EMPLOYMENT TRIBUNALS

Claimant: Mr J Tartt

Respondent: Falconer Chester Hall Limited

Heard at: Liverpool (by CVP) **On:** 14 and 16 December 2020

Before: Employment Judge Aspinall

REPRESENTATION:

Claimant: Mr J Halson, Solicitor
Respondent: Mr P Goodbody, Counsel

JUDGMENT having been sent to the parties on 14 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, with apologies for the delay:

REASONS

Introduction

1. By a claim form dated 19 August the claimant, who worked as an Architect Assistant for the respondent from 17 March 2014 until his dismissal on 23 March 2020, brought claims for unfair dismissal and notice pay. He had entered early conciliation with ACAS on 19 June 2020 and he achieved his certificate on 19 July 2020.

Background

2. The claimant said he had been unfairly dismissed, both because the respondent had no fair reason for his dismissal and because it did not follow a fair procedure in bringing that dismissal about.

3. On 19 March 2020 the claimant was suspended from work. He was interviewed by video on 23 March 2020 and dismissed by email later that day. The respondent said that whilst the claimant had been entitled to do small scale architectural work outside of his role with them, for friends and family, they found that he had, with others, formed a limited company called Group D Architects Limited

which was competing with the respondent for work. They say this put him in breach of his contract of employment and that is why they dismissed him.

4. The claimant says that he was permitted, as part of his role, to work on those small scale projects for friends and family, and that he regularly did this throughout his employment with the knowledge and consent of his employer. The claimant says he was told that the meeting by video on 23 March 2020 was to be an investigatory interview, that there was no proper investigation, no explanation of the seriousness of the meeting, no documentation available to him prior to the meeting, and that the dismissing officer was also his investigating officer such that he did not have a fair hearing.

5. The respondent contended that the claimant consented to not seeing the documents, that he knew their content in any event and that any procedural failings that there may have been would have made no difference to the eventual outcome.

Hearing and Evidence

6. Our hearing began on 14 December 2020 and we had a slow start whilst we got our IT and documents together and we were able to agree to go part-heard and resume today, 16 December 2020.

7. There was an agreed bundle of documents of 104 pages which I saw electronically and we added two pages by consent from the claimant.

8. I heard evidence from the respondent's HR Manager, Mrs Protheroe. She gave her evidence in a helpful way but she was cautious about making admissions as to the failings in procedure and she did not always differentiate between her first-hand knowledge and what she had been told by Mr Hall.

9. I heard from Mr Shepherd. He gave his evidence in a straightforward and helpful way. I preferred his account of the telephone conversation on 17 March with the claimant to the claimant's evidence. He rang the claimant who was his colleague and friend to give him a heads-up that the company was investigating him and he advised his friend to think and to tread carefully. He did not suggest that the claimant ring Mr Hall. Mr Shepherd has been consistent in his evidence and in his witness statement, whereas the claimant's position as to the content of that call has shifted.

10. I heard evidence from Mr Hall. He gave his evidence in a careful and focussed way, taking time to ensure that he answered accurately. Sometimes his admissions were not helpful to the respondent's position, for example when he said that Mr Falconer himself had been part of the decision to dismiss. Mr Falconer was the designated appeal officer. This added to Mr Hall's credibility, for me, as did his reluctance to be drawn, from memory, on exactly what he saw on the Group D website in March 2020. I found him to be a credible witness who answered only within his own personal knowledge and only from his own certain recollection.

11. The claimant when giving evidence avoided answering questions. He did this in a range of ways. Sometimes he latched onto an innocuous part of the question. For example, when asked why he did not inform Falconer Chester Hall about his new exciting project at Group D, he described how he was not that excited, deliberately attempting to sidestep the thrust of the question, which was the reason

for not informing his employer. He reluctantly shifted position on a number of occasions when pressed and eventually agreed, for example, that the purpose of the website was to be a shop window to attract business for profit. He held to a position in which he would have me believe that the reason that the visualisation projects were on the website were to display ability in the production of visualisations rather than to attract architect jobs like the ones visualised. This was not a plausible reason. I also found him not to be credible in relation to his assertion that he had told a director called Quentin of his role in Group D and had tacit approval for it. If that had happened it is not plausible that he would not have said so on 17 March to Mr Shepherd, that he would not have said so on 17 March to Mr Hall, that he would not have said so in the telephone calls that I find took place on 19 March to Mrs Protheroe, and that he would not have said so throughout the meeting on 23 March March 2020.

12. What was credible, though, was the email history in which the claimant protested about procedural failings in the case, and I found him to be credible when he said that it did not occur to him to open Dropbox during the hearing on 23 March, because during that hearing he was under pressure: he felt he was being interrogated.

Agreed Facts

13. The claimant was employed from 17 March 2014 until 23 March 2020. At his selection interview there was discussion and agreement about employees being allowed to undertake small scale architectural projects in their own time for their friends and family. The claimant earned, at the time of termination of employment approximately £ 35,700 per annum. During the course of his employment the respondent funded training for the claimant and allowed him a sabbatical.

14. On 28 December 2017 the claimant became a Director of Group D Architects Limited. This was a company he formed with two other colleagues to win business from clients not already known to him, and with a profit making motive. In October 2019 Group D had sufficient work to pay a full-time salary to an employee JC.

15. In February 2020 the respondent became aware that two of its employees had submitted a planning application for a large architectural project through their own private company SAL. One of the employees left the respondent's business and the other resigned his directorship of SAL so as to remain employed with the respondent. This was generally known by the respondent's staff and known by the claimant. The claimant did not disclose to the respondent at that time that he too was a director of a firm seeking architectural projects and employing a full-time employee.

16. On 7 March 2020 the claimant returned from annual leave and had to self-isolate for 14 days. At some date around this time Ms Protheroe, concerned at the respondent's lack of knowledge of directorships held by its employees searched against the claimant's name at Companies house and found his directorship of Group D Architects Limited.

17. On 17 March 2020 the respondent, through its IT service providers, accessed the claimant's work computer and found work there for Group D Architects Limited. It also found files relating to its clients in the claimant's Dropbox files.

18. On 17 March 2020 Mr Shepherd telephoned the claimant and informed him that the respondent was investigating him for his activity with Group D.

19. On 17 March 2020 the claimant telephoned Mr Hall in response to the call from Mr Shepherd. Mr Hall told the claimant that he had accessed the Group D Architects website and seen projects similar to the scale of work advertised by the respondent and that he felt there was a conflict of interest in the claimant being a director of Group D whilst employed by the respondent. The claimant did not agree that there was any conflict.

20. On the evening of 18 March 2020 Mr Hall again accessed the Group D website and found that all the projects advertising for work of a similar scale to that undertaken by the respondent had been removed from the site.

21. The claimant received a letter by email from Ms Protheroe suspending him from his employment. It was dated 19 March 2020. It said:

> *"Gross misconduct-suspension*
>
> *Further to your recent telephone conversation with Adam Hall, I'm writing to inform you that you are suspended on full pay pending an investigation into the allegations of gross misconduct made against you.*
>
> *These allegations include but are not limited to, claims that you are suspected to be using information you have obtained by virtue of your employment with the Practice for your own interests and personal finance with the intention of diverting business away from the Practice to an entity in which you have an interest. More specifically, this includes:*
>
> *(i) a breach of contract abusing your position within the Practice to gain pecuniary and commercial advantage to the detriment of the Practice, are both serious and substantive*
>
> *(ii) competing for business to the detriment of the Practice and constitute a breach of the recognised implied terms of mutual trust and confidence that must exist between an employer and employee*
>
> *(iii) using confidential information provided by the Practice that is commercially sensitive and protected under the GDPR Regulations, for your own ends*
>
> *(iv) accessing the Practices computer systems-for your own personal gain.*
>
> *Please be advised that the suspension is precautionary to allow fair and impartial investigation to take place and will not prejudge the outcome of any investigation.*
>
> *…..*
>
> *We would like you to attend the meeting on Monday 23 March at 10 AM. This meeting will be attended by Adam Hall and Julie Protheroe. The purpose of this meeting is to discuss the allegations as presented in for you to have the*

opportunity to reply. If the allegations are not substantiated you will be reinstated and return to work as quickly as possible.

You are entitled if you wish, to be accompanied by a work colleague. At the meeting you will be given the opportunity to state your case."

22. On 20 March 2020 1652 the claimant wrote to Ms Protheroe

"Hi Julie, further to your email yesterday, prior to any meeting taking place, is it possible for you to be more explicit with regards the allegations presented. Also with regard your reference to "other issues coming to light" again can you please be more explicit.

There is a reference in the suspension letter to an investigation taking place. Again, prior to any meeting taking place, would be helpful to understand the exact remit of this investigation, and what has been substantiated to date-so that I can adequately address these issues at the meeting.

It would be mutually beneficial for all attendees at the meeting if I was able to understand the scope of the allegations."

23. The claimant was invited to attend a meeting to discuss the allegations on 23 March 2020. At 7:50 AM the claimant wrote to Ms Protheroe saying:

"Hi Julie, further to my email on Friday, can I ask if I'm supposed to have a point of contact within FCH during my suspension period? How do I nominate a companion? Am I allowed to speak to a companion? I would most certainly like there to be a companion at the meeting. Apologies for all of the questions, but it just hasn't been explained very clearly, thus far, what I can and can't do-other than not speaking to anybody related to FCH.

Given that I only received the invitation to the disciplinary meeting out of hours on Thursday evening and the fact that I'm not entirely sure exactly what this disciplinary meeting intends to cover, I think having a meeting today is a little short notice-one working day (Friday).

My understanding of the disciplinary meeting/hearing is that an employer should in good time before the meeting/hearing put in writing to the employee:

- *the alleged misconduct a performance issue (which I have requested further information my previous email - request to be more explicit)*
- *any evidence from the investigation (which I've not had sight of)*
- *any other information they plan to talk about"*

24. At 8:04am on 23 March 2020 Mr Hall sent an email to the claimant. In it he said:

"James, the purpose of the meeting this morning is to discuss the allegations we have raised, it is not a formal hearing. With regards to a point of contact while suspended this would be Martin Haymes, your line manager. If you

would like a companion to join you at the meeting and we can assist do you have some suggestions in mind?"

25. The respondent's policy on investigatory processes provides:

"Procedure for Formal Investigation

3. In most cases where misconduct or serious misconduct is suspected, it will be appropriate to set up an investigatory hearing. This would be chaired by the appropriate senior manager/director who would be accompanied by another manager. The investigating manager would be asked to present his/her findings in the presence of the employee who has been investigated. The employee has a right to be accompanied by a work colleague at this hearing.

4. Following the full presentation of the facts and the opportunity afforded to the employee to state his/her side of the case, the hearing should be adjourned and everyone would leave the room except the senior manager/director hearing the case and the other manager. They would discuss the case and decide which of the following option was appropriate:

- *take no further action against the employee*
- *recommend counselling for the employee*
- *proceed to a disciplinary hearing*

5. All parties should be brought back, and informed as to which option has been chosen. Should the decision be taken to proceed to a disciplinary hearing then this may follow on immediately from the investigatory hearing if the following criteria have been met

- *the employee has been informed by letter that the investigation may turn into a disciplinary hearing, and that he/she has the right to be accompanied by a work colleague*
- *he/she has been told in advance what the nature of the complaint is, and had time to consult with a work colleague if they wish to be accompanied at the hearing*
- *all the facts have been produced at the investigatory hearing and the manager director is in a position to decide on disciplinary action*
- *manager/director should then inform the employee and their work colleague that the hearing would now become a formal disciplinary hearing and invite them to say anything further in relation to the case*

6. It may be appropriate at this point to adjourned proceedings as necessary arrangements are made for work colleague to attend the hearing at the request of the employee."

26. The respondent's Disciplinary Procedure provides:

> *"3.2 Written Notice of Intended Disciplinary Meeting*
>
> *3.2.1 If it is decided that there is a disciplinary case to answer, the practice will write to the employee giving them a minimum of 2 days' notice of the meeting and advising employee of their right to be accompanied to the meeting. At the same time the practice will provide the employee with written notice informing them that this constitutes the start of the formal disciplinary procedure and as such outline:*
>
> - *the alleged misconduct or poor performance and any possible consequences of these*
> - *the improvement that is required on a timescale for achieving this improvement and any support available if appropriate*
> - *details as to the time and venue of the disciplinary meeting and*
> - *notice of the employee's statutory right to be accompanied if the meeting could result in a formal warning the confirmation of a warning or the taking of some of the disciplinary action. (This statutory right can be exercised once the employee has made a reasonable request to be accompanied)."*

27. The respondent's procedure also provided examples of gross misconduct. At paragraph 5.2.1 it cited theft, fraud, dishonesty or deliberate falsification of records as instances of gross misconduct.

28. The meeting took place by video link because the claimant was still isolating and the coronavirus pandemic lockdown had begun. Ms Protheroe opened the meeting explaining that this was an investigatory interview. Mr Smith accompanied the claimant.

29. Mr Hall reiterated that there was a conflict in the claimant's position as Group D was advertising for work of a similar scale to that undertaken by the respondent. The claimant answered questions that were put to him about Group D Architects Limited but did not accept that there was any conflict. Mr Hall raised the issue of the removal of the larger scale projects from the site prior to 18 March 2020. The claimant said that the larger projects were visualisations only and no work of that scale had been undertaken. Mr Hall referred to the claimant's contract of employment and the implied term of trust and confidence and said that the removal of the visualisations showed that the claimant knew that there was conflict between his roles.

30. There was discussion about the Dropbox files and work for the respondent and Group D being in the same folder. Mr Hall said that one interpretation of this was that the claimant was taking data from the respondent's files for his own use in Group D. The claimant denied this. Ms Protheroe was looking at a document showing the files in the folder but the claimant did not see that document.

31. There was also discussion about an historic matter of the claimant participating in a WhatsApp group that had contained comments that were critical of the respondent.

32. The meeting concluded with Ms Protheroe telling the claimant that the respondent would be in touch within 24 hours with a decision as to what would happen next.

33. Later that same day 23 March 2020 the claimant received an email terminating his employment. It was headed "gross misconduct: notice of dismissal". It said that the outcome of the investigatory hearing held that morning was summary dismissal. It recited the allegations that had been set out in the letter convening the meeting.

34. It said the dismissal was for;

a. A breach of contract, abusing your position within the Practice to gain pecuniary and commercial advantage to the detriment of the Practice

b. Competing for business

c. Using confidential information for your own ends

d. Accessing the Practice's computer systems for your own personal gain during your contracted working hours.

35. It said that the dismissal would take effect as of 23 March 2020. It informed the claimant of his right to appeal against his decision on the grounds of gross misconduct and gave him a 5 working day deadline in which to do so. It was signed by Ms Protheroe. On 25 March 2020 at 1620 the claimant wrote to Ms Protheroe chasing a response to an email he had sent the previous day. He asked when he would receive the information. He requested his previous email being copies of all investigatory evidence/information and copies of the minutes taken at the "investigatory meeting".

36. After that meeting two sets of notes one entitled "Investigation Meeting Minutes" 23 March 2020 compiled by Darren Smith and the other entitled "Disciplinary Hearing" on the face of the document but in the subject line reading "Investigatory Hearing" were sent to the claimant.

37. On 27 March 2020 Ms Protheroe replied to an email from the claimant, in which the claimant must have raised concerns about the contents of those notes, and asked for changes to be made to them because Ms Protheroe says that the notes taken are contemporaneous *"representing a best recollection of what was witnessed and should not be changed"*

38. The claimant did not appeal his dismissal. He took up employment with Group D.

The Relevant Law

39. Section 98 Employment Rights Act provides:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub section if it**
>
> **(b) relates to the conduct of the employee."**

40. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

41. That requires the Tribunal to make a finding about who took the decision to dismiss and the beliefs held by him.

42. If a potentially fair reason within section 98 is shown, such as a reason relating to conduct, the general test of fairness in section 98(4) will apply.

> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

43. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

44. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

45. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

46. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

47. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

48. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

49. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

50. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13.** Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

51. Where an employee is accused of moonlighting the starting point is that the employee is free to do as he wishes during his outside of work time provided that there is no express contract term to the contrary and provided his activities do not harm the employer's legitimate business interests **Hivac Ltd v Park Royal Scientific Instruments Limited [1946] 1 CH 169, CA**.

52. Factors to be taken into account when considering harm to the employer's legitimate business interests include the role of the employee for the employer, the nature of the work, the employee's hours of work and the risk and extent of harm to the employer's business interests. If moonlighting work is directly damaging to the employer's interests then it may be gross misconduct for the employee to have engaged in that work.

53. An employer considering dismissal for moonlighting must carry out a reasonable investigation. The ACAS *Code of Practice 1 – Disciplinary and Grievance Procedures* provides, at paragraphs 4, 9 and 10:

"4. …whenever a disciplinary … process is being followed it is important to deal with issues fairly. There are a number of elements to this:

...

- *Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.*

…

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.

10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting."

54. Dismissal without following procedures may be fair but only where the employer reasonably takes the view that following procedures would be futile **Polkey v A E Dayton Services Limited [1988] ICR 142.**

55. Where an employer has failed to follow procedures, and the Tribunal is considering whether the dismissal is fair or unfair, one question that the Tribunal must not ask itself at that stage is whether the claimant would still have been dismissed had the procedures been followed. That question is relevant to determining any compensatory award under section 123(1) of the Employment Rights Act 1996. The Tribunal is required to speculate as to what would or might have happened had the employer acted fairly unless the evidence in this regard is so scant that it can be disregarded **Software 2000 Limited V Andrews [2007] IRLR 568.**

56. Where the Tribunal considers that the conduct of an unfairly dismissed employee before the dismissal was such that it would be just and equitable to reduce the basic award to any extent, then section 122(2) requires the Tribunal to reduce the basic award accordingly.

57. If the Tribunal finds that a dismissal was to any extent caused or contributed to by an action of the claimant then section 123(6) of the Employment Rights Act 1996 requires the Tribunal to reduce the compensatory award by such amount as is just and equitable having regard to that finding.

58. To justify a reduction in either the basic or compensatory awards the contributory conduct must be culpable or blameworthy and must have contributed to or caused the dismissal **Nelson v BBC No. 2 [1980] ICR 110, CA.**

59. The Tribunal must in addition be satisfied that it is just and equitable to reduce the award. In deciding on a contributory fault reduction, the Tribunal must consider only the fault of the employee and not the conduct of the employer.

60. The amount of any reduction is a matter for the discretion of the Tribunal. Guidance was given in **Hollier v Plysu [1983] IRLR 260**. Contribution should be assessed broadly and without fettering the Tribunal's discretion. The Employment Appeal Tribunal considered parameters for reduction. Where the employee is wholly to blame for his dismissal the award might be reduced by 100%; where he is largely to blame 75%; where the employer and employee are equally to blame 50% reduction, and where he is only slightly to blame 25% reduction.

Applying the Law to the Facts

Reason for Dismissal

61. The decision to dismiss was made by Mr Hall following the meeting on 23 March 2020. It was for breach of the implied term of mutual trust and confidence in that the claimant was a Director of a firm competing for work of a scale similar to that undertaken by the respondent.

62. Mr Hall had a genuine belief that the claimant was a Director because the claimant did not deny this, and Ms Protheroe had told Mr Hall of the entries at Companies House. The claimant denied that Group D was competing with the respondent but I accept Mr Hall's evidence that he genuinely and reasonably believed it was competing because there were visualisations of projects of a scale that the respondent might undertake on Group D's website prior to 18 March 2020. That is enough to found an honest and genuine belief by Mr Hall that Group D and the claimant were competing with the respondent. The investigation that led to the formation of that honest and genuine belief was reasonable in that it involved a search of Companies House, a visit to the Group D website, a second visit to the Group D website on 18 March 2020, IT scrutiny of the claimant's work computer and dropbox files and discussion with the claimant on 17 March 2020 by telephone when he did not dispute his role in Group D. The dispute was in relation to whether or not the work was "competing" work. Mr Hall formed a reasonable belief that it was based on his reasonable investigation of looking at the Group D website and seeing jobs of a scale similar to those the respondent would undertake advertised there, and then visiting again on 18 March 2020 and seeing that those visualisations had gone. He did not need to go so far as to ask to see the work that Group D had or hadn't done. It was reasonable in terms of scope of investigation that he looked at the website and spoke to the claimant.

63. The respondent had carried out such investigation as was reasonable in the circumstances and had formed an honest and genuine belief of the claimant's guilt of the misconduct and therefore had a potentially fair reason for dismissal in this case.

Fairness of dismissal

64. Section 98 provides that the determination of the question whether the dismissal is fair or unfair depends upon whether in the circumstances, including the size and administrative resources of the employer's business, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and the section goes on to say that the Tribunal shall determine this in accordance with equity and the substantial merits of the case. That gives me a broad context in which to consider fairness.

65. The respondent did not act fairly because it failed to follow a fair procedure for dismissal. I accept the claimant's submissions in relation to the breaches of the ACAS Code. The most basic adherence to principles of procedural fairness were absent in this case:

65.1 If the meeting on 23 March 2020 was a disciplinary hearing then the claimant had no notice of the disciplinary hearing whatsoever. He was told he was attending an investigatory meeting by zoom

65.2 Mr Goodbody described the meeting on 23 March as the Zoom meeting. That may have been because it started as an investigatory hearing and concluded as a disciplinary hearing, and was labelled in the respondent's notes as both investigatory and disciplinary. There was no further opportunity for the claimant after that meeting to attend a hearing before he was dismissed. It became the de facto disciplinary hearing.

65.3 The meeting was not conducted by someone impartial in the sense of being unrelated to the investigation: that is to say that Mr Hall had been involved in the investigation (he told me he had looked at the Group D Website and discussed the use of IT to investigate the dropBox issue with Ms Protheroe prior to the hearing), he had been described as the investigating officer and was then the decision maker on dismissal.

65.4 The claimant was not warned that the outcome of the meeting might be his dismissal. He was told it was an investigatory discussion by Mr Hall and Ms Protheroe. He had recent experience of someone within the respondent organisation alleged to have committed gross misconduct by moonlighting with SAL, managing to retain his job and someone else resigning. Knowledge of a gross misconduct allegation is not the same as notice that the outcome might be dismissal. It ought to have been explicitly stated in writing prior to the meeting that a possible outcome of the 23 March meeting was the loss of his employment.

65.5 The claimant was not given sufficient time from the notification of allegations in which to prepare to respond to them, either at investigatory interview or for a disciplinary hearing. He was not given sufficient factual background or copies of the respondent's case against him so that he could prepare.

65.6 The conduct of the meeting itself, which became a disciplinary hearing, was not structured in such a way that first management put its case and was questioned on it, then the claimant put his case and was questioned on it. I accept the claimant's description of that meeting as an interrogation.

66. The decision to dismiss was made by Mr Hall, shortly after the 23 March meeting. He discussed it with Ms Protheroe and Mr Shepherd and Mr Falconer that day and then gave instruction that it was communicated to the claimant in writing. The claimant was notified of his right to appeal and told that it would be Mr Falconer who would hear any appeal. Mr Falconer would not have been an independent

decision maker at appeal because he had discussed the case with Mr Hall before the claimant was told of the decision to dismiss. The claimant did not appeal.

67. I reject the respondent's submissions that it was enough that the claimant knew that the meeting was about Group D and about his use of Dropbox – it was not enough. He was entitled to know not only what was within his own knowledge already but he was entitled to know the respondent's state of knowledge of his alleged wrongdoing. He did not know what Ms Protheroe was looking at (relating to the dropbox files) during the 23 March 2020 zoom meeting which led to his dismissal. I further reject Mr Goodbody's suggestion that it was for the claimant to access Dropbox during the meeting.

<u>The claimant succeeds in his unfair dismissal complaint for procedural reasons</u>

68. The reality was that the respondent did not follow the ACAS Code or its own procedures in relation either to investigatory processes or disciplinary hearings. The respondent failed to give the requisite notice of a disciplinary hearing. It could and should have adjourned the investigatory interview, informed the claimant that there was a case to answer, restated the allegations and evidence supporting them, informed the claimant of a disciplinary hearing and his right to be accompanied at that hearing, given reasonable notice of that hearing, given him copies of any documents that would be relied on and ensured an independent person to hear the disciplinary hearing and any subsequent appeal. The claimant must succeed in his claim for unfair dismissal because of procedural failings, however this will be a hollow victory.

69. I accept the respondent's submission that if a proper procedure had been followed the claimant would have been dismissed in any event. Implied into every contract of employment is the implied term of mutual trust and confidence. The claimant's participation in Group D Architects put him in breach of that implied term. He accepted in evidence that this was a commercial venture, profit making, a shop window to advertise the services of him and his colleagues. He persisted in the implausible argument that the visualisations were to demonstrate ability to use visualisation technology, and even went so far as to suggest that this was done by one of the directors as a hobby: I reject that evidence. The reason the visualisations were on Group D website was to attract business on the scale that Group D Architects was holding itself out as being capable of delivering. That put the claimant in competition with his employer in breach of his contract. The claimant had those images removed before Mr Hall revisited the site on 18 March 2020.

70. The claimant happened to be a director of Group D. It was in fact the directorship and his registration at Companies House that found him out when Ms Protheroe undertook some Companies House searches, but the directorship itself was not fatal in this case. It may be perfectly possible to be a director, for example, of a flat management company, if you live in a block of flats, and for that directorship not to put you in breach of the implied terms in your contract of employment with your employer. What matters here is that the claimant was though Group D competing for business against his employer.

71. The evidence before me was that Group D did not win work of the scale undertaken by the respondent, I make no finding on that point. It is not the winning but the competing that matters.

72. The Dropbox issue, the use of commercially sensitive files by the claimant, became peripheral in this case. There were certainly procedural failings in relation to those allegations as I have set out above, but it is my decision that on the breach of the implied term of trust and confidence alone in the claimant's participation in Group D competing for work against his employer the respondent had sufficient reason to dismiss for gross misconduct.

73. I find that the claimant would have been dismissed even if a fair procedure had been followed.

The basic award and adjustments to basic award

74. In relation to a basic award the claimant would be entitled to a basic award save that I apply section 122(2) Employment Rights Act 1996. I find that that the relevant conduct of the claimant is his competition against his employer in breach of his contract of employment. I find that his contributory conduct wholly caused his dismissal. I therefore find that it would be just and equitable to wholly reduce the basic award by the maximum 100%.

Adjustments to the compensatory award

75. In relation to the compensatory award section 123 Employment Rights Act 1996 provides that it shall be "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".

76. I find that it would have taken the respondent two weeks to follow a fair procedure, to have made sure there was compliance with the ACAS Code, and to have given the claimant time to properly respond to the full case against him. Any compensatory award must be limited to two weeks only. The claimant has lost only two weeks pay attributable to the procedural failings of the employer.

77. The claimant seeks an ACAS uplift and I would award the maximum 25% ACAS uplift on award to reflect the failing of the respondent to follow a fair procedure for the reasons set out above.

78. I now apply a percentage reduction to the two weeks, ACAS uplifted compensatory award to reflect the contributory conduct of the claimant. I find that the dismissal was wholly caused or contributed to by the action of the claimant in competing with his employer. Under section 123(6) Employment Rights Act 1996 I reduce his compensatory award by 100%.

79. I consider a 100% reduction under section 123(6) to be just and equitable because the claimant competed against his employer and it was the competing that wholly caused the dismissal.

80. Although the claimant succeeds in his claim for unfair dismissal the respondent is not ordered to pay him any compensation.

Employment Judge Aspinall

Date: 5 July 2021

REASONS SENT TO THE PARTIES ON

8 July 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.