EMPLOYMENT TRIBUNALS

Claimant: Alexandra Leese

Respondent: Intercoat Industrial Paints Limited

Heard at: **The Midlands (West) Employment Tribunal, remotely by CVP**

On: **7 and 8 March 2022**

Before: **Employment Judge Wilkinson**

Representation
Claimant: Mr Barnes (counsel)
Respondent: Mr Leonhardt (counsel)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. A 100% reduction in the compensatory award for unfair dismissal will be made under the principles of *Polkey v A E Dayton Services Limited* [1988] ICR 142.

3. The claimant contributed to her dismissal and it is just and equitable to reduce the amounts of both the basic and the contributory awards for unfair dismissal by 100%.

4. The claimant's complaint of breach of contract is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant, Ms Leese, was employed by the respondent, Intercoat Industrial Paints Limited, latterly as a Sales Office Manager. Her employment with the respondent commenced on 1 February 2005 and ended on 2 February 2021 when she was dismissed without notice.

2. The claimant claims that her dismissal was unfair pursuant to section 98 of the Employment Rights Act 1996 ("the Act"). She also claims for damages for wrongful dismissal (breach of contract) on the basis that she was dismissed without notice.

3. The respondent contests the claim. It says that the claimant was fairly dismissed for gross misconduct due to concealing her knowledge of former employees' relationship with competitors, facilitating products to be sent out free of charge, being complicit in the unauthorised taking of paint from the respondent by her partner and colleague, Richard Arnold, and falsely 'clocking in' Mr Arnold. As such it says that it was entitled to dismiss the claimant without notice.

4. The claimant was represented by Mr Barnes of counsel and the respondent was represented by Mr Leonhardt of counsel.

5. In considering the claims I have considered the documents in the electronic bundle which were referred to in evidence and submissions, I have read transcripts and partial transcripts relied upon by both parties of various meetings and I read evidence and heard oral evidence from the following people:

    a. For the respondent:

        i. Steven May – third party investigator, former police officer, who carried out the initial investigations on behalf of the respondent;

        ii. Michael Vann – managing director of the respondent company who carried out the disciplinary meeting with the claimant and who made the decision to dismiss her; and

        iii. Michael Harris – senior part-time employee of the respondent who conducted the claimant's internal appeal hearing.

    b. For the claimant:

        i. The claimant herself;

        ii. Emma Carroll – former director of the respondent;

        iii. Richard Arnold – former employee of the respondent (and the claimant's partner with whom she lives and lived at all material times); and

        iv. Robert Walker – owner of R W Finishing, a customer of the respondent.

6. The hearing took place before me over the course of two days, remotely by CVP due to the ongoing impact of the Covid-19 pandemic. After some initial technical difficulties

joining two of the respondent's witnesses, the hearing proceeded without significant disruption. I gave sufficient screen breaks to the parties and am satisfied that all witnesses had access to the relevant documents to enable them to give the best evidence they could.

Preliminary matters

7. I was invited to consider as a preliminary matter whether to admit late documents into evidence before the tribunal. These were lodged by both parties as follows:

    a. The claimant – sought to rely on two transcripts of her investigatory meeting (with Mr May, on 13 January 2021) and her disciplinary meeting (with Mr Vann, on 26 January 2021). In both cases the transcripts were of poor quality due to the poor quality of the recordings upon which they were based. Mr Barnes told me that both recordings had been sent to a professional transcription service but neither could be transcribed due to the poor quality. In the circumstances, an administrative employee of Mr Barnes's firm had done the best she could in the circumstances.

    b. For the respondent – a partial transcript of an interview of Mr Arnold carried out by Mr May with relevant sections highlighted (dated 13 January 2021), and a similar document of an interview carried out by Mr May of Mr Walker (dated 27 January 2021). Neither of these documents contained the full interview. Both were created by Mr May over the weekend preceding the tribunal hearing, at the request of the respondent's solicitors. Mr May confirmed in his evidence that he was the creator of the documents.

8. Neither party objected to the other relying upon the transcripts provided that their own documents were permitted into evidence. On the basis that I made it clear that I would attach what weight to them as I could, given the limited quality and scope of the documents, and on the basis that I made it clear that I would consider the documents in light of all of the other evidence in the case, both oral and documentary, I allowed the transcripts to form part of the evidence.

The law

Unfair dismissal

9. The law in this matter is not contentious. Neither advocate made any particular submissions in respect of the well-established legal principles. The key piece of legislation is the Employment Rights Act 1996 ("the Act").

10. Section 94 of the Act states:

    (1) An employee has the right not to be unfairly dismissed by his employer.

11. Any complaints that an employee was dismissed are brought pursuant to section 111(1) of the Act.

12. An employee must show that he or she was dismissed by the employer, as defined in section 95 of the Act, however it is common ground in this case that there was a dismissal.

13. Section 98 of the Act deals with the general principles relating to claims of unfair dismissal. It states the following:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

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

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

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

14. This is a case in which the respondent asserts that it dismissed the respondent for gross misconduct. This is a potentially fair reason pursuant to section 98(2)(c). In respect of misconduct dismissals there is well-established guidance for Employment Tribunals in the cases of *British Home Stores v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

15. Essentially those authorities established the following questions for the Tribunal to address:

    a. Did the employer genuinely believe that the employee was guilty of misconduct?

    b. If so, was that belief based on reasonable grounds (considering the information available at the time of the dismissal and appeal decisions). The tribunal must evaluate whether the view that there was misconduct was within the band of reasonable responses.

    c. Had the employer carried out such an investigation into the matter as was reasonable (within the band of reasonable responses). A Tribunal must bear in

mind the nature of the allegations, the position of the claimant and the size and resources of the employer.

d. Did the employer follow a reasonably fair procedure?

e. If all of the above requirements were met was dismiss within the band of reasonable responses, as opposed to the imposition of a lesser sanction? The tribunal must take care not to substitute its view for that of the reasonable employer.

16. In the event that the Tribunal is satisfied that the dismissal was unfair, then the tribunal must consider what remedy to award, by reference to Chapter II of the Act. In respect of cases such as this where compensation is sought then the tribunal must consider sections 118 to 127B of the Act.

17. When considering remedy the tribunal must determine whether any adjustment to an award ought to be made to the compensation on the grounds that if a fair process was followed that the claimant might in any event have been fairly dismissed. The Tribunal must consider the principles established in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8.

18. Additionally the Tribunal must consider, if it finds that a claimant was unfair dismissed, whether the basic or compensatory awards ought to be reduced for culpable conduct in the circumstances set out in sections 122(2) and 123(6) of the Act.

19. Section 122(2) sets out that:

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

20. And section 123(6) says:

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

Breach of contract

21. The claimant asserts that she is entitled to notice payment. The respondent asserts that it was entitled to dismiss without notice for her gross misconduct.

22. I must decide whether the claimant committed an act or acts of gross misconduct sufficient to entitle the respondent to dismiss without notice. In contrast the issue of unfair dismissal, where the focus is on reasonableness of the employer's decision; under this head of claim I must consider whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

General principles

23. I remind myself that the standard of proof is the civil standard: the balance of probabilities, that is that any party who hold the burden of proving any fact in dispute must be able to prove that what is alleged is more likely than not.

The issues for the tribunal to consider

24. In this case it is not in dispute that:

    a. The claimant was dismissed;

    b. That the principal reason for her dismissal was misconduct; and

    c. That as such that is a potentially fair reason.

25. The issues which fall to the tribunal to consider can be set out relatively simply. Whilst no list of issues had been provided (this being a short track claim), the issues for determination are:

    a. Did the respondent genuinely believe that the claimant had committed misconduct?

    b. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. In particular:

        i. Were there reasonable grounds for the belief?

        ii. At the time that the belief was formed had the respondent carried out a reasonable investigation?

        iii. Did the respondent otherwise act in a procedurally fair manner?

        iv. Was dismissal within the range of reasonable responses?

    c. In the event that the tribunal finds that the dismissal was unfair, then the tribunal must consider:

        i. The level of compensation payable to the claimant – both the basic and the compensatory award;

        ii. Whether there is a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed.

        iii. Whether the compensatory award ought to be reduced accordingly and if so, by how much.

        iv. Whether the claimant contributed to her dismissal by blameworthy conduct and if so, whether it would be just and equitable to reduce the level of the basic and/or compensatory award and if so, by how much.

    d. In respect of the claim for notice pay the tribunal must consider whether the claimant was guilty of gross misconduct such that the respondent was entitled to dismiss without notice.

Findings of fact

26. As with any case such as this, there were a number of agreed facts and a number of facts which are in dispute. Some of the facts in dispute are not probative to the issues in hand. I do not propose within these reasons to determine all of the disputed facts and I limit my

reasons to those facts which are probative to determining the claims and the issues before the tribunal.

27. For ease I set out the facts as I have found them below in a chronological order. Where pertinent I shall indicate where a relevant fact is agreed or in dispute and set out my reasons for determining any disputed facts.

Essential background

28. The claimant was employed by the respondent from 1 February 2005 until 2 February 2021. She was promoted during the period of her employment such that latterly she was working as a Sales Office Manager.

29. The respondent is a small company which employs 60 people. It manufactures paint. The company manufactures industrial paints for specific uses. Mr Vann's evidence was that the company produces paint to order; as he put it "we are a company that makes what we sell rather than sell what we make." The company has a number of competitors who produce similar products. One of those companies is ISF. That company is based in Leicester and is one of the respondent's primary competitors. It was agreed that the respondent has in place a confidentiality agreement which specifically named ISF.

30. The tribunal did not see in this case either the claimant's contract of employment or the confidentiality agreement. That was unusual. The tribunal notes that the contents of the bundle are however a mutually agreed list of documents. Neither party therefore seemingly sought to include those documents into the bundle.

31. In respect of the confidentiality agreement there was a dispute as to its precise terms. I have not seen a copy of that agreement although it is accepted by the claimant that she was aware of it. She was also aware that ISF were a main competitor of the respondent. Mr Barnes in his closing submissions observed that when Mr Vann read a section of the agreement out in his evidence he initially read that employees are unable to visit the premises of 'customers' before repeating and using the word 'competitors'. Mr Vann was not challenged about this by Mr Barnes at the relevant time. In any event in my judgment it matters not. Whilst Mr Barnes may be right that there was nothing prohibiting the claimant from visiting ISF's premises, I am satisfied based upon the claimant's own evidence to the tribunal that she was aware that ISF were a key competitor and that the respondent would not look favourably on its employees or former employees sharing sensitive information with its rivals.

32. It is an agreed fact that prior to the incidents which I shall set out below which occurred towards the latter end of 2020, the claimant had a clean disciplinary record.

33. The claimant was at all material times and remains in a relationship with another former employee of the company, Richard Arnold. Mr Arnold gave evidence before the tribunal. Mr Arnold's role in the respondent company was working in the laboratory. The claimant and Mr Arnold would drive to and from work together.

34. The claimant (and Mr Arnold) asserted that there was an agreement with Mr Vann that as the claimant's office was next to the clocking in machine, that she could clock them both in. I accept that evidence and it was not challenged. However the claimant accepted in her evidence that this agreement clearly only in respect of days when both she and Mr Arnold were actually working on site. I accept that position advance by the respondent. I find that there was an agreement that on days when the claimant and Mr Arnold arrived at work together, entered the premises and remained in work, that the claimant could

clock them both in. It appears that this was a practice that had been in place for some time.

35. The claimant accepted that on one occasion on 6 January 2021 she had travelled to work with Mr Arnold and clocked him in despite knowing that he had not even entered the premises. He had returned home as the couple were expected a visit from a boiler repair man. She accepted that whatever the agreement that was in place between her and Mr Vann, that the agreement did not extend to circumstances such as this. She also accepted that this may also have occurred on 13 January 2021 when the boiler repair man visited again, albeit she could not recall that incident. It is accepted that this was an example of misconduct and in the respondent's disciplinary policy it is something that is listed as an example of gross misconduct ('falsification of company documents or work records').

36. The claimant and Mr Arnold were friends with two former directors of the respondent company; they are Mark Thomas and Emma Carroll. Whilst in her evidence the claimant sought to downplay the closeness of the friendships with these individuals, I find that both of them were relatively close friends. I do that for the following reasons:

    a. Mr Thomas and his wife were close enough that they met up with the claimant and Mr Arnold at the latter's home between Christmas and New Year in 2020 (on 29 December 2020). I accept the point put to the claimant in her evidence by Mr Leonhardt that meetings over that time of year are usually with friends who are closer than mere work friends.

    b. Ms Carroll was present by the side of the claimant throughout the two day remote hearing. She attended at the claimant's home and it was from there that she gave her evidence. I therefore find that the claimant and Ms Carroll have a relatively close friendship albeit I accept the claimant's evidence that initially she was closer to Mr Thomas on account of not knowing Ms Carroll for as long.

37. Both of these individuals had left the respondent company by the time that the relevant factual matters arose. Mr Vann told me in evidence (and I accept, as it was not challenged) that Mr Thomas left in around September 2019 and Ms Carroll in early 2020.

38. One of the companies which was a customer of the respondent was R W Finishing. That business was owned by Robert Walker who gave evidence on behalf of the claimant. Mr Walker also owned another business named Insight Interiors. It is accepted that on occasion the respondent provided goods free of charge to Mr Walker's companies. As Mr Walker sets out in his statement, this amounted to 'a private arrangement between Michael Vann and myself to cover work carried out for Intercoat Industrial Paints and also for personal work and good for Michael Vann.' In particular it is agreed that free of charge orders were issues for a white primer for R W Finishing to spray panels for the respondent company which were subsequently used by the respondent, on a quid pro quo basis.

39. Mr Vann's evidence on this point was that he had agreed to the quid pro quo arrangement in around 2017 but that in 2018 he had directed that it stop and he had suggested this to Mr Thomas. I found Mr Vann's evidence on this point to be somewhat vague. Ms Carroll was not challenged as to the contents of her witness statement nor was Mr Walker. On balance I am satisfied that the free of charge arrangement between the respondent and Mr Walker's companies was a regular occurrence and that it did not end in 2018 (as was seemingly conceded by Mr Vann in his evidence).

<u>9 December 2020 – meeting at the Shoal Hill Tavern</u>

40. On 9 December 2020 after a day at work, the claimant and Mr Arnold travelled by car to the car park of the Shoal Hill Tavern, a local public house which I am told was on the way home to the claimant's house. The purpose of this was to meet with Mark Thomas. This meeting took place at the height of one of the national lockdowns imposed by the government due to the coronavirus pandemic. I therefore note and accept that (a) the public house was closed and in darkness; and (b) that any meeting between households such as this would by necessity have had to have taken place outside.

41. The claimant's evidence to the tribunal, which was broadly the same as her account both during the subsequent investigation, disciplinary and appeal processes, was that she was told by Mr Arnold that they were going to the car park in order for Mr Thomas to give her a bottle of wine for her birthday (which is on 22 December).

42. It is accepted and agreed that during the course of that meeting a tin of paint that had not been paid for was transferred (outside the knowledge of the respondent) from the car of Mr Arnold to the car of Mr Thomas who at that stage was no longer a director of the respondent. I have been provided with photographic evidence taken as part of the investigation which purported to be of that meeting. The photographs are not particularly helpful in terms of determining the disputed facts.

43. The claimant's case is that she remained seated in the front passenger seat and was passed a bottle of wine by Mr Thomas through an open car door. She asserted that she had never been present to her knowledge when paint was transferred between Mr Arnold and Mr Thomas and that she was not aware of anything passing between them on this occasion. She accepted that she would have been aware from her position in the car that the car boot had been opened by Mr Arnold. The claimant asserted that Mr Arnold left the car and then got back in. Her evidence was that she did not ask Mr Arnold why he had got out of the car when he returned. When cross-examined on this point she suggested that the two gentlemen very often spoke about things such as football and that she would have assumed this would have been a similar conversation.

44. I find that the claimant's version of events given both to the respondent and repeated to the tribunal lacks credibility. The claimant was unable to explain when I asked her why, given that she had been under the impression that the meeting was solely to exchange the gift, she had not asked Mr Arnold why he had got out of the car. Even were I to accept that she had assumed that the two of them were talking football, this doesn't explain why either (a) they would have had to have both left their cars to do this; (b) why Mr Arnold would have needed to have opened his boot in order to do this; or (c) why the claimant, who accepted that she would have seen the boot open, did not thereafter ask why Mr Arnold had opened the boot.

45. In his closing submissions Mr Leonhardt invites me to find that the claimant's evidence on a number of key factual matters lacked credibility. I accept that submission. I will set out below further examples of this.

46. I find that on the balance of probabilities the claimant's evidence as to the events of 9 December 2020 was neither truthful nor credible. Whilst acknowledging that she has been consistent in her account I find that this has been a consistently inaccurate account.

<u>21 December 2020 – visit to ISF</u>

47. On the evening of 21 December 2020, after work had finished, the claimant and Mr Arnold travelled directly to Leicester to the premises of ISF (one of the main competitors of the respondent). The claimant accepted in her evidence that she was aware that ISF were a direct and important competitor. I am satisfied that she was so aware. I am also satisfied

that the claimant was aware that she ought not to be party or privy to others sharing confidential information with ISF and that she ought to be honest with the respondent if asked about such matters.

48. The journey to Leicester took one hour and 20 minutes each way. Whilst there Mr Arnold went into the premises and spent two hours with the managing director of ISF whilst the claimant waited in the reception area without, she says, any phone signal. The claimant's case was that this was an entirely innocent meeting. It was submitted on her behalf that Mr Arnold was entitled to drop his CV off at another company and indeed that that is common practice when anyone is looking for a new job. Whilst I accept that there is nothing wrong on the face of it, with any employee of any business seeking to look for alternative employment, I do not accept the claimant's version of events or assertion that the events of 21 December 2020 were entirely innocuous.

49. I do not accept the claimant's version of events for the following reasons:

    a. The claimant's case is that she spent a total of almost five hours after work driving to Leicester, waiting around in an unfamiliar reception area and driving back and that she didn't ask Mr Arnold for further information pertaining to his meeting or the circumstances of his visit.

    b. The claimant's case is that she understood that Mr Arnold was simply going to drop of a CV. Setting aside why the CV could not have been submitted either by email or by post, the claimant's case when challenged in evidence that it was unusual for there to be a two hour meeting with the managing director of a company when dropping off a CV was to assert that she didn't know as she had never dropped off her CV. I do not accept that evidence. The claimant is an intelligent lady. In circumstances where she had spent five hours of her time, after work, in the dark on a journey that she had no need to be on whatsoever four days before Christmas, I find that it lacks any credibility that she would not have asked questions of Mr Arnold.

    c. The claimant asserted that whilst she thought it 'a little' strange, she did not ask him at all on the 80 minute journey home as she was catching up on telephone calls to her son and to her mother that she had missed due to having no signal.

50. However even if I were to accept the claimant's assertion that such a visit was innocuous in those circumstances, which I do not, then the final facts pertaining to this incident force me to find that the claimant's account, as given to the respondent, is not credible.

51. It is agreed that on the same evening as the claimant and Mr Arnold were visiting ISF, they saw Mark Thomas and Emma Carroll in Leicester. When asked directly by Mr Leonhardt whether or not she thought this was a huge coincidence the claimant replied: 'at the time I was on the phone. Then I saw them and waved. Afterwards I thought "I wasn't expecting that"'. The claimant's assertion is that she never thereafter raised this event with either Mark Thomas or Emma Carroll. In particular she denied that she mentioned it when Mr Thomas and his wife spent the evening with her and Mr Arnold just over one week later, on 29 December 2020.

52. I find that this account lacks credibility. The claimant asserts that not only did she not question Mr Arnold about the visit or the purpose of it, that even in circumstances where she saw two former directors of the respondent, who were close friends, at ISF on the same evening, at a late hour (the time by this point would have been pushing 8.00pm) she did not discuss this with either Mr Arnold or Mr Thomas or Ms Carroll.

53. ISF were a direct competitor of the respondent. They were one of two companies specifically named in the confidentiality agreement. Mr Thomas and Ms Carroll were relatively close friends of the claimant and were (on the account which she asked the respondent to accept) coincidentally present on the same evening as she accompanied Mr Arnold on a two hour and 40 minute round trip to hand his CV in to the company, a task which in itself took two hours. I am satisfied that the respondent was acting reasonably in not accepting the claimant's version of events.

54. Again, I remind myself as Mr Barnes submits, that the claimant has been consistent in her accounts. However I find that the claimant has been consistent in giving an inaccurate account. This is yet another example of the claimant's evidence the investigation/disciplinary/appeal processes (and to the tribunal) lacking credibility.

55. Before moving on I remind myself that people may not tell the truth for any number of reasons. However I find myself drawn to the inescapable conclusion that the reason that the claimant has not given a truthful account in respect of the incidents on 9 and 21 December 2020 to either the respondent or to the tribunal is that she was well aware that she was in breach of what was expected of her by the respondent and she therefore has sought to claim ignorance of any knowledge in order both to support her position through the investigation and disciplinary process and subsequently to support her claim before the tribunal.

<u>The order of 5 January 2021</u>

56. On 5 January 2021 the claimant cancelled an order which had been placed by R W Finishing. I have seen a copy of the dispatch note showing that the product was for around 25 litres of paint. On the dispatch note is written 'cancel'. It is accepted that that is the claimant's handwriting. For ease of reference I shall refer to it as "the relevant order".

57. The relevant facts to place this issue into context are as follows. I found Mr Harris's evidence extremely helpful in understanding this process. He is clearly a gentleman who is very knowledgeable about his work and about the company's processes. I was impressed with the clarity of his evidence, which was not in effect challenged. I find the following:

    a. As stated above, the respondent makes paint to order. Therefore when an order is placed, as here, the production line is given the instruction to make it.

    b. At the point that the order is finalised and ready to collect, an invoice is raised. If the order is cancelled before this time then no invoice is raised; however the paint may have still been produced. This is what happened to the relevant order.

    c. If this happens, then the proper course of action is for the superfluous product to have been placed into a storage unit.

    d. In and of itself there is nothing wrong with orders being cancelled in such a manner – this happens. However as Mr Harris put it 'if the paint goes floating off through the gate' then that is not authorised and potentially illegal.

58. It is the claimant's case that the order was placed for R W Finishing. As stated above, R W Finishing is a company that has a history of receiving free of charge supplies from the respondent on the basis of a quid pro quo agreement. I have already made findings that I am satisfied that that arrangement had come to an end. However the claimant avers that

it was against this backdrop that she saw nothing wrong in the events surrounding the relevant order.

59. It is agreed that the relevant order was placed by a different member of the sales team to the claimant. It is accepted that the relevant order was placed on the instruction of Mr Arnold. Initially it was set out within certain of the documents prepared for the investigation and the disciplinary meetings that the claimant had been the member of staff who placed the order. This is now accepted not to be the case by the respondent and I find that so.

60. However the claimant did subsequently cancel the order on the instruction of Mr Arnold. Mr Arnold has accepted that he later took the superfluous paint which had been generated by the relevant order and passed it on to Mark Thomas. He accepted this at an investigatory meeting for which I have seen some documents, including part of the transcript, which took place on 13 January 2021. Given when the cancellation took place, no invoice was ever created for the relevant order. The paint could therefore go missing without any proper audit trail.

61. It is an accepted fact that the paint was in fact subsequently transferred to Mr Thomas by Mr Arnold. This happened at the Shoal Hill Tavern on 7 January 2021. Again the claimant admitted to the respondent being present but denied that she had any knowledge of the transfer.

62. It is in dispute as to whether Mr Arnold told the respondent during the investigatory and disciplinary processes that the claimant had some knowledge of Mr Arnold intending to obtain the paint deceitfully. The claimant and Mr Thomas assert that he did not. It is the respondent's case that he did.

63. The respondent points to the following documentary evidence:

    a. In a document entitled 'Summary of Investigation Findings Richard Arnold', following an investigation meeting with Steven May it is recorded that Mr Arnold admitted to giving the order to the claimant to cancel the relevant order that the 'RA states that AL was aware of the purpose of his actions.'

    b. In the transcript of the same interview, provided on the morning of the tribunal hearing it is recorded as follows:

        'SM: Yeah. Alex cancelled it [the relevant order].

        RA: Yeh but I instructed Alex to do it because I can't do that.

        SM: Right. Did she know it was going to Mark?

        RA: Er, no. Her knew it was for Rob and her knew that I had cancelled it but her knew it was for me basically. Yeah, her knew it was for me. Nothing err…'

64. Mr Arnold was questioned on the above documentary evidence. I found Mr Arnold's evidence to be unsatisfactory. He suggested that he had never said any of those things. To the contrary, he suggested that he had made it quite clear that nobody knew of his intentions with the 25 litres of paint. He said that he brought this up several times at both the disciplinary meeting and the appeal. Whilst he did not go as far as to suggest that Mr May had fabricated the transcript of the 13 January 2021 meeting, Mr Arnold suggested that there were things missing from the transcripts where he would have denied it.

65. When Steven May was asked questions about what was said by Mr Arnold although it was suggested to him that Mr Arnold had not specifically said that the claimant was aware that the paint was for him. Mr May did not accept this. He gave specific evidence that Mr Arnold had in fact said that she knew that the paint was stolen. It was not suggested to Mr May that the transcripts, which he produced were cherry-picked or otherwise contained additional material in which Mr Arnold offered clarification.

66. I prefer the evidence of Mr May on this point. Mr May has provided the tribunal with transcripts. Whilst I acknowledge that these are not professionally transcribed it was not suggested that they were fabricated. Furthermore the relevant sections have been provided to the tribunal with a relatively extensive degree of context. They are not single lines of transcript provided out of context. Given Mr May's direct evidence of this point and given that the transcripts are consistent with this, I am satisfied and find that Mr Arnold did initially say to Mr May that the claimant knew that the paint was for him.

67. The claimant denies that Mr Arnold told her that the paint created by the relevant order was intended to be kept by him. In her investigation meeting (which took place on 13 January 2021) it was set out the claimant that Mr Arnold had admitted to her knowledge in his own investigation meeting. Those minutes are within the bundle and were sent to the claimant alongside a letter notifying her of the disciplinary meeting which was dated 21 January 2021. However the claimant was not present at the initial meeting between Mr May and Mr Arnold on 13 January 2021 and therefore any evidence she can give on what was or was not said must be limited to what she has been told by Mr Arnold.

68. On behalf of the claimant Mr Barnes points out that within the notes of Mr Arnold's disciplinary meeting of 27 January 2021 the following list of questions appears, without any answers (in contract to other questions within the document in which the answers are set out):

    'MV …

    - You also statement that Alex was aware of the true purpose of your instruction [to cancel the relevant order]

    - Is this correct? (If No what reasons did RA give to account for the instruction)'

69. Mr Arnold was asked about this and gave evidence that he did not simply go silent at this stage. He did not give any evidence as to what he asserts he did state. When Mr Vann (who was conducting the interview) was cross-examined by Mr Barnes on this point he was unable to give any account as to why there were no recorded answers at this point. It was neither suggested to Mr Vann in evidence nor to me in submissions that this was due to a conspiracy on the part of Mr Vann. Absent any evidence as to what it is asserted that Mr Arnold did in fact say in response to those questions I find myself in a situation where this particular lack of documentary evidence has little to no probative value in determining the disputed issues.

70. In circumstances where Mr Arnold initially told Mr May that the claimant knew that the paint was for him, where the claimant had been present during the earlier handover between Mr Arnold and Mr Thomas at the Shoal Hill Tavern (9 December 2020) and had given an account that lacked credibility I am satisfied and find that the respondent could reasonably conclude that the claimant did have knowledge of the circumstances surrounding the relevant order and had facilitated Mr Arnold's actions.

<u>The investigatory process</u>

71. The investigation carried out by the respondent was undertaken by Mr May. He was instructed on a consultancy basis. He is a former police officer. His work for the respondent had commenced on 12 November 2020 when he was instructed to investigate wider issues surrounding the alleged theft of paint from the respondent which it is asserted totalled around £7,700.

72. On 5 January 2021 Mr May's remit was widened to include an investigation into the conduct of the claimant.

73. As part of his earlier investigations Mr May had placed a tracking device onto Mr Arnold's car and at least three other vehicles. This was done under the instruction of Mr Vann. All of the cars were private vehicles and not company cars. For the avoidance of doubt this tribunal makes no findings as to the legality or otherwise of these actions however it appeared to me that this approach was perhaps both heavy handed and extremely concerning, given as it did the encroachment onto the private property of the respondent's employees and extended the surveillance both to the incidents set out within these findings of fact but also to all aspects of the private whereabouts of each of the individuals whose cars had been tracked.

74. When asked about these incidents I found that neither Mr May nor Mr Vann could give a satisfactory explanation. Neither of the witnesses seemed to me to accept that there were any matters which could have given cause for concern to have arisen.

75. Mr Barnes spent some time exploring what the remit of Mr May's investigation was. I make the following findings of fact which arise from his evidence:

    a. Mr May was instructed that there were alleged breaches of contract; however he was not given copies of the contracts or even the clauses which it is alleged were in breach. Whilst I accept that Mr May is not a lawyer, that could said for any such case in which an employee is alleged to have breached their contact and is being investigated for that. I therefore find that it would have been extremely difficult if not impossible for Mr May to have accurately investigated whether or not their had been a breach.

    b. Mr May's evidence to the tribunal was that he was relying on what he had been told by Mr Vann. Of course the tribunal has no objective evidence by which it can know what Mr May was told; however I find that it would have been inevitable that conducting an investigation on such a basis would inevitably have led to the independence of the investigatory process being compromised.

76. In respect of the broader thrust of the investigation I am however satisfied that Mr May's investigation was not too narrow, as has been suggested by the claimant. I say that for the following reasons:

    a. Mr May was criticised for not having spoken to a wider cross-section of the respondent's employees. Mr May's evidence was that all of the relevant facts and allegations related to the same individuals. I accept his evidence. I have seen nothing other than circumstantial evidence which would suggest that any person who ought to have been spoken to by Mr May had not been spoken to.

    b. It therefore follows that I do not accept that Mr May deliberately kept his investigation narrow in order to discredit people within the business. He spent a significant amount of time both gathering evidence (in the form of photographs, videos, surveillance and interviews) and exploring the issues.

c. I note that when Mr May was asked directly as to whether the claimant ought to have lost her job he replied immediately that he was not commenting on whether or not that sanction ought to have applied. I found this answer telling as, in my judgment, it demonstrated that Mr May was fully aware that his role was to investigate. He was not the decision maker. I find that he understood the role that he had been asked to carry out.

77. On 13 January 2021 the claimant had her investigatory interview. Present were the claimant, Mr May and Ian Canham (the respondent's HR advisor). At the conclusion of the meeting the claimant was suspended from work. In the bundle of documents the tribunal was provided with what purported to be the notes from that meeting however it was accepted by Mr May (and I find) that the document entitled 'Investigation Meeting with Alex Leese' was in fact preparatory notes.

78. That document was not something that was either seen or used by Mr May as part of the investigation meeting. It was prepared by Mr Canham. It was prepared in advance of the meeting and contains the following section (which takes up over one third of the document itself:

'**SUSPENSION**

Thank AL for her time and input into the meeting.

Advise AL that she is now being suspended from work pending completion of the investigation.

…'

79. It is telling that this document was prepared by the respondent's HR advisor as opposed to Mr May. I find that on the basis that this document was prepared by a member of the respondent's HR advisor and that it was created in advance of the meeting shows that, on the balance of probabilities, the decision had been taken prior to the investigation meeting to suspend the claimant. I also find that it shows that the respondent had pre-determined the outcome of that meeting which was supposed to have been a fact finding exercise. It had essentially pre-judged that there were matters which necessitated the claimant's suspension.

80. The meeting on 13 January 2021 was followed by a letter from Mr May dated 14 January 2021 which advised the claimant of her suspension. Whilst I do not consider it probative to the issues before me I note that it is unusual that this letter is sent from Mr May who was not an employee of the respondent.

The disciplinary process

81. On 21 January 2021 a letter was sent to the claimant from Mr Vann inviting her to a disciplinary meeting on 26 January 2021. That letter spelt out clearly the allegations which were being considered against the claimant. It is not necessary for me to set them out verbatim but essentially set out all of the key allegations made against the claimant including her involvement in the passing of paint between Mr Arnold and Mr Thomas, her involvement in cancelling the relevant order in full knowledge that the paint was intended to go to Mr Arnold, and attending at ISF's premises on 21 December 2021 with a view to engaging in activities competing with the respondent. The letter makes clear that the allegations are alleged to be both a breach of the express terms of the contract and a breach of the duty of trust and confidence amounting to gross misconduct.

82. The disciplinary meeting took place on 26 January 2021. It was chaired by Mr Vann with Mr Canham present once again to take the minutes. The claimant was present. She had declined to have anybody accompany her.

83. Within her witness statement prepared for the tribunal dated 2 March 2022 the claimant says this:

> ’13. It was obvious that the outcome of the meeting was predetermined as the person chairing the disciplinary inadvertently talked about their conclusions at the start of the meeting. The meeting was a sham, a tick box exercise and the decision to dismiss me had been made long before I could possibly provide any explanations.

84. I find that the very clear intention behind this paragraph, contained in the statement dated just five days before the tribunal hearing, was to make an allegation that the outcome of the disciplinary was a foregone conclusion. It is specific in the nature of the allegation it makes, referring to the person chairing the meeting (Mr Vann) as having ‘inadvertently talked about their conclusions’ at the outset.

85. The allegation is not supported by the contemporaneous evidence. Neither the minutes in the bundle nor the transcript of the meeting, prepared and relied upon by the claimant, support that allegation. In her oral evidence to the tribunal the claimant said as follows:

> ‘The meeting started off saying that the result could be a number of things. He made a point of saying dismissal and I picked up on that. And the fact they emphasized that in the context of what they were saying…I felt that is how the meeting was going to end up…Mr Vann and Mr Canham were sniggering. I felt intimidated. I felt that the decision had already been made.’

86. The claimant accepted that this was an entirely different account.

87. I do not accept the claimant’s account. Mr Vann was not cross-examined on this point and so the claimant’s case was not put to him. I find as a fact that there was nothing said at the start of the meeting by either Mr Vann or Mr Canham to suggest that the outcome was predetermined or that the disciplinary meeting was sham.

88. I find that this is yet another occasion on which the claimant lacks credibility. This underscored my perception of her as a witness. On a crucial piece of evidence her account changed significantly with no real explanation as to why.

89. Within the disciplinary meeting the claimant was asked about a wider number of orders allegedly placed by R W Finishing which the respondent was concerned accounted for the missing £7,700 worth of paint. I accept and find that this was the first time that the claimant was presented with this information and this allegation.

90. Following the meeting on 1 February 2021 Mr Vann sent a letter to the claimant. That letter summarised the disciplinary meeting, set out the findings in respect of the allegations and set out that Mr Vann had considered whether dismissal was reasonable. In particular the letter sets out that Mr Vann had considered the claimant’s length of unblemished service with the respondent. This is something that Mr Vann repeated in his evidence and which I accept he considered.

91. The claimant’s contract of employment therefore terminated upon receipt of the letter, the following day, 2 February 2021.

The appeal process

92. On 17 February 2021 the claimant wrote to the respondent formally appealing her decision. That letter set out in detail the grounds for her appeal. A letter of response was sent on the following day from Mr Canham which confirmed that the appeal hearing would take place on 23 February 2021 and be heard by Mr Harris.

93. The respondent's disciplinary procedure sets out that an appeal will be heard by 'the appropriate director'. At the relevant time Mr Harris was not an appropriate director, however I heard evidence that due to a shortage of directors within the respondent's business and given that Mr Vann had chaired the disciplinary hearing, then there was no other suitable person. Mr Vann also gave evidence that given Mr Harris's lengthy service, his knowledge of the company and his position as a senior member of staff, he was deemed to be an appropriate person. The claimant herself accepted in her evidence that Mr Harris was very good at his job. There is no evidence to suggest that any objection was raised at the time to Mr Harris carrying out this role. I have already observed that I was impressed with Mr Harris as a witness and his knowledge of the respondent's business. I am satisfied that whilst not in line with the disciplinary procedure, there was no detriment in Mr Harris carrying out this role in the circumstances in which the respondent found itself.

94. Within her written evidence the claimant does not raise any particular criticisms of the appeal process. Mr Harris told me that he had received the relevant documents a number of days in advance of the appeal hearing electronically and that he had read them on his mobile telephone. He did not have access to a printer and therefore obtained hard copies about 30 minutes before the hearing. There was no suggestion that Mr Harris was inadequately prepared for the appeal hearing. I am satisfied that he was fully appraised of the relevant matters.

95. The appeal took place with Mr Harris, Mr Canham and the claimant present. Again there are no recordings of this meeting. Nor have I been provided with a transcript. There appears in the bundle a document which seems to be once again Mr Canham's preparatory notes.

96. On 26 February 2021 Mr Harris sent a letter to the claimant which details his response and findings in respect of each of the grounds of appeal set out in the claimant's letter of 17 February 2021. I am satisfied and I find that Mr Harris adequately and thoroughly responded to each of the points of appeal raised by the claimant in her appeal letter.

97. The appeal was dismissed and the dismissal was upheld.

The daily order reports

98. Before turning to my analysis of the issues I deal briefly with whether my decision would have benefited from having sight of the daily order reports. The tribunal heard a significant amount of evidence as to the relevance of these documents. It was suggested by the claimant, relying upon the evidence of Emma Carroll, that Mr Vann knew or ought to have known about any asserted anomalies by reference to these records. Ms Carroll in her written evidence states that Mr Vann never queried any of the orders for R W Finishing, or a linked company (also owned by Robert Walker), Impact Interiors. It is therefore asserted that they may have been probative to the issue of considering whether the respondent had a reasonably held reasonable belief as to the claimant's actions in respect of the relevant order.

99. Mr Barnes submits that at numerous points during the course of this litigation requests have been made by the claimant to the respondent for disclosure of these records. The respondent initially sought to suggest that these records could not be retrieved. This was challenged in her written evidence by Ms Carroll and in his oral evidence Mr Vann seemingly accepted that this was not the case, albeit he suggested that he had only discovered this very recently. Setting aside whether or not Mr Vann's explanation was satisfactory, I also heard evidence from Mr. Harris who explained to me in some detail that the records in question word documents which could be amended as time goes by. They therefore provide a snapshot at the time upon which they are retrieved, and it is not possible to determine from those snapshots the history open brackets including any amendments to close brackets of the orders set out there in.

100. I note that despite the tribunal proceedings having been ongoing for some time, no applications were made to determine this issue by the claimant. I have already had cause to observe that I found the evidence of Mr Harris particularly helpful, especially insofar as it related to the technical processes of the respondent company. I accept his evidence on this point and in my judgment the disclosure of these records would be unlikely to assist the tribunal in determining the issues before it. Furthermore I am satisfied based on the evidence of Mr Harris and Mr Vann that there is no way of the tribunal determining what Mr Vann would have seen or read on any of the daily reports that he read. This would be speculation and the tribunal cannot draw any proper conclusions from them.

Discussion by reference to the legal principles

Unfair dismissal

101. Having made my factual findings as set out above I turn now to consider the legal framework.

102. The following points are agreed:

a. The claimant was dismissed – on 1 February 2021.

b. The reason for the dismissal was set out in the dismissal letter dated 1 February 2021 and is for gross misconduct.

c. That is therefore a potentially fair reason pursuant to section 98(2)(b) of the Act.

103. I go on to consider the relevant issues set out in the authorities on conduct dismissal as referenced above at paragraph 14.

Did the respondent genuinely believe that the claimant had committed misconduct?

104. In my judgment the respondent did hold this genuine belief. This is set out in a number of documents which stem from the initial investigation report through to the outcome of the appeal process. I note that initially the respondent had instructed Mr May to carry out a wider investigation. It was as a result of the enquiries made as part of this investigation that Mr May was instructed to carry out an investigation in respect of the claimant early in 2021.

105. I specifically reject the submission made by the claimant that this was a foregone conclusion, with the claimant being collateral damage and being made to be a scapegoat for the faults of others. At the time that the dismissal took place, the respondent has

demonstrated clearly and concisely that it believed that the claimant had committed misconduct. That can be particularised as follows:

a. Falsifying accounts and orders – in particular the relevant order of 5 January 2021;

b. Being aware of Mr Arnold illicitly transferring paint to Mr Thomas and failing to report this;

c. Attending at ISF and engaging in actions which were in competition to the respondent in full knowledge that this was not allowed;

d. Failing to report that Mr Arnold, Ms Carroll and Mr Thomas had all been present, thereby undermining the implied term of trust and confidence; and

e. Clocking Mr Arnold into work in circumstances in which she knew that he was not present on the premises.

106. Whilst there may have been deficiencies in the way in which the respondent approached the investigation I find that that those deficiencies were borne of the respondent's genuine belief in the misconduct as opposed to an attempt to create the misconduct. I am satisfied that there is no evidential basis to suggest that the respondent did not hold the genuine belief.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. In particular:

Were there reasonable grounds for the belief?

107. I am satisfied that there were reasonable grounds for the respondent to hold that belief. These are clearly set out and reasoned in the letters of Mr Vann and Mr Harris following the disciplinary and appeal meetings.

108. In essence, the reasonable grounds are based on both the documentary evidence available at the time, the evidence gathered by Mr May as part of investigations and the admission of Mr Arnold that the claimant had knowledge at the time that the relevant order was cancelled.

109. However more pertinently in my judgment, the respondent was faced with the claimant whose accounts were entirely lacking in credibility. I have made a number of findings as to the claimant's account to the respondent in respect of the relevant order and the visit to ISF on 21 December 2021. I note that the account given to me was the same as that given to the respondent at all stages of the disciplinary procedure. In my judgment the respondent at the time, and faced with the evidence that it had at that time was entitled to take the same view of the claimant's account as the tribunal has.

110. In light or this position I accept Mr Leonhardt's submission that the respondent was therefore entirely reasonable in coming to the conclusion both that the claimant had committed gross misconduct and that as part of this the relationship of mutual trust and confidence had been fundamentally broken.

At the time that the belief was formed had the respondent carried out a reasonable investigation?

111. I remind myself that the respondent is an organisation employing 60 people. It is not a large employer. I remind myself that it was investigating a number of matters simultaneously albeit with overlapping factual matters. I also accept Mr Leonhardt's submission that this was no a simple case of theft that was being investigated but a wider investigation involving the passing on of trade secrets following that theft.

112. In those circumstances I find that the respondent's actions in employing the services of Mr May were appropriate and reasonable. I have already made findings as to the scope of Mr May's investigation. I reject the claimant's position that Mr May ought to have widened his investigation to speak to other employees. It appears to me that the issues which were being investigated and which were subsequently investigated involved the same core cast. Each of these people were considered as part of the investigation.

113. Mr May carried out surveillance on a number of the individuals and spoke to the relevant people who he was able to speak to. Whilst it is correct that Mr May could have spoken to other members of staff in respect of the free of charge orders, that would not, in my judgment, have been necessary nor is it unreasonable for him to have done so. Based on the information that he had already gathered as part of his investigation by the time that the claimant raised that, it would have been clear where the focus of the evidence and the focus of his enquiries lay. I am not satisfied that aside from being an exercise in perfection that to widen his enquiries would have added anything new such as to render the scope of the investigation unreasonable.

114. The claimant's case is that the investigation was not focused on finding the truth but on matching assumptions. Based on my findings of fact I am satisfied that the information gathered by the respondent as part of the investigation and the responses, in particular of the claimant and Mr Arnold, when interviewed by Mr May were such as to lead the respondent to form the reasonable view that the claimant was guilty of misconduct.

115. Whilst there may have been a single-mindedness on the part of Mr Vann to get to the bottom of the alleged matters, I am not satisfied that the investigation was so rendered unfair. In my judgment the very fact that it was only after the initial investigation had commenced (which did not include the claimant) and some evidence gathered, that Mr May was instructed to carry out investigation into the claimant, supports this conclusion. Had there been a vendetta against the claimant it is perhaps more likely that she would have been included in the scope of the investigation from the outset. As matters panned out I am satisfied that there was sufficient evidence known to the respondent at the turn of the year in 2021 so as to demonstrate that the decision to investigate the claimant was reasonable.

Did the respondent otherwise act in a procedurally fair manner?

116. I have made a number of findings in respect of the investigatory process in particular. In my judgment these are sufficient to render the ultimate decision procedurally unfair. These include:

    a. The decision as part of the investigation to place tracking devices on private vehicles, including the car shared by the claimant and Mr Arnold, without any authority or knowledge. I accept Mr Barnes's submission that such a course of action is extremely concerning. One perhaps would have expected a former police officer to have treaded more carefully.

    b. The failure of Mr May to consider the claimant's contract to consider the alleged breaches and to instead take the lead as to the content of his investigation from Mr Vann.

c. The decision prior to the investigation meeting on 13 January 2021 to suspend the claimant. This suggests a pre-determination of the facts and the claimant's answers.

d. Only providing the claimant with paperwork and allegations surrounding the wider investigation of theft during the disciplinary meeting (although I am satisfied that the claimant was subsequently able to properly respond to this matter as part of her appeal process and therefore that nay defects were rectified).

e. The wholesale lack of any proper paper trail. Whilst I have determined that the reasons provided in both the dismissal and appeal letters were detailed and reasoned, there has been a concerning lack of any proper documentation in this case which was given to the claimant (and indeed to the tribunal). This includes:

i. A lack of appropriate recordings of the investigatory and disciplinary meetings – despite the same being requested and agreed. This led to a situation in which the claimant was placed at a potential disadvantage.

ii. The lack of any real minute-taking or recording of meetings by either Mr May, Mr Vann or Mr Harris. In circumstances where on each occasion Mr Canham was present ostensibly to take the minutes it is troubling that this appears to be a role that he never properly fulfilled. Whilst the claimant was provided with summaries and preparatory notes there has been a decided paucity of contemporaneous notes that one might have expected.

117. In his closing submissions Mr Leonhardt concedes that the investigation in particular was not 'text-book'. Mr Barnes submits that the paperwork has been 'woeful'. I am inclined to agree with Mr Barnes's submissions. Whilst Mr Barnes framed these submissions primarily as to the reasonableness of the investigation, I find that they go mainly to the heart of the procedural fairness of the respondent's actions as set out above.

118. I find that in all of the circumstances the actions of the respondent were not procedurally fair.

Was dismissal within the range of reasonable responses?

119. The issues in this case which led to the claimant being dismissed for misconduct stem primarily from her honesty and integrity. Her responses to the investigation and disciplinary process did nothing to assuage the respondent's concerns.

120. I am satisfied that the respondent properly considered the mitigating circumstances and I am satisfied that the claimant's unblemished and lengthy history of employment was taken into consideration.

121. However I ultimately must accept the submission of Mr Leonhardt: what else could the respondent do. The respondent had formed the view that the claimant was dishonestly lying about both the theft of materials and a conspiracy to share competitive secrets. The people with whom she was doing this were her romantic partner and close friends. I am wholly satisfied that against that factual backcloth that dismissal was in the range of reasonable responses.

Remedy

122. It therefore follows from my findings and decision above that the claimant was unfairly dismissed. Having determined that I turn to the issue of remedy. I have received in this case an amended schedule of loss which sets out the claim as follows:

Basic award:	£6,732.96	
Compensatory award:	£7,611.20	(loss of earning)
	£500.00	(loss of statutory rights)
TOTAL	£14,844.16	

123. I am told that save for a minor dispute in respect of mitigation through a claim of Job Seekers' Allowance the figures are agreed. The amount in dispute is around £450.00. I have received brief written submissions from both parties in respect of the disputed amount which I have considered.

124. For reasons however that will become clear I do not need to deal with this disputed amount. I therefore turn to the issues of the application of *Polkey* (reference above) and contributory fault pursuant to ss. 122(2) and 123(6) of the Act.

Should there be a reduction in the compensation because if a fair process had been followed there was a chance that the claimant might have been fairly dismissed?

125. It follows from the findings that I have made that the dismissal was unfair due to the respondent acting in a procedurally unfair manner. I have found that the respondent had a genuine belief that the claimant had committed misconduct, that there were reasonable grounds for that belief, that the respondent carried out a reasonable investigation and that dismissal fell within the range of reasonable responses.

126. Mr Leonhardt on behalf of the respondent invites me to conclude that this was a 'text book example of 100% deduction by *Polkey* or contributory fault or both. He submits that the respondent had no choice give what it reasonably suspected that the claimant knew about or was facilitating and that given her lack of engagement and honesty it was inevitable that she would be dismissed.

127. Mr Barnes essentially repeated his submissions on liability in that he submitted that the faults were so egregious that had they been rectified no reasonable employer would have dismissed.

128. I remind myself that I must be careful not to assess what I would have done. I am assessing what this employer would or might have done.

129. That question leads me inescapably to conclude that had the procedural defects which I have identified not been present, and therefore had the respondent followed a fair process, then this employer, based upon its reasonably held reasonable belief would still have dismissed the claimant. I am satisfied based upon my findings of fact that the respondent was faced with a situation in which it genuinely held a belief that the claimant was complicit in theft and sharing economically sensitive trade secrets. Faced with the claimant's lack of frankness, honesty and engagement I am wholly satisfied that dismissal would have occurred. None of the defects that I have identified above would have changed this.

130. I am therefore satisfied that there is a 100% chance that the claimant would still have been dismissed and that if the respondent had followed a fair process the dismissal would have still been within the range of reasonable responses.

Did the claimant contribute to her dismissal by blameworthy conduct and if so, is it just and equitable to reduce the level of the basic and/or compensatory award and if so, by how much?

131. For the sake of completeness I also consider the issue of contributory fault. I remind myself that although slightly different the tests for reducing the basic and compensatory awards are broadly. I need to consider what conduct is said to have contributed to the dismissal, and whether such conduct is blameworthy; secondly I must consider (in the case of s.123(6) in respect of the compensatory award) whether the blameworthy conduct caused or contributed to the dismissal to any extent; and finally I must determine to what extent it is just and reasonable to reduce the award.

132. As with the issues above in respect of *Polkey* Mr Leonhardt invites me to consider that this is a 'text book' case in which the claimant's lack of engagement and honesty caused or contributed to her dismissal. He invites me to conclude that it would be just and equitable to reduce the award by 100%.

133. Mr Barnes submits that there was no blameworthy conduct and not to reduce the award.

134. In determining this issue I am satisfied of the following:

a. In failing to report or otherwise be honest about her knowledge in respect of Mr Arnold's actions regarding the relevant order and the meeting at ISF on 21 December 2020 the claimant engaged in conduct which was blameworthy. I have no hesitation in making this finding as, based upon my findings, the claimant's account to the respondent was both lacking in candour or credibility. I am satisfied that it was blameworthy because they led to an inevitable and irreparably breach of trust and confidence in respect of crucial matters which go to the heart of the employer/employee relationship. The claimant chose to do this rather than giving an honest account in respect of her partner and her friends.

b. I am further satisfied that for the purposes of s.123(6) of the Act, the conduct caused or contributed to the dismissal. This is evident from the dismissal letter and the response to the claimant's appeal. I am satisfied that had the claimant been honest then it is highly likely that she would not have been dismissed.

135. I turn then to the level of reduction and what reduction it would be just and equitable to make. Given that the claimant is the author of her own misfortune in this case and that, on my findings, her blameworthy conduct is by far and away the principal reason for her dismissal I am satisfied that this is a case in which it is just and equitable to reduce the amount of both the basic and compensatory awards in the claimant's compensation by 100%. In reaching this figure I have considered that the claimant has given no account as to why she responded the way she did. Indeed to this tribunal she maintained the account given to the respondent.

<u>Breach of contract</u>

136. I deal finally with the breach of contract claim. I have set out my findings in respect of the claimant's actions above in some detail. They apply equally to this head of claim and I repeat them when considering whether the claimant was guilty of conduct entitling the

respondent to dismiss without notice. I find that she clearly was, and that accordingly she was not entitled to notice pay.

137. Her claim for breach of contract therefore fails and is dismissed.

Conclusion

138. For the reasons set out above my decision therefore is that whilst the claim for unfair dismissal succeeds, the claimant's damages ought to be reduced by 100%. I further find that the claimant's claim for breach of contract fails and is dismissed.

Employment Judge **Wilkinson**
(signed electronically)

Date: 21 March 2022