficult position being asked to potentially overturn Ms Fox's decision and go against her wishes both as the most senior person in the company and the owner. I was not completely convinced that it would not have been possible to arrange for one of the previous Directors to be asked to act in this capacity or for an approach to be made to some other independent senior

person perhaps from the Accountancy profession or Regulatory body. No evidence was led about any such efforts.

182. The upshot is that the appeal was dealt with by an HR Consultant employed by the business and her findings taken uncritically by Mrs Bair who gave the impression that she was somewhat overawed by what was happened but nevertheless keen to assist her employer. The appeal had a series of major flaws. Mrs Blair's stated position was that the claimant was clearly guilty but she found it difficult to articulate why. However, during cross examination she agreed that the witness statements provided by the claimant from Toby Douglas, Mohsen Abed, Karen Murray and Suzanne Hogg, which she had no reason to disbelieve, demonstrated that the Claimant had not been acting in competition with the Respondent . It was impossible to reconcile this with the outcome of the appeal which was that they would not have altered the decision to dismiss. That appeared to be an convenient position. She went further and accepted that they did contradict the reason for dismissal.

183. In addition, the procedural fairness was undermined when she accepted that the finding that the claimant had been undertaking work privately for Catriona Casey was based on an email that was not sent to the claimant in advance of the appeal hearing, nor was it discussed during the appeal hearing. She accepted when it was put to her that the respondent could have sought a witness statement from Ms Casey to determine whether there was any truth in the assumption that the Claimant was undertaking work privately for her. She could not answer why Ms Kypta included in her appeal outcome a reference to an email from a Nadia Awad which had also not been provided to the claimant or discussed with her.

184. One of the aspects of the process used in this case which gave me concern is that neither Mrs Fox nor Mrs Blair actually spoke to the claimant at the disciplinary or appeal. They both worked in the business, knew the processes and procedures and were in the best position to question the claimant from

their own knowledge and evaluate the evidence before them rather than relying on reports. In the event it would have made no difference in this case as I am not convinced that Mrs Fox or indeed Mrs Blair would have approached their roles with open minds. They certainly approached the reports they ultimately relied on uncritically. At no point did they assess whether the claimant was really in competition with the business or whether acting for a friend (Ms Murray) and a relative (Ms Casey) in her own time and for limited purposes could really be described as acting in competition. There was no suggestion that either would have instructed DFS or that DFS lost anything by the claimant's actions. In this regard the case of **Scottish Daily Record and Sunday Mail Ltd v Laird** which was referred to highlights that there has to be a real conflict in the employee/employer relationship.

185. Looking at the case in the round the dismissal was both procedurally and substantively unfair.

Remedy

186. The claimant seeks compensation. No issue was taken in relation to the arithmetical calculations contained in the Schedule of Loss (JBp390-394). The claimant is accordingly entitled to a basic award of £5250 calculated with reference to her age (39), service (10 years) and weekly pay capped at £525. (£525 x 10). Her weekly wage loss of £595.41 to the date of hearing was £30,365.91 (51 weeks x £595.41) . She earned some bookkeeping income during this period (£11685) and some money through her new business Acorn Accounting (£2000 and £375) leaving £16305.91 as wage loss to the date of the hearing. Future wage loss is somewhat speculative as much depends on what her new business will provide against a difficult economic background. The expected earnings are £7,625 which appears reasonable and is just over a half of what she earned to the date of the hearing. As she is not seeking losses beyond this point overall the calculations appear reasonable.

187. The claimant seeks an uplift for a failure to follow the ACAS Code. Ms. Moscardini submitted that paragraph 27 of the Code was breached through the use of Consultants by Peninsula hearing the disciplinary and appeal as there was no truly impartial or independent process. There were undoubtedly a number of shortcomings in the two reports prepared by the Consultants but I think this is to misunderstand the role they played as the decision making was still left with Ms Fox and Mrs. Blair. That responsibility cannot be delegated.

188. I reminded myself what the Code says: ‘‘27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case’’. It was apparent from her evidence that as the Manager in the Edinburgh office Mrs Blair had been directly aware of some of the events giving rise to the initial suspicions and had to that extent ‘‘been involved’’ That was probably inevitable given the size of the business.

189. I have some sympathy with the application in so far as the manner in which the appeal was dealt with by Mrs Blair but the situation here is that what could be described as the formal requirements of the Code were followed (an Investigation, Disciplinary and Appeal) it was the spirit of the Code namely approaching the matter fairly as a reasonable employer would that was lacking. The application perhaps is on firmer ground regard to the failure to provide an impartial appeal but in this regard I do take into account the potential problems faced by the employer given the size of the organisation. Considering the whole circumstances including the possible difficulties faced by the employer and standing I have found no direct collusion between Ms Fox and Mrs Blair as to the desired outcome I do not consider an uplift is justified.

190. The claimant was wrongfully dismissed and Notice pay should have been paid but I have approached the matter in line with the Schedule of Loss and calculated the claimant’s losses from the date of dismissal.

Mitigation/ Adjustments/ Contributory Fault

191. The onus is on the respondent to demonstrate that the claimant has failed in her duty to mitigate her loss. The duty is a reasonable one and the Tribunal should not be too stringent in its expectations. (***Wilding v British Telecommunications Plc*** *[2002] IRLR 524, paragraph 37*). The claimant was prevented by the Restrictive Covenants she entered into from working in competition with the respondent during the period from 1 November 2019 until 31 January 2020. The only income the claimant received during this period related doing bookkeeping work for NLU Limited. The claimant was also not able to carry out any work though her company Acorn Accounting Limited until she received her practicing certificate from the ACCA which she did not receive until April 2020. The evidence disclosed that Ms Fox did not complete the application properly despite promising to do occasioning delay in it being granted. I also accepted that part of the background was that the claimant suffered from anxiety and depression from her suspension and was signed off sick with stress and anxiety from 20 September 2019 until 16 October 2019. At the hearing she confirmed that she continued to suffer a significant amount of stress following the termination of her employment in October 2019 and was still taking medication to help with low mood and insomnia. In these circumstances I came to the conclusion that the claimant had mitigated her loss and that the Schedule was robust and reflected correctly the losses she had sustained.

Contributory Fault

192. Mr Lane submitted that a ‘‘Polkey’’ deduction should be made. I am not attracted by that submission. The essential allegation was one of being in competition with her employer and there was simply no evidence that a reasonable employer would regard as showing that state of affairs. As an accountant Ms Fox will have been aware that if the claimant was not imperiling

her professional status she would have to have had a practicing certificate to carry out most accountancy work other than bookkeeping. She would also have had to declare that income in her Tax Returns which were not sought. If the employer followed a fair process then I am not convinced that any dismissal would have resulted even leaving out of account her unblemished disciplinary record and length of service.

193. The claimant is entitled to a basic award calculated with reference to her age, capped weekly wage and service amounting to £5250 (10 weeks x £525). In relation to the compensatory award her loss of earnings to the 21 October amounted to £30,365.91 (51 weeks x £595.41) less sums earned (£11,685,£2000 and £375) leaving a net loss to the date of the hearing of £16,305.

194. There is always a degree of speculation in relation to future loss but the claimant faced a number of difficulties setting up her new business in the current poor economic climate and with the health problems occasioned by the manner of her dismissal. The total future loss claimed of 26 weeks is appropriate and the estimated income was not seriously challenged. I therefore accept that the figure of £7855.66 is a reasonable estimate. Pension loss was uncontentious and amounts to £1888.24. I will award £300 for loss of statutory rights. As the compensatory award does not exceed £30,000 there is no grossing up.

Employment Judge: James Hendry
Date of Judgment: 28 January 2021
Entered in register: 29 January 2021
and copied to parties