EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4113730/2021

Hearing held in Glasgow on 15, 16, 17, 22 and 25 August 2022 (hearing) and 26 August 2022 (deliberations)

Employment Judge M Whitcombe
Tribunal Member Mrs L Brown
Tribunal Member Mr W Muir

Mrs T Graham	**Claimant** **Represented by:** **Mr R Eadie - Solicitor**
DSS Automatic Doors Limited	**Respondent** **Represented by:** **Ms K Patullo - Solicitor**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is as follows.

(1) The claimant was unfairly dismissed by the respondent.

(2) No compensation is awarded for unfair dismissal because it would be just and equitable to reduce both the basic award and the compensatory award to zero.

(3) The claim for notice pay as compensation for breach of contract fails and is dismissed.

(4) The claimant is entitled to holiday pay due upon termination in the agreed sum of £827.96 (gross).

(5) The claimant was not provided with a written statement of terms and conditions as required by section 1 of the Employment Rights Act 1996. However, no compensation is awarded because there were exceptional

circumstances which would make an award of compensation or an increase in compensation unjust and inequitable.

(6) The claim for sex discrimination was withdrawn at the hearing and is now dismissed under rule 52 of the Employment Tribunal Rules of Procedure 2013.

REASONS

Introduction

1. These are the reasons for our unanimous reserved judgment following a hearing listed for 7 days. Ultimately only 5 days of hearing time were necessary to complete the evidence and submissions. The case had been given a generous allocation of time to accommodate the availability and travel arrangements of witnesses who were not based in Scotland.

2. The claimant was employed by the respondent from 1 July 2007 until her dismissal without notice for gross misconduct on 22 July 2021. At the time of her dismissal the claimant held the position of Operations Director. The respondent is based in East Kilbride and supplies and installs integrated automatic entrance systems and is a company owned by FAAC Entrance Solutions UK Limited, part of the FAAC Group of companies.

3. The respondent's managing director at the relevant times was John Graham, the claimant's husband. The respondent's Finance Director was Stuart Fraser. The claimant, John Graham and Stuart Fraser were all suspended at or around the same time.

Claims

4. By a claim form (ET1) received by the Tribunal on 15 December 2021 the claimant brought claims for unfair dismissal, sex discrimination, notice pay as damages for breach of contract and a payment in respect of untaken annual leave at the date of termination. The claimant also sought an uplift in compensation for the respondent's admitted failure to provide her with a written statement of terms and conditions.

5. The claimant withdrew the claim for sex discrimination during the first morning of the hearing and it was common ground that the sex discrimination claim could also be dismissed under rule 52. Since the Tribunal had by then completed a period of pre-reading the case continued with a full panel, even though the remaining jurisdictions would normally have been heard by an Employment Judge sitting alone.

Issues

Unfair dismissal

6. By the end of the case the claimant conceded that the respondent had an honest belief in misconduct as its reason for dismissal, so the potentially fair reason for dismissal was established and the first limb of the ***BHS v Burchell*** test was met. The main remaining issues were therefore:

    a. whether the respondent's investigation of the alleged misconduct fell within the reasonable range;

    b. whether the respondent had reasonable grounds for a belief in guilt;

    c. other points of procedural fairness, chiefly whether the respondent had a closed mind such that the outcome of the process was a foregone conclusion, and whether the claimant's grievance about alleged mistreatment by her colleague Ian Mulligan should have been heard before, or at the same time as, the disciplinary process;

    d. ***Polkey*** issues, in other words the chance that a fair procedure would have led to the same result, and if so by when;

    e. contributory fault.

Notice pay / wrongful dismissal / breach of contract

7. The issues in the wrongful dismissal claim were straightforward. There was no dispute that the claimant would ordinarily have been entitled to notice of dismissal or that the respondent dismissed the claimant without notice. The respondent's defence to the claim for notice pay was that it was entitled to

dismiss summarily because the claimant was guilty of gross misconduct, and therefore in breach of the fundamental and implied term of trust and confidence, such that the respondent was entitled to accept that breach and dismiss without notice. The determinative issue was therefore simply whether we found the claimant to be in fundamental breach of her contract of employment, or not.

Holiday pay

8. No legal issues arise. The simple factual issue was whether or not the claimant worked on 4 disputed dates (10 March 2021, 11 March 2021, 28 April 2021 and 4 May 2021). The respondent's records have those dates marked as leave but the claimant maintained that she had worked and had not taken leave on those dates. If the claimant is correct, then she was entitled to 4 additional days' pay upon termination.

Failure to provide a written statement of terms

9. The respondent accepted that it was in breach of its obligation under section 1 of the Employment Rights Act 1996. It resisted an award of, or increase in, compensation of 2 or 4 weeks' pay under section 38 of the Employment Act 2002 on the basis that the claimant had HR responsibilities and was therefore personally responsible for the failure to provide a section 1 statement to herself and should not "profit from her own wrong". We queried the applicability of that broad-brush common law principle in a heavily structured statutory jurisdiction which uses mandatory language ("must") when providing for compensation in particular circumstances. We suggested that the potentially relevant statutory provision was section 38(5) of the Employment Act 2002, which provides that a Tribunal's "duty" to award or increase compensation for failure to provide a written statement of terms "does not apply if there are exceptional circumstances which would make an award or increase [under section 38] unjust or inequitable".

Evidence

10. We were provided with a joint file of documents initially running to 471 pages. At our request, the claimant also provided copies of some handwritten notes that she had made and which she had referred to in her oral evidence. They were added as pages 472 to 483.

11. It is necessary to approach the joint file of documents cautiously. Large parts of it consisted of documents provided by the respondent but which were not referred to during the hearing at all. Certain other documents were not referred to in evidence but were referred to for the first time in the respondent's submissions. Even leaving aside questions of formal proof, it was not clear who had created those documents or how. It was difficult to give them any significant weight in those circumstances. The index is also misleading. There is a section headed "disciplinary documents" which might be thought to refer to documents used and available to all during the disciplinary process. However, most of the documents in that section were not available either to the claimant or to the disciplinary decision makers at the time of their decisions.

12. We heard from the following witnesses in the following order. For the respondent we heard from:

    a. Neil Matthews, Managing Director of FAAC Entrance Solutions UK Limited, who suspended the claimant and carried out the disciplinary investigation;

    b. Lauren Morton, then the HR & Payroll manager at FAAC Entrance Solutions UK Limited, who provided HR support including note taking throughout the disciplinary process from suspension to appeal;

    c. Chris Dodgson, Managing Director of FAAC UK Limited, who took the decision to dismiss the claimant on 22 July 2021;

    d. Lee Burton, Managing Director of HUB Parking Technology, who heard the claimant's appeal against dismissal on 4 August 2021.

13. For the claimant we heard from:

a. the claimant, Toni Graham;

b. Craig Allway, formerly the respondent's Senior Projects Manager, who accompanied the claimant at the disciplinary and appeal hearings.

14. All of those witnesses gave evidence on oath or affirmation and were cross-examined. Witness statements were not used. Mr Matthews gave his evidence in a polished and confident way, but we were struck by a marked difference between the relaxed and gentle tone of his oral evidence to us and the tone revealed by the respondent's own note of the investigatory meeting. We found Lauren Morton to be unconvincing and evasive at times, declining to engage with relatively straightforward questions and appearing determined to stay "on message" from the respondent's point of view. We did not have any similar concerns about Mr Dodgson or Mr Burton who appeared to be doing their best to help us and to give us the facts as they honestly remembered them. The claimant was often emotional during her evidence and, perhaps for that reason, her evidence sometimes lacked focus. In general, we nevertheless found her to be a credible witness. Mr Allway gave his evidence in a straightforward manner, and we were confident that he was telling us the truth as he saw it.

Findings of fact

15. Where facts were disputed, we made our findings on the balance of probabilities, in other words on a more likely than not basis. Many of the relevant facts were not in dispute, although the parties' joint statement of agreed facts contained just 9 agreed facts.

Suspension and investigation

16. The background to the suspension of the claimant, John Graham and Stuart Fraser is that towards the end of June 2021 three whistle-blowers, including Ian Mulligan, had sent an email to the whistle-blowing hotline of the FAAC group in Italy. Mr Matthews was asked to investigate by the head office of the group company. To that end he was given a letter of authority since he was the managing director of one of the respondent's sister companies.

17. The respondent was a relatively small company and there would typically be no more than 15 people in the office at any one time. Everybody seemed to know everybody else's business and so Mr Matthews decided to suspend all three of the individuals who the whistle-blowers had said were involved in inappropriate activities. The logic of that decision was that it might be disruptive to the investigation if any of those individuals were in the office while it was carried out and that suspension would prevent any suggestion that evidence had been interfered with. The respondent had a relatively small stand-alone IT system to which a small number of administrators had complete access. Mr Matthews therefore arranged for an IT specialist to take control of the system to secure evidence.

18. Neil Matthews and Lauren Morton visited the respondent's premises on 29 June 2021. The claimant was suspended on full pay and contractual benefits that day. She was asked to leave her phone, laptop and other items of company property. The claimant asked whether Mr Matthews could share any information about the terms of the investigation, but he replied that he was unable to divulge any, except that the allegations were very serious and that the group company had deemed suspension to be necessary. The claimant immediately expressed concern that the allegations might have been created by a specific member of staff to protect themselves. She was referring to Mr Mulligan, although she did not do so by name at that stage. She explained that she had been bullied over the previous four years and that she felt that her career had been sabotaged. Mr Matthews replied that the bullying was a separate matter and that if the claimant wanted the respondent to investigate it she should approach Ms Morton direct. The suspension meeting lasted 19 minutes and matters were confirmed in a letter from Mr Matthews of the same date.

19. There were four main areas of inquiry.

    a. The claimant's involvement in a company called Total Door Solutions Limited.

    b. The claimant's involvement in the payment of invoices to "Marian

Engineering", which was thought to be a vehicle through which Stuart Fraser received significant additional income.

c. Company expenditure on Go-karting, an activity which involved the claimant's son and husband (the Managing Director). Primarily, this aspect of the investigation focussed on stays at Premier Inn hotels on the company account.

d. The claimant's claims for mileage payments in respect of journeys on company business.

20. The issue in relation to Marian Engineering was not raised by the original whistle-blowers but was raised by the employee with responsibility for managing the materials inventory, because in his view none of the materials for which purchase orders had been raised had ever been received by the respondent. Similarly, the issue in relation to mileage payments was not raised by the original whistle-blowers but was raised by an employee in the accounts department.

21. On 7 July 2021 Neil Matthews held an investigation meeting with the claimant at the Holiday Inn in East Kilbride. Lauren Morton was also in attendance. The respondent prepared a note of that discussion, but the claimant does not accept its accuracy. She has prepared her own amended notes. Whichever version is considered, the language used by Mr Matthews is consistent with the confrontational tone recalled by the claimant. He suggested that the issuing of an invoice including VAT but with no VAT registration number was "VAT fraud". He repeats that allegation later. That is an overstatement of the position. It is certainly an error, but it is by no means necessarily dishonest, and the error could easily be corrected by issuing a credit note and a substitute invoice. A little further on Mr Matthews asserts on another point, "once again, that's fraud. How do you comment?". A little later he says, "you realise this is fraud and illegal", and "you have defrauded DSS". Further on he states, "you have defrauded the company". In one lengthy passage of questioning concerning Marian Engineering Mr Matthews asked a series of questions without waiting for the claimant's answer and sometimes supplying

the answer himself. That fills almost 5 lines of the notes and towards the end Mr Matthews states “I don’t think you’re being honest with me” before finally asking “anything you’d like to tell me?”. The claimant replied that she had no idea what to say. On the issue of business mileage Mr Matthews asked the claimant whether she could prove that she had undertaken the journeys claimed. This was at a time when the claimant’s access to the office, her phone and her computer was suspended whereas the respondent was fully able to examine the claimant’s work emails for itself, as Mr Matthews noted during the meeting. Mr Matthews’ approach at this point appears to have been to require the claimant to prove her innocence. Towards the end of the meeting Mr Matthews said, “I have to say Toni, a lot of what you said today doesn’t add up. We will go away and investigate. I’m not sure at this stage I believe you. If it is the case that you haven’t been telling me the truth there will be serious consequences.” Mr Matthews then returned to a point that he had already covered, asserting repeatedly that the claimant had committed fraud, issued fraudulent invoices and received money from the respondent fraudulently. At pages 123 to 124 Mr Matthews asserts on three separate occasions that the claimant was not being honest, or that he did not believe her, or that she was lying.

22. We understand that the tone of a meeting does not always come across accurately in notes or in a transcript. We are also cautious about taking remarks out of their proper context. However, we also have the claimant’s evidence regarding the tone of the meeting, and we have considered all of the evidence available to us in the round. We have also drawn on the real-life industrial experience of the non-legal members of the Tribunal. On the balance of probabilities, we think that the claimant is likely to be right and that Mr Matthews’ questioning style and tone was at times overbearing, dogmatic and aggressive. We have concluded that his comments betray a mind that was at least partially made up regarding the claimant’s guilt. We accept that the claimant was probably intimidated by Mr Matthews’ approach at that meeting and that her answers were probably affected. She is likely to have been unsettled and inhibited.

23. In a follow-up email dated 13 July 2021 Lauren Morton asked the claimant to supply details of the Total Door Solutions Limited bank account and proof of transfer of "private fuel expenses" (which we take to be a reference to mileage payments) to her husband's bank account. The claimant replied, "having had time to reflect on my meeting with Neil last week, given the current state of my mental health I don't believe providing the requested information would be in my best interest or for the well-being of my family." We regard that as a clear and deliberate failure by the claimant to cooperate with a reasonable management request.

24. The respondent obtained information from Companies House, which is freely available on the web, confirming that Total Door Solutions Limited was a company with just one officer. The claimant was its director and sole shareholder. The company was active. However, the printouts are in landscape format and much of the information available on the web has been cut off. The printouts which formed part of the investigation pack, and which were made available at the disciplinary and appeal stages, were similarly affected.

25. On 16 July 2021 Lauren Morton wrote to the claimant to invite her to a disciplinary hearing on 22 July 2021. Mr Matthews had decided that there was a disciplinary case to answer. The allegations of gross misconduct were summarised over seven bullet points:

- the setting up of a "competing business" – Total Door Solutions Limited - with the aim or purpose of diverting business from the respondent and causing the respondent a loss of revenue
- authorising Marian Engineering invoices which were a vehicle through which Stuart Fraser was overpaid about £80,000 of the respondent's money without authorisation
- misappropriation of funds or fraud relating to the above
- misuse of company funds by authorising or paying expense claims related to go-karting activity which were not part of the respondent's core business

and doing so without seeking or obtaining authorisation

- fraudulent expense claims relating to business mileage that was not actually undertaken
- failing to provide further information to support the investigation of the above allegations, despite having confirmed that she would do so during the investigation
- a final overall allegation that the claimant had seriously breached and undermined the trust and confidence of the respondent.

26. Included with the letter were documents which were referred to before us as "the disciplinary pack". They were the respondent's minutes of the claimant's investigation meeting, the email exchange about further information referred to above, the Companies House information referred to above, a list of supplier transactions for Total Door Solutions Limited, purchase orders for Total Door Solutions Limited on two particular dates, a list of supplier transactions for the Premier Inn between July 2020 and July 2021, two Premier Inn purchase orders on particular dates, one Marian Engineering purchase order, a list of supplier transactions for Marian Engineering between January 2020 and June 2021, a list of the claimant's business mileage claims, the respondent's Employee Handbook and minutes of the investigation with Mr Fraser.

27. The respondent explained that the enclosures were a representative sample of the most recent alleged fraudulent transactions, and that the claimant could request evidence of all historic alleged fraudulent transactions if she wished. The claimant was told that she should come to the hearing prepared to answer the allegations and would be given a reasonable opportunity to ask questions, present evidence and raise any points about information provided by the respondent. The claimant was warned that if the allegations of gross misconduct were made out disciplinary action could include dismissal without notice or payment in lieu of notice. The claimant was reminded of her right to be accompanied.

The Employee Handbook

28. The respondent's Employee Handbook is organised into two sections. Section A was stated to form part of the contract of employment and Section B outlined policies and procedures. The following parts of Section A are relevant.

29. Clause 1.1 provides, "unless you are ill or there are other reasons agreed by the company you will be expected, while working for the company to devote your full time and abilities to the company's and its clients' business. You may not, under any circumstances, whether directly or indirectly, undertake any other duties, of whatever kind, during your hours of work for the company."

30. Clause 7.7 is headed "secondary employment" and provides as follows: "While employed by the company you must not undertake any employment that creates a conflict of interest with the company's business (which includes the interest of our client's business) [sic]. Therefore you must apply to your manager for written consent in order to undertake any employment outside of the company. Failure to disclose such information may result in disciplinary action."

31. Section B includes the usual non-exhaustive list of potential forms of gross misconduct. Included within that list are dishonesty, contravention of the company's or client's procedures, sale of own goods on company premises or operating or being involved in the operation of a business from the company's premises and any other serious breach of conditions of employment or employee duties.

Disciplinary hearing

32. The disciplinary hearing took place on 22 July 2021. The decision-maker was Chris Dodgson. He prepared for the meeting by attending the premises the day before, reading the pack of documents and printing out some parts of it. He also spoke to Neil Matthews for around 15 minutes. The claimant was accompanied by Craig Allway and at the start of the meeting Lauren Morton explained that he would be permitted to ask questions or to make statements

but could not answer questions on behalf of the claimant.

33. The meeting began with a summary of the allegations against the claimant and of the basis upon which it might be suggested that she was guilty of misconduct. The meeting then proceeded in a logical fashion through the four main themes identified above. We do not think that Mr Dodgson's tone or style of questioning had the same faults as those of Mr Matthews at the investigatory stage and overall it seems to us to have been a reasonably balanced meeting at which the claimant had a fair opportunity to put her side of the case.

34. Mr Dodgson reached his decision after a 40 minute adjournment, although he told us that he had been gradually making up his mind as the meeting proceeded. When the meeting reconvened for him to announce the outcome, Mr Dodgson referred for the first time to a website. The implication was that it was the website for Total Door Solutions Ltd, although the claimant maintained that it was for her other company Total Contract Solutions Ltd. That website had not been mentioned by Mr Dodgson before and the disciplinary pack had not included any evidence of the layout of that website, or of the text appearing on it. Mr Dodgson explained to us that his knowledge of the website had probably come from a 15 minute discussion that he had with Neil Matthews prior to the disciplinary hearing. Mr Dodgson's decision was to dismiss the claimant without notice for gross misconduct. The result and the essence of the reasoning was confirmed in a dismissal letter dated 23 July 2021.

35. The charges were set out in the same terms as in the invitation to the disciplinary meeting. However, in fairness to the respondent, there was more to the first charge than simply setting up a *competing* business. A fair reading of the notes makes it clear that Mr Dodgson was also interested in whether that business also created a different type of conflict of interest, in the sense that the claimant raised purchase orders on behalf of the respondent for goods which were then supplied by her own company Total Door Solutions Limited, profiting from each transaction. The essential reasoning on each of the charges was as follows.

a. Total Door Solutions Limited had been set up with the aim or purpose of diverting business from the company and causing the company a loss of revenue. The claimant had not obtained the required written permission to work for another company in accordance with section 7.7 of the Employee Handbook. The claimant's evidence in relation to the business had changed three times during the investigation and disciplinary hearing and there was sufficient evidence to suggest that the business was in direct competition with the respondent. In his oral evidence to the Tribunal Mr Dodgson added that he also concluded that there had been a conflict of interest in that the claimant had authorised orders to her own company when she should have been purchasing direct from source, to get the best value for her employer, the respondent. This point is absent from the dismissal letter, but it was discussed in detail during the disciplinary hearing. On the balance of probabilities, we accept that this additional form of conflict of interest was also an aspect of Mr Dodgson's reasoning, and that the explanation for the discrepancy is that the dismissal letter was poorly drafted and incomplete.

b. While the claimant conceded a degree of negligence in relation to Marian Engineering invoices, she had effectively authorised an overpayment to Stuart Fraser in the region of £80,000 without authorisation.

c. Stays had been booked in Premier Inns for weekend karting events. Sometimes the claimant would stay there too. She had therefore authorised and participated in an excessive spend in relation to karting and had personally benefited from the misuse of company funds.

d. Fraudulent expense claims had been made in relation to business mileage not actually undertaken. The claimant had explained at the investigatory stage that she had been instructed by her husband John Graham to falsify a proportion of her business mileage in order to take money from the company. She transferred that money to her husband's bank account but subsequently retracted an offer to provide

evidence. Although the claimant stated during the disciplinary hearing that all of the business mileage was legitimate, she had not provided any evidence of her attendance at the relevant meetings.

e. The claimant had failed to cooperate with the investigation by failing to supply information that the respondent had requested.

36. In his evidence to us Mr Dodgson explained that, in his view, a finding that the claimant had set up a competing business would have justified dismissal on its own. So would a finding that the claimant had facilitated payments to Marian Engineering knowing their true purpose. If the allegation relating to mileage claims had been considered and upheld on its own, then further investigations might have been warranted. The claimant's actions in relation to mileage claims certainly reached the level of misconduct but the seriousness of that misconduct probably required further investigation. The charge in relation to karting and stays at Premier Inns would not have justified dismissal on its own but would perhaps have merited a lesser penalty such as a final written warning. The failure to cooperate with investigations was a serious matter and would have merited some disciplinary sanction but not dismissal.

37. The dismissal letter reminded the claimant of her right of appeal, which she exercised on 27 July 2021.

Appeal

38. The appeal took place on 4 August 2021, chaired by Lee Burton. In addition to the documents in the original disciplinary pack he considered both the respondent's notes of the investigatory and disciplinary meetings and the claimant's version of those notes. We see nothing objectionable about the tone or style of questioning at the appeal hearing. The respondent's procedures were flexible enough to allow for two types of appeal: either a full rehearing or a more limited review of fairness (see paragraph 13.12.5 of the Handbook). Either approach allowed the appellant to raise any new information that had come to light. Mr Burton's approach was initially to carry out a more limited review and he would only carry out a full rehearing of the

disciplinary allegations if a review of the fairness of the original decision revealed a reason to do so.

39. The appeal outcome letter confirmed the decision to dismiss. On the charge relating to Total Door Solutions Limited the conclusion was that the claimant should have been aware that her actions in setting up that company were a serious breach of her terms and conditions of employment with the respondent and a conflict of interest due to the nature of the business. The conclusion in relation to Marian Engineering was that the claimant had been negligent in signing off purchase orders which led to fraudulent payments to Stuart Fraser. The claimant had not provided any evidence of approval for the Premier Inn purchase orders, or to substantiate journeys in respect of which mileage had been claimed.

Legal principles

Unfair dismissal

40. The reason for the dismissal is approached in the following way. The employer has the burden of proving a potentially fair reason for dismissal which is either one of those falling within section 98(2) of the Employment Rights Act 1996 or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reason for dismissal is the set of facts known to the employer or beliefs held by it, which cause it to dismiss (***Abernethy v Mott, Hay and Anderson*** [1974] ICR 323). This has also been expressed as the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss, or alternatively it is what motivates them to do so (***Jhuti v Royal Mail*** [2018] ICR 982). In this case the employer seeks to prove that the reason for dismissal related to the conduct of the employee, which would be a potentially fair reason within section 98(2)(b) of the Employment Rights Act 1996.

41. If the respondent establishes a potentially fair reason for dismissal, then the test of fairness in s.98(4) of the Employment Rights Act 1996 applies. On this issue the burden of proof is neutral. The question whether the dismissal was

fair or unfair having regard to the reason shown by the employer 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. The statute requires that question to be determined "in accordance with equity and the substantial merits of the case".

42. The well-known case of ***BHS v Burchell*** [1978] ICR 303, EAT sets out some typical issues of fairness in a dismissal for misconduct. It is important to remember that the burden of proof on issues of fairness is now neutral whereas it lay on the employer when ***BHS v Burchell*** was decided. First, the employer must establish that it did believe the employee to be guilty of misconduct. In practical terms, that is no different from the need in every case to prove a potentially fair reason for dismissal. Second, the employer must have reasonable grounds upon which to believe that the employee is guilty. Third, at the stage (or at the final stage) at which the employer formed that belief on those grounds the employer must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

43. It is well-established that a Tribunal must not substitute its own view for that of the reasonable employer (see e.g. ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17). The law recognises that different reasonable employers might have different reasonable responses to the same situation. The fairness of dismissal is therefore assessed by reference to a "range of reasonable responses". Put another way, if *some* reasonable employers would have dismissed in the same situation, then the dismissal is fair. Only if *no* reasonable employer would have dismissed is the dismissal unfair. These principles apply as much to the procedure adopted in relation to the dismissal as they do to the overall decision whether or not to dismiss (see e.g. ***Sainsbury's Supermarkets Ltd v Hitt*** [2003] ICR 111).

44. The requirements of a reasonable investigation are likely to vary from case to case. They will typically depend on the nature and gravity of the alleged misconduct, the state of the evidence, the potential consequences for the

employee of an adverse finding and the time and expense involved in any particular aspect of investigation.

45. The more serious the allegations against the employee, the more thorough the investigation conducted by the employer ought to be. This proposition derives from the ACAS Guide "Discipline and Grievances at Work" and from ***A v B*** [2003] IRLR 405, EAT. An investigation leading to a warning need not be as rigorous as one likely to lead to dismissal. In ***A v B***, the fact that the employee, if dismissed, would never again be able to work in his chosen field was relevant. Serious criminal allegations must always be carefully investigated, and the investigator should focus on evidence that may point towards innocence as much as on that which points towards guilt. This is particularly so where the employee has been suspended and cannot communicate with witnesses.

Unfair dismissal compensation

46. Where the tribunal considers that any conduct of the complainant before the dismissal (or before notice of dismissal 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 the award accordingly (section 122(2) of the Employment Rights Act 1996).

47. Similarly, but with potentially important differences in wording, 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 (section 123(6) of the Employment Rights Act 1996).

48. The general rule in section 123(1) of the Employment Rights Act 1996 is that "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". That has an important consequence where the tribunal finds that a fair procedure would or might

have led to dismissal anyway. In those circumstances it may be just and equitable to reduce the compensatory award in order to reflect that probability (***Polkey v A E Dayton Services Ltd*** [1988] AC 344, HL). In some cases, it might be appropriate to limit compensation to the additional period necessary for the respondent to have carried out a fair dismissal. The assessment is predictive and entails asking whether the employer could fairly have dismissed and, if so, the chances that it would have done so. The issue is not what a hypothetical fair employer would have done, but rather whether the respondent employer would have dismissed, on the assumption that it acted fairly (***Hill v Governing Body of Great Tey Primary School*** [2013] IRLR 274, EAT). The predictive exercise may well entail a speculative element, but the tribunal must not shirk its duty merely because the exercise is difficult or to some extent speculative (***Thornett v Scope*** [2007] ICR 236, CA, ***Contract Bottling Ltd v Cave*** [2015] ICR 146, EAT). Unless the evidence is so unreliable that no sensible prediction can be made, the question is not whether the tribunal can predict with confidence all that would have occurred, but rather whether it can make some assessment based on the evidence, its common sense, experience and sense of justice (***Software 2000 Ltd v Andrews and others*** [2007] ICR 825, EAT).

Notice pay/wrongful dismissal

49. The claim for notice pay is effectively a claim for wrongful dismissal. The claimant alleges that the respondent has dismissed in breach of the contractual term regarding minimum notice. However, an employer faced with a repudiatory breach of contract by an employee may accept that breach and terminate the contract, resulting in immediate dismissal. The issue is therefore whether the respondent was entitled to dismiss summarily (i.e. without notice) because of the claimant's own repudiatory breach of contract. The employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract (see e.g. ***Laws v London Chronicle (Indicator Newspapers) Ltd*** [1959] 1 WLR 698, CA). Expressed in terms of the implied term of trust and confidence, the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the

employer should no longer be required to retain the employee in employment (***Neary v Dean of Westminster*** [1999] IRLR 288, HL). Matters must be assessed objectively and therefore an employee may repudiate a contract without intending to (***Briscoe v Lubrizol Ltd*** [2002] IRLR 607, CA).

Failure to provide a written statement of terms and conditions

50. This is not a free-standing claim, and it depends on the claimant succeeding in one or more of the types of claim listed in Schedule 5 to the Employment Act 2002. They include unfair dismissal and breach of contract. The precondition of an award is that when proceedings were begun the employer was in breach of its duty to give a written statement of initial employment particulars or particulars of change (sections 1(1) and 4(1) of the Employment Rights Act 1996).

51. If the Tribunal makes no award to the claimant in the successful claim listed in Schedule 5 then it *must* make an award of 2 weeks' pay and *may* make an award of 4 weeks' pay if it considers it just and equitable to do so in all the circumstances (section 38(2) Employment Act 2002).

52. Equivalent provisions apply to increases of compensation where the Tribunal does make an award of compensation in the successful Schedule 5 claim (section 38(3) Employment Act 2002).

53. However, neither duty applies if there are exceptional circumstances which would make an award or increase unjust or inequitable (section 38(5) Employment Act 2002).

Submissions

54. The parties made their submissions primarily in writing. They also made supplementary oral submissions. Little useful purpose would be served by repeating or summarising those submissions here when they could be read elsewhere if necessary. Instead, we will deal with the essential points in our reasoning below.

Reasoning and conclusions

Unfair dismissal – the reason for dismissal

55. It is common ground that the reason for dismissal was conduct. The respondent has therefore established a potentially fair reason for dismissal and has met the first limb of the ***BHS v Burchell*** test.

Unfair dismissal - investigation

(a) Total Door Solutions Limited, competition and conflict of interest

56. First, it is necessary to consider precisely what the respondent was investigating in relation to the company Total Door Solutions Limited, of which the claimant was the sole director and shareholder. A reading of the correspondence containing the charges and the disciplinary outcome might suggest that the first issue was confined to setting up a *competing* business, but a fair reading of the notes of meetings reveals that the issue was broader than that and that the respondent was also considering other aspects of *conflict of interest*. If this was a change of tack or a change of emphasis then we do not think that it caused any unfairness to the claimant, who was prepared to discuss that aspect too and to explain her actions.

57. The respondent sought to obtain Companies House information in relation to Total Door Solutions Limited and that was undoubtedly a reasonable and relevant step. However, that aspect of the investigation was flawed because the printouts obtained were not complete and the “nature of business” section was not visible to the decision-makers. That was of obvious relevance to the question of competition, or intention to compete, with the respondent. However, we do not think that this caused any unfairness to the claimant because the error omitted information which would have harmed rather than helped the claimant’s case. The “nature of business” entry read “43290 Other construction installation”.

58. The presentation and content of the Total Door Solutions Limited website was undoubtedly a relevant matter for the respondent to investigate but it was not investigated reasonably. It seems that Mr Matthews had viewed the website

as part of his investigation and had passed on some hearsay information about it, orally, to Mr Dodgson prior to the disciplinary hearing. However, no printouts were in the disciplinary pack, and it was not shown to or viewed with the claimant during the disciplinary or appeal hearings. Mr Dodgson clearly thought that the website was relevant but did not mention it until after the adjournment during which he reached his decision. Even then, the source of his information was Mr Matthews rather than anything Mr Dodgson had seen himself. The detail of Mr Matthews' recollection of the website was not put to the claimant during the process. It was effectively information supplied to Mr Dodgson only and it was not presented in a way that allowed the claimant to engage with the detail or to challenge either Mr Matthews' assessment of it, or Mr Dodgson's understanding of that assessment. All reasonable investigations would have presented the website evidence to the claimant directly for her consideration and comments.

59. The other issue was that of conflict of interest through transactions facilitated by the claimant between the respondent and the claimant's company Total Door Solutions Limited. We are satisfied that the investigation into the trading relationship between Total Door Solutions Limited and the respondent fell within a reasonable range, at least so far as documents were concerned. Relevant documents were gathered, and relevant questions were asked about them.

(b) Mr Matthews' conduct and questioning

60. We have already set out in detail above our findings of fact in relation to the conduct by Mr Matthews of the investigatory meeting. After highlighting some key passages, we concluded that Mr Matthews' questioning style and tone was at times overbearing, dogmatic and aggressive. His comments betrayed a mind that was at least partially made up regarding the claimant's guilt. We accept that the claimant was probably intimidated by Mr Matthews' approach at that meeting and that her answers were probably affected. She is likely to have been disconcerted and inhibited. No reasonable investigation would have been conducted in that manner.

61. While neither the disciplinary hearing nor the appeal hearing was conducted in a similar way, we do not think that they corrected this procedural defect because the information gathered by Mr Matthews remained central to the respondent's conclusions.

(c) Marian Engineering

62. As far as the Marian Engineering allegation is concerned, the claimant alleged that she had received emails from "Matty" which caused her to think that the transactions were genuine. That was an important point since it had a potential bearing on the claimant's awareness (or lack of awareness) of the wrongdoing of others, and her own honesty. The respondent failed to investigate the existence, content or source of emails from "Matty", even though the respondent had full access to the email system and the claimant had none. That was a significant failure.

63. We also consider that the investigation of the claimant's wrongdoing was superficial when Mr Fraser was interviewed. Mr Fraser was allegedly both an architect and a beneficiary of the fraud. He implicated the claimant, but in a cursory way which was not followed up. Mr Fraser was not asked when and how the claimant became aware of the scheme, precisely what she had known about the true destination of the payments, from whom, when and how. Those were all important matters to test and investigate because someone who admits wrongdoing might well seek to deflect or to share blame by implicating others. The respondent's approach appears instead to have been to accept the word of someone who admitted deception without further investigation or challenge. We do not think that any reasonable employer would have conducted so superficial an examination of those facts.

(d) Karting/Premier Inn

64. The investigation into the karting or Premier Inn allegations lacked the necessary focus and clarity to fall within a reasonable range of investigations. In closing submissions at the end of the case the respondent was not initially able to say what the extent of the wrongdoing was, either in terms of the number of stays or invoices, or the expenditure involved. Eventually the

respondent settled on a figure of £10,000, but the purchase orders provided to the claimant during the disciplinary process did not come close to substantiating that amount, even if all of the stays covered by those purchase orders were inappropriately booked on the company account. All reasonable employers would have identified all the suspect stays which were within the scope of the investigation and sought the claimant's comments on all of them, unless it was agreed that representative samples would suffice. The focus of the investigation was on two purchase orders for transactions totalling less than £500, yet the offence under investigation supposedly involved expenditure of £10,000. It was not satisfactory, safe, or reasonable to provide the claimant with two samples selected by the respondent and to extrapolate guilt from her answers when questioned about those two examples.

(e) Mileage claims

65. In our assessment the respondent failed to carry out a reasonable investigation into the meetings which allegedly necessitated the disputed mileage. We were told during the hearing that the respondent had spoken to its client, the Co-Op, and had established that the meetings were either held by video conferencing rather than in person or did not take place at all. Mr Matthews had certainly indicated at the investigatory stage that he intended to speak to the Co-op. However, there was no such evidence in the disciplinary pack and the decision to dismiss was not based on it. Page 314 of the joint file of documents was misleadingly categorised and was not before the disciplinary decision makers, nor did we hear any evidence to explain when, how, or how reliably it had been compiled. The Co-op's evidence, whatever it might have been, was not before the disciplinary decision maker or the appeal decision maker and the investigation was therefore deficient. On the balance of probabilities, we are not satisfied that the respondent really did carry out any such investigation prior to dismissal. If the respondent had done so then the evidence would surely have been in the disciplinary pack and would have been discussed in some detail at the relevant meetings.

66. The claimant also identified “Colleen” and “Anthony” as people with relevant knowledge of the meetings, but that was not followed up by the respondent. That is a further deficiency and the respondent failed to establish what, if anything, those potential witnesses could say about the matter.

67. The respondent had full access to the claimant’s emails, whereas the claimant had none. The emails sent and received by the claimant around the time of each alleged meeting might well shed light on whether it occurred at all, and if so whether it took place in person or by video. The respondent did not investigate the claimant’s emails. That was a significant failure to obtain relevant evidence.

(f) Failure to cooperate

68. No further investigation into this allegation was required and the respondent’s approach was certainly reasonable. The respondent had made a reasonable request for documentary evidence and the claimant had declined to comply with it. Her reference to mental health was not supported by medical evidence, nor did the claimant supply that information at any subsequent stage. It was not before the Tribunal either.

Overall conclusion in relation to the investigation

69. There is no doubt that the respondent got many things right in its approach to the investigation. Relevant documents were certainly obtained, and some relevant questions were certainly asked. However, we are quite satisfied that the investigation nevertheless fell outside the reasonable range because of the multiple deficiencies identified above.

Unfair dismissal – grounds for a belief in guilt

70. Our conclusion is that despite the multiple deficiencies in the investigation, the respondent did have reasonable grounds for a belief in guilt so far as the Total Door Solutions Ltd allegations are concerned. The first issue was competition, or an intention to compete. In his evidence to us Mr Allway agreed with the respondent’s witnesses that the scope of the respondent’s business activities potentially included the supply of spare parts to customers

if there was a demand for that. We accept that evidence. Therefore, even if the claimant's evidence that Total Door Solutions Ltd was merely a spare parts business were accepted, it was potentially in competition with the business of the respondent. There was no evidence of *actual* competition in the sphere of spare parts, but there was certainly evidence of an *intention* to compete.

71. An additional conflict of interest arose from the fact that the claimant facilitated transactions between Total Door Solutions Ltd and the respondent. Total Door Solutions Ltd profited from that transaction, or certainly sought to. The claimant could instead have used her source to obtain parts for the respondent at the best possible price. Instead, she derived a profit by using her own company as an intermediary.

72. The respondent had reasonable grounds for thinking that these were both clear breaches of the contractual provisions of the Handbook at paragraph 7.7, and that the setting up of the claimant's company Total Door Solutions Ltd created a conflict of interest between the claimant and her employer the respondent.

73. We do not consider that the respondent had reasonable grounds for believing that the claimant was guilty of misconduct in relation to the Marian Engineering invoices. The essence of the disciplinary charge was dishonesty. It was framed in the correspondence as fraud or misappropriation of funds, not negligence. The only direct evidence that the claimant was aware of the scheme came from Mr Fraser himself, and that evidence should have been treated with caution given his own admitted wrongdoing. The claimant denied dishonesty or any awareness of the fraud or of the true destination of the funds. There was insufficient evidence for a reasonable employer to conclude that the claimant had been aware of the scheme, or that she had been dishonest. The fact that the invoices were for similar materials each month is not a reasonable basis for doubting the claimant's explanation, because purchase orders for regularly consumed stock items might well be similar from month to month. There is no reasonable basis for an inference of dishonesty from that. While there was, apparently, no proof of delivery, it was not the

claimant's role to check for proof of delivery. That was the job of the finance department, so a lack of proof of delivery did not give rise to any adverse inference in relation to the claimant's own knowledge or honesty.

74. There were no reasonable grounds for a belief that the claimant had inappropriately booked Premier Inn accommodation on the respondent's account to the extent of £10,000. The documents before the decision makers failed to substantiate even as much as £500 of that total and there was no reasonable basis upon which to extrapolate from the conclusions reached about two sample transactions. Further, there was no reasonable basis for a belief that the claimant knew that *any* of the expenditure was inappropriate, given that she claimed to have understood that it was all part of authorised sponsorship activities which were both known to and authorised by the managing director. If it was not, there was no evidence that the claimant knew or should have known that it was not. The managing director had authorised the bookings and the suggestion that the claimant derived a "personal benefit" was flawed if the activities were thought by her to be part of company sponsorship activities. The hotel room did not cost any more if the claimant stayed there as well as her husband (the managing director) and the sponsored driver (her son).

75. There were no reasonable grounds for a belief that the claimant had claimed mileage inappropriately. There was no evidence before the decision makers that the meetings did not occur, or that they took place by video. The essential reasoning was simply that it was inherently improbable that the claimant could have undertaken so many business miles within such a short space of time. We do not think that was a reasonable basis for a belief in guilt, because the equally plausible and likely explanation was that the claimant had been undertaking a punishing amount of mileage to look after a key client. Mr Dodgson accepted that it was certainly possible for the claimant to have done that sort of mileage but said that "the story was slightly difficult for me to believe". A reasonable employer would not find that mild scepticism to be a sufficient basis to infer that the journeys were not made. We do not think the respondent could reasonably have thought that the claimant had admitted a

degree of guilt at the investigatory stage either. When the claimant was asked whether she had legitimately undertaken all of the miles claimed she replied, "most of them", but she subsequently explained that remark as having meant that she was beginning to have doubts about the accuracy of her administration, rather than an admission that she had knowingly claimed for journeys that had not been undertaken. While the respondent's notes of the investigation meeting recorded the claimant as having answered "yes" to the question "so you have fabricated these business miles so that you could get more money", the claimant firmly and consistently disputed the accuracy of that part of the notes. We do not think that the alleged admission provided a reasonable basis for a belief in guilt unless there was at least some direct evidence that the claimant had not undertaken a particular journey. More generally, we do not think that any reasonable employer could place much weight on the alleged admissions made by the claimant when interviewed by Mr Matthews, because that interview was conducted in a significantly flawed manner (see above).

76. The respondent did have reasonable grounds for a belief in guilt so far as the failure to cooperate is concerned. The respondent had reasonably requested that the claimant provide potentially relevant information relating to Total Door Solutions Limited and the mileage claims. The claimant declined to do so in circumstances where there was no medical evidence to substantiate her suggestion that she was too unwell to do so. The claimant did not supply the information at any subsequent stage either.

Unfair dismissal – procedural fairness

77. By the time of closing submissions, the sole additional argument in relation to procedural fairness was that it was unfair to put the claimant's grievance on hold until after the conclusion of the disciplinary process, and then to fail to deal with that grievance at all because the claimant had been dismissed. This was in direct contravention of the undertaking given by Lauren Morton at the end of the disciplinary hearing. The claimant asked what would happen to her grievance, and in Lauren Morton's own notes Lauren Morton's reply is recorded as having been "your grievance will be investigated".

78. On this issue the Tribunal reached a split decision in which EJ Whitcombe was in the minority and Mrs Brown and Mr Muir were in the majority. All three members of the Tribunal considered that there was a potential overlap in subject matter between the grievance and the disciplinary process because:

a. one of the original whistle-blowers whose disclosure led to the disciplinary process was the person against whom the claimant raised her grievance;

b. the claimant had immediately questioned whether that person had made allegations against her when informed of her suspension, and therefore promptly raised a potential link;

c. the subject matter of the grievance was also relevant to the mitigating circumstances put forward by the claimant, since she alleged that she had made poor decisions because of the pressure she felt after a sustained course of harassment by Mr Mulligan.

79. The minority (EJ Whitcombe) concluded that although Lauren Morton broke her own undertaking, the respondent's approach nevertheless fell within a reasonable range because:

a. the ACAS Code of Practice (paragraph 46) and Guidance (pages 22 and 23) are permissive rather than mandatory, they identify circumstances in which an employer "may" choose to hear a grievance first, and do not go so far as to suggest that in those circumstances all reasonable employers "must" do so;

b. the situation did not fall within the examples given in the Code and Guide, nor was it comparable;

c. some reasonable employers would have dealt with the grievance first, but equally some reasonable employers would have thought that:

i. taking it at its highest, the claimant's mitigation would not be sufficient to avoid dismissal if the charges were found to be proved;

ii. the person against whom the grievance was brought was not the sole whistle-blower and the investigation also included much material that the original whistle-blowers had not provided, so the conduct and potential motivation of one of the whistle-blowers was not likely to be relevant to conclusions regarding the claimant's guilt;

iii. the grievance did not make any allegations about the conduct of any of the disciplinary decision makers or their HR support.

d. Therefore, while it might well have been better to have heard the grievance before reaching a disciplinary conclusion, it is not possible to say that all reasonable employers would have done so.

80. In contrast, the majority of the Tribunal (Mrs Brown and Mr Muir) considered that the approach adopted by this respondent fell outside the reasonable range because the disciplinary investigation was still at a very early stage when the claimant made her allegations and raised her grievance. Therefore, the grievance could easily have been investigated and conclusions drawn without delaying the outcome of the disciplinary process. All reasonable employers would have proceeded with both processes simultaneously since there was no difficulty in doing so.

Unfair dismissal – sanction

81. The claimant did not make any separate challenge to fairness on this basis and her focus in submissions was on other matters. Leaving aside the issues considered above in relation to the reasonableness of the investigation and the grounds for a belief in guilt, we are satisfied that a reasonable employer certainly could have dismissed if it concluded that the claimant was guilty of the offences which this respondent found proved. They amounted to dishonesty, a serious breach of trust and deliberate actions which were very obviously contrary to the best interests of the respondent. If necessary, the situation was analogous to some of the examples of gross misconduct in the Handbook, such as dishonesty, contravention of company procedures, sale of an employee's own goods on company premises or operating or being

involved in the operation of a business from the company's premises. Dismissal fell well within the reasonable range in those circumstances.

82. We have not ignored the matters which the claimant put forward in mitigation, but we do not think that all reasonable employers would have concluded in the light of those factors that the appropriate penalty was something less than dismissal. Dismissal remained well within the reasonable range. Even if the claimant's allegations of bullying, harassment and overwork were well-founded, they do not justify the setting up of a business with the intention of competing with the respondent, while remaining employed by the respondent. Similarly, that mitigation would not justify the conflict of interest that arose from the deliberate decision to raise purchase orders on behalf of the respondent for spare parts which were then supplied by the claimant's own company, with the intention to make a profit.

Unfair dismissal – overall conclusion

83. For those reasons, we find that the claimant was unfairly dismissed. The respondent's investigation fell outside the reasonable range and there were insufficient grounds for a reasonable belief in guilt of any of the charges save for those relating to Total Door Solutions Limited and the failure to cooperate with the investigation. The majority of the Tribunal also consider that the dismissal was procedurally unfair because the respondent declined to investigate the claimant's grievance at the same time.

Unfair dismissal - remedy

84. We will deal first with the ***Polkey*** issue – the chance of a fair dismissal by this respondent if it had followed a fair procedure. We have concluded that dismissal would have been a certainty if a fair procedure had been followed.

85. Firstly, after a fair procedure the respondent would have concluded that the claimant was guilty of setting up a business which was intended to compete with the respondent. Quite apart from the evidence of intention to compete in relation to the supply of spare parts, a fair procedure would also have considered the full Companies House information which described the

activities of Total Door Solutions Limited as "Other construction installation". That is a statement of intention to compete even more directly with the respondent's business.

86. Secondly, the evidence of a different type of conflict of interest was clear. The claimant's own company traded material with the respondent and made, or sought to make, a profit from doing so. The claimant was obliged to use her knowledge to source material at the best possible price for her employer the respondent, but instead the claimant sought to make a profit from the respondent.

87. The claimant was in clear breach of her contractual obligations and the respondent would have regarded the offence as gross misconduct as defined by the Handbook, justifying the most serious of responses: dismissal for a first offence. Dismissal by the respondent would therefore have been certain even if a fair procedure had been followed. We do not think a fair procedure would have taken any longer than the time the respondent took to follow an unfair procedure. The date of dismissal would therefore have been the same.

88. We therefore find that it would be just and equitable to reduce the compensatory award to zero for what we will summarise as "***Polkey***" reasons.

89. Additionally, we reduce both the basic award and the compensatory award by 100% to reflect the claimant's own contributory fault. The claimant was a senior, clever, experienced and capable employee. She either knew or certainly should have known that her actions were wrong. The claimant was plainly culpable, and her misconduct wholly caused the dismissal. It would not be just or equitable for her to receive any compensation given the seriousness of that misconduct. It fully justified dismissal.

Notice pay/wrongful dismissal

90. For the purposes of this claim we assess questions of breach of contract objectively, reaching our own conclusions. We are not concerned with the range of views that reasonable employers might have taken.

91. Our conclusion is that the claimant was not entitled to notice pay because she

was herself in fundamental breach of contract. The respondent was entitled to accept that breach and to terminate the contract of employment summarily, without paying notice. The claimant's claim for breach of contract in relation to the payment of notice therefore fails.

92. In our judgment, the claimant was in breach of the implied term of trust and confidence, in other words the implied term that neither party to the contract would, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or cause serious damage to the relationship of trust and confidence between employer and employee. Any breach of that term is necessarily fundamental (***Morrow v Safeway Stores plc*** [2002] IRLR 9, EAT).

93. The claimant's conduct was likely to destroy or cause serious damage to the relationship of trust and confidence for the reasons set out at some length above. In summary, she deliberately set up a company with the intention that it would compete with the respondent both in relation to installation and also spare parts, and it traded with the respondent in a further clear conflict of interest.

94. Further or alternatively, the claimant was also in fundamental breach of clause 7.7 of the handbook, which had contractual effect. She undertook employment which created a conflict of interest with the respondent's business. We construe "employment" in this clause in a non-technical way, because we think that at the time of contracting both parties would have understood "employment" to include the activities of a company of which the claimant was the sole director and shareholder, even if she were not technically also its employee for the purposes of the Employment Rights Act 1996. It therefore makes no difference to our finding whether the claimant was employed by Total Door Solutions Limited or not, she was in full control of the company and had set it up.

Failure to provide a written statement of employment particulars

95. The claimant estimated that she had held HR responsibilities for at least 10 of the 14 years for which she worked for the respondent. It was therefore the

claimant herself who was primarily responsible for the respondent's failure to comply with its statutory obligations under section 1 of the Employment Rights Act 1996. We consider that this is an exceptional circumstance that would make any additional award of compensation unjust and inequitable. Section 38(5) of the Employment Act 2002 applies.

Holiday pay

96. While the situation is far from certain, our findings are made on the balance of probabilities. We think that the claimant's memory is more likely to be accurate than the respondent's leave records. We reached that conclusion because the claimant had booked leave in July 2021 which does not appear on the records. The claimant had not cancelled it and the respondent was not able to explain that discrepancy. In those circumstances our confidence in the accuracy of the leave records is undermined and we prefer the claimant's firm evidence that she worked on all four of the disputed days. She is therefore entitled to the agreed sum of £827.96 (gross).

Employment Judge: Mark Whitcombe
Date of Judgment: 08 September 2022
Entered in register: 12 September 2022
and copied to parties