



EMPLOYMENT TRIBUNALS

Claimant: Mr S. Le Mezec

Respondent: Matcon Limited

Heard at: Birmingham

On: 21-22 August, 23-25 October 2017 &

Before: Judge Cocks

Representation

Claimant: Mr Northall Counsel

Respondent: Mr Cooksey Counsel

JUDGMENT

The Claims are for unfair dismissal and breach of contract (notice pay).

The Tribunal heard evidence from Steven Ball (Managing Director), Michael Allsop (HR Business Partner and investigating officer), Robert Reynolds (joint dismissing manager and HR Director now retired) and Paul Cuttell (appeal manager and Business Director for Wrightflow Business Technologies Ltd).

For the Claimant, I heard from the Claimant himself, Mr Ed Piepereit (current employee of the respondent), David Bowles (Business Line Leader) and Charles Lee (former Managing Director of the Respondent)

There was an agreed bundle of documents with additions marked C1 and R1.

This has been a strongly fought case on both sides; it would not normally be the case to have so many witnesses in an unfair/wrongful dismissal claim. The reason for hearing from so many is twofold. First, the Claimant disputes the real reason for his dismissal was misconduct. Secondly, in respect of both wrongful dismissal and (if I find unfair dismissal) contributory fault, the test as to whether the Claimant was wrongfully dismissed or was guilty of culpable behaviour rests with me. It is for those reasons I have allowed the parties to call so many witnesses.

The Issues

The parties have agreed a list of issues, it is not necessary for me to reproduce it in this Judgment, but I make reference to it in my conclusions.

Findings of Fact

Background

The Claimant had continuous service with the Respondent from 6 December 1993 until his dismissal on 19 September 2016. He is a French National. His role at the time he was dismissed was Business Line Leader/Global Sales Director. He had worked in France, the US and the UK in several roles before this. He had good service up until events in Autumn 2016.

Matcon Ltd was acquired by IDEX in 2012. IDEX is an American Group. Matcon itself employs around 90 employees and produces industrial production equipment. There are several other companies in the IDEX Group in the UK, for instance, Mr Cuttell works for Wrightflow Technologies Ltd. Although Matcon Limited is not a large company, it is part of a multi-national organisation.

It is clear from the evidence, the Claimant's witnesses in particular, that the Respondent's employees formed a close-knit team. I would not go so far as describing it as "like a family", but the nature of the workforce is illustrated by the petition after the Claimant's dismissal and the strength of feeling which his and Mr Newbould's dismissal gave rise to. There is also no doubt that the Claimant was a highly regarded senior employee, promoted to his current role by Mr Lee in 2013. The Claimant had built up a strong relationship between Nestle and Matcon which resulted in the generation of orders in the region of thirty million pounds over ten years.

It is not necessary to go into bonus issue. The Respondent accepts that what happened at the end of the August 2016 did not personally benefit the Claimant, other than in a putative reputational sense.

Mr Le Mezec's contract of employment is pages 51 to 61. It is dated 20 December 2013. Of note, paragraph 17 makes clear the contract may be terminated without notice or pay in lieu of notice, in the following circumstances:-

- a. "If the employee shall at any time be guilty of dishonesty, or other gross misconduct or wilful neglect of duty or commits any other serious breach of this agreement, or
- b. Act in any manner (whether in the course of his duties or otherwise) which is likely to bring him, the Company or any associated Company into disrepute, or prejudice the interests of the Company or any associated Company

There are two other important relevant documents. The Disciplinary Policy and Procedure is at pages 181 – 189. From this document, the following extracts are pertinent:-

- "Line Managers are responsible for the implementation of the Disciplinary

procedure” (182)

- “Potential gross misconduct - the following are examples of conduct falling with the definition of gross misconduct and which entitled the company to dismiss without notice or pay in lieu of notice;

Breach of trust and confidence

Theft, fraud, falsification of company records.....

Bringing the company into disrepute.

Gross incompetence or failure to apply sound professional judgment ...”

“If the Company is satisfied following investigation and a Disciplinary Hearing that the Employee has committed gross misconduct, the Company will normally dismiss the employee without notice or pay in lieu of notice. In some circumstances, demotion or suspension without pay may be used as alternative sanctions”. (184-185).

- The purpose of the Appeal is to ensure that the decision made at the original hearing was reasonable in light of the evidence available at that time. It is not a re-hearing”. (189)

The other important document is the IDEX Code of Business Conduct and Ethics (83-100). This is not a policy which exists on paper and is not put into practice. It is clear from both parties evidence that this policy is at the heart of how Matcon does business and all employees are trained in ethical business conduct on a very regular basis. As was Mr Le Mezec (page 336).

Of particular note from this Code, are the following extracts:-

- “Consistent high standards of conduct are essential to meeting and exceeding the expectations of our customers, suppliers, employees and shareholders.....”
- The foundation of the IDEX Code of Business Conduct and Ethics is that we act in every instance with honesty, fairness and integrity.
- In the final analysis, each individual must exercise his or her own best judgment to determine what is required to comply with high ethical standards.
- IDEX is very serious about compliance with its Code of Business Conduct and Ethics. Anyone who disregards the Code in any way, will not only be subject to dismissal, but may also face civil or criminal penalties.
- You are expected to carefully read and fully understand and comply with both the letter and the spirit of the Code. IDEX is an international organization and its Code of Business Conduct and Ethics applies to all of its Employees, Officers and Directors worldwide” (83).

On page 84, the Code goes further. In reference to affirmative responsibilities:

- “IDEX Employees, Officers and Directors are expected to raise ethical concerns and report any actual or suspected illegal or unethical conduct in accordance with the procedures described below under the caption

“Reporting Procedures”.

- Honesty also requires that Employees, Officers and Directors refuse to participate either actively or passively in any cover up of illegal or unethical conduct”. “Looking the other way”. On potential, legal and ethical violations is in direct contradiction to Idex’s commitment to honesty and integrity and will not be tolerated. (page 84)
- “Idex Employees, Officers and Directors are responsible for ensuring the accuracy and reliability of Idex’s accounts. Fictitious, improper, deceptive, undisclosed or unrecorded accounts of funds or assets are a serious ethical violation..... It is Idex’s policy that all books and records conform to generally accepted accounting principles and all applicable laws.”
- All transactions must be accurately documented and accounted for in the books and records of Idex. All entries must contain appropriate descriptions of the underlying transactions and no false or deceptive entries may be made.
- “No Employee, Officer or Director may enter into any transaction with the knowledge that it is other than as is described in the supporting documentation. Furthermore, no Employee, Officer or Director may participate in obtaining or creating false invoices, payroll records or other misleading documentation.....” (93)

On page 96, under compliance, the company reiterates the importance of its employees being familiar with the Code and applying it at all times in the performance of their responsibilities. It repeats that Employees who fail to comply with the Code are subject to disciplinary action up to and including immediate termination. It goes on to state:-

Idex Supervisors are responsible for ensuring compliance with this code by monitoring and enforcing this code within their area of responsibility.

On the same page, under the heading of “asking questions and voicing concerns”, it states:

If any aspect of this code is unclear, or if an Employee, Officer or a Director should have any questions or face dilemmas or problems with respect of this code they should be brought to Idex’s attention in accordance with the applicable reporting procedures. (96)

In other words, if you are in any doubt about anything, you should bring it up and discuss it with a supervisor, further it stresses that each employee is personally responsible for their actions.

These two documents form the backdrop to, and informed the respondent’s managers involved in the disciplinary process, when reaching the decision they did to dismiss and uphold the dismissal. As stated, the Code in particular is a cornerstone of the respondent’s business operations.

Mr Ball became Managing Director at the end of 2015, when Mr Lee left. He was the Claimants Line Manager, together with two other direct reports, the other Business Line Leaders: Mr Baker (pharmaceuticals) and Mr Bowles (after-

market).

David Newbould was the Trade Compliance Manager. He was known as the “go to man” for compliance issues. His reputation for attention to detail led to him being lightheartedly referred to in the Sales Team as ‘the Order Prevention Department’. He was clearly held in high regard and was trusted to give the correct advice on acting within the Respondent’s policies.

I now deal with the question of appraisals:-

Mr Le Mezec’s year end review for 2015 took place with Mr Ball on the 25 February 2016, he received the lowest ratings. Whilst Mr Le Mezec accepted the C rating for results (2015 had not been a good sales year), he complained about the C he received for behaviour and performance. At Media Review on the 24 August 2016, Mr Ball had revised his view of Mr Le Mezec (page 77), presumably because of the good sales figures during 2016, however nothing much turns on these appraisals other than perhaps to show that whilst the Claimant has given evidence about the pressures Mr Ball put him under in August 2016, he himself was determined to prove to Mr Ball that he could perform well and this must have resulted in some self-imposed pressure as well.

Which leads me to events at the end of August 2016 and what Mr Allsop calls in his investigation report, which of course is highly relevant as it forms the basis of what Mr Reynolds and Mr Goolam knew of events prior to the Disciplinary Hearing with Mr Le Mezec on the 09 September 2016 and what Mr Cuttell knew when he upheld the decision to dismiss Mr Le Mezec.

It is very much the case that I must look at what was known at the time that these Managers made their decisions. Hindsight and subsequently discovered matters are not relevant to the fairness or otherwise of Mr Le Mezek’s dismissal. I have therefore examined and set out in my findings what was known about what had happened at the end of August through the prism of the investigation and disciplinary process, otherwise it would risk falling into the substitution mindset.

In the disciplinary process, Mr Le Mezec described the pressure he had been under in the last week of August, culminating in the telephone call with Mr Ming Zhao. He has described the pressure he felt under to me as well, but as I say, it was what was known at the time which is important.

In August 2016, Mr Ball had been on holiday for two weeks, the Claimant for three. At a daily management meeting on the 22 August, the Claimant found that the sales figure had been set much higher than he was expecting and much higher than his forecast for Mr Jamile and Mr Ball had been at the end of July. Added to this a contract for £100,000.00 (to Carter) had been cancelled. Mr Le Mezec raised why the Tecarter order was still in the forecast as the project could not happen in August (as emailed at page 102 show) The order intake was clearly not where it was expected to be and as the Claimant puts it, “there was a long way to go to achieve target.”

At the daily management meeting, Mr Ball stated that it was critical “to land a seven digit order intake” to enable a meeting with Idex Senior Managers over from the US in early September to run smoothly.

In his second interview with Mr Allsop (166) the Claimant described the pressure to Mr Allsop. He does not ascribe that all the pressure is coming from Mr Ball, but as one of three sources of pressure. At page 177 there is a document prepared by Mr Le Mezec where he sets out in more details the pressures he felt under at the time (178). This document was not given to Mr Reynolds but was referred to by the Claimant at the Disciplinary Hearing. Mr Le Mezec blamed the order pressure to Mr Reynolds and Mr Goolam at the Disciplinary Hearing (195).

The Claimant explained that there was a further meeting on the 22 August to discuss the Order situation which he says was unprecedented. Mr Mezec told the Disciplinary Hearing when he returned from holiday on the 22 August, the order actual was Nil compared to an intake target of 3.8 million which had been set by Mr Ball. He took the Managers through how the targets had come about.

Mr Le Mezec took issue with what had been stated by Mr Ball in the statement he had provided to Mr Allsop (197). Mr Ball's statement is at page 163. Pertinent to the pressure issue, is that Mr Ball says that he had told Mr Le Mezec that the Shuangying Order was looking more like a September order. Mr Le Mezec challenged that this had ever been said by Mr Ball. He pointed out that if he had been told that, he would not have taken the steps that he did at the end of August to ensure that the Shuangying Order went into the August figures. The points to be made about Mr Ball's statement, is that it was self-generated rather than being given in an interview with Mr Allsop. Although denied by Mr Ball and Mr Reynolds, there was clearly an involvement between Mr Allsop and Mr Reynolds before the Disciplinary Hearing and page 147 suggests that Mr Ball, whose statement is dated the 02 September 2016, received the statements for Mr Le Mezec and Mr Newbould before he wrote his own statement.

In evidence, Mr Ball told me that he had not read theirs before doing his own statement. I do not find this evidence particularly credible, the wording of Mr Allsop's email implies that Mr Ball had asked for the statements, he was not interviewed by Mr Allsop as would be normal in an investigation (particularly when Mr Newbould and Mr Le Mezec were interviewed) and it is noticeable that Mr Ball deals very specifically with point that Mr Le Mezec makes (161) that the aim was to get everything completed by the 31 August and a reference that if the contract was signed and dated, as at the 01 September 2016, it would have to be posted as a September order. It is more likely than not that Mr Ball had knowledge of the other two interviews when he wrote his own statement. On the 25 August, a new order from Shuangying (worth £300,000.00 three hundred thousand) was looking likely. This would have made a significant impact on the August Sales figures, which were still not good and nowhere near the seven digit figure Mr Ball was looking for.

The events between the 25 August and the 01 September are not, in essence, greatly disputed, but do need to be set out.

I have seen a number of emails between these dates, I am not proposing to reproduce what is in them except to say that they show the lengths to which the Claimant and his colleagues were going to try and get the Shuangying order into August.

The first problem which needed to be overcome was that an intermediary was needed as Shuangying did not have a licence to import. This meant either using an Agent, whereby commission would be payable or using ITS (Matcon China)

as the importer, this meant that ITS became the purchaser from Matcon and the seller on to Shuangying. ITS I the Chinese arm of Idex.

There has been a considerable amount of evidence about how Mr Ming Zhao, General Manager in China fitted into the Line Management structure. The Claimants position is that he evaluated and managed Mr Zhao in terms of sales performance but was not his Line Manager overall. The documents at R1 consistently show Mr Zhao as being managed by Andre Goodson. The issue may be important on the consistency point.

The Respondents believe that Mr Zhao was subordinate to Mr Le Mezec. Mr Le Mezec says he was not as Mr Zhao was General Manager of MPT in China, not a member of the sales team. Mr Zhao was involved in the passing on advice from Mr Newbould and Mr Le Mezec via Robin Chang, to the customer at Chang Ying about signing and dating the contract.

I am not entirely sure where this point takes me as Mr Reynolds and Mr Cuttell were not involved in the Disciplinary Action taken against the Chinese employees, nor the outcome. In any event, it is not something which became an issue during Mr Le Mezec's disciplinary process, on balance through, I accept his evidence did not have direct management responsibility for Ming Zhao, but only supervised him in relation to commercial sales matters.

On the 29 August and the Claimant told me Allsop about this (167) he received text messages on a Bank Holiday from Mr Ball asking for an update on the August orders and Chang Ying in particular. Mr Le Mezec considered it to be undue pressure, especially since nothing could happen in China overnight (123-127). The urgency in Mr Ball's text is apparent. Although he says it was simply so he could report to Idex the next day (it not being a Bank Holiday in the US) the text suggests otherwise, especially when read in conjunction with this email at page 127. Despite his position to the Tribunal that there was no present from Idex in relation to the order situation from August, that email says otherwise. It is hardly surprising that the Claimant felt under the pressure he did and reported that pressure in the Disciplinary process. As he put it, what made the pressure particularly intense that month, was that the low orders for August and Senior Managers having been on holiday earlier on in the month.

I have also seen emails (119) on the 30 August chasing China and stating "this order is critical for China and us this month" from Mr Le Mezec. Mr Ball had been copied into all of the emails (110, 117) including the later ones (for example 114) where the header on the claim that's emailed reads "we absolutely need this contract booked in August". It is hardly likely to have stated this if indeed Mr Ball had told Mr Le Mezec the order could go into September. Mr Ball says that he did not see this header. I find that evidence difficult to accept. Even if he did not read the header, the tone of the emails and the work being done, would have alerted him to the urgency felt by the whole team to bring the Shang Ying contract in by the end of August.

I simply do not find Mr Ball's evidence that he was not putting Mr Le Mezec under pressure to get this contract into August, prior to the Management meeting with Idex in September credible, especially in light of the specific nature of his text messages on the 29 September and his email at 127. I accept that this was no all of the pressure, and some of it was undoubtedly coming from the Claimant himself, but the pressure on him at the end of August for a number of reasons

was immense.

More pertinently, he was telling both Mr Allsop and the Disciplinary and Appeal Hearing about it. With Mr Ball's assistance, the decision was taken that the order would go through ITS in China to get around the import license difficulty. This made the contractual position difficult as to two contracts would be needed, Matcon to ITS and ITS to Shang Ying. Mr Lee was responsible for the preparation and approval of the contracts and gave me evidence about this.

By 12.24 pm on the 31 August (134A) Mr Lee was happy with the contracts and about half an hour later, Mr Ball signaled his approval in an email (134A). It is obvious that a number of people were involved in getting the documentation ready as quickly as possible, the aim being to get it signed on the 31 August so it would meet the August orders deadline. As Mr Le Mezec write on the 30 August (134L), "we absolutely need the contract signed tomorrow otherwise we would not be able to meet the deadline". As the recipients of the email show, both the China team and the UK team were involved in the process.

A further idea which the Claimant came up with, was that a purchase order could be raised by ITS to Matcon before receiving the signed contract from Shang Ying. Mr Ball told Mr Le Mezec that this was not to be done. Although Mr Allsop's investigation report says that Mr Ball told Mr Le Mezec that this was an unethical issue, this is not reflected in Mr Ball's statement. It was described to me as more of a risk matter, not an ethical issue. It would have placed the Respondent at financial risk if it had a purchase order from ITS without a corresponding contract from Shang Ying to ITS. It was about financial risk, not unethical conduct by Mr Le Mezec. However in the event, this did not happen. Again perhaps this is an indication of the pressure Mr Le Mezec felt under that he was coming up with such ideas, as he put it himself at the Disciplinary Hearing, it was a crazy idea (196).

Although there has been much dispute about the contract effective date, that being an argument put forward by Mr Le Mezec at the Appeal stage, as the Disciplinary stage, it is clear from the emails that 135 and 135A that the contract was actually signed by the customer on the 01 September 2016. Robin Chang told the Claimant in an email at 7.05 (UK time – China being seven hours ahead), Robin Chang told the Claimant in an email that he now had the signed contract from the Client and that it had recently been signed. Mr Le Mezec then sent it on the Mr Newbould with "here you go" (135A).

The signed contract itself is at pages 128 – 131, it is hand-signed and dated by the customer giving the date as 31 August 2016. Thereby enabling it to be put into the August figures.

One matter which became an issue in the Disciplinary process was the practice, unique to Matcon in the IDX group, of including contracts which came in up to 12 noon on the following date (eg: the first of the month) to be included in the previous months figures. However they still needed to be signed and dated in the previous month. This was to allow for time differences, it is a practice which was brought to an end soon after Mr Newbould and Mr Mezec's dismissal. I deal with this at the Appeal stage.

Events on the 31 August are not really factually disputed between the parties. On 31 August 2016, Mr Zhao told the Claimant that ITS was willing to place the

purchase order to the Respondent without having the contract from Chang Ying (provided the Respondent would accept cancellation at no time. Mr Ball said No, the Claimant told Mr Zhao that ITS needed the contractual documents from Chang Ying. Mr Lee had prepared the documents for ITS and these were approved by Mr Ball (as I have said). The top heading stated contract effective 31 August 2016 (128). It was sent to the China Team to send down the Claimant. The China team issued the order documents to Chang Ying.

Later on Mr Newbould and the Claimant called Mr Zhao to see if Chang Ying had signed the contract documents. They were told that the signatory had gone home and was not contactable. The Claimant and Mr Newbould told Mr Zhao to get the signatory to sign but not to date the contract. Mr Newbould said that if the signatory insisted on dating it, he should put the effective date on it, namely the 31 August 2016 even if he signed the document on the 01 September. Thereby backdating the contract from the date it was actually signed on.

??? Should paragraph although there has been much dispute going here?

On the 31 August, Mr Ball was told by Mr Yu that there was an issue with the Chang Ying contract which had been identified by Maggie Pow in China. Mr Ball instructed further enquiries to be made into what looked like a date being changed. Translated emails (136-138) were sent to him.

Mr Ball was told by Mr Yu that Mr Robin Chang had instructed ITS to request that the Claimant date the contract the 31 August 2016 even if it was signed on the 01 September.

Once he had received the translated email, (136) Mr Ball identified that the matter needed to be investigated. Mr Allsop was appointed by Mr Ball to investigate on the 01 September and he was shown the email from Mr Yu to Mr Ball soon after.

Mr Allsop interviewed by the Claimant and Mr Newbould that day. Their interviews are at pages (161 and 162). In his initial interview, at which the Claimant was not informed it was of a disciplinary nature, the Claimant explained what happened as I have already set out. There is very little contentious or in dispute about what Mr Ming Zhao was told to tell the customer, namely to leave the date blank or date it as the 31 August, even if it was signed on the 01 September. Initially, Mr Le Mezec said that Mr Newbould had not been involved. He also said that this had happened on another contract, the Harrison one, although even the Claimant is to recognize now that this was different as it had been signed on the 30 June but received later by Matcon and booked into June rather than July. Mr Newbould in his interview said that he had advised Mr Le Mezec to say that it was ok to sign the contract on the 01 September, but date it the 31 August in order to get it into the August order intake. He confirmed that this was the advice he had given. As stated earlier, Mr Newbould and Mr Le Mezec's interviews were sent to Mr Ball and Mr Allsop saw nothing wrong in doing so. He was of the view that Mr Ball had asked him to conduct the investigation and he was reporting back, the fact that Mr Ball was another witness and how what was in the statements might influence Mr Ball's statement, appears not to have occurred to him. When he was asked about this, Mr Allsop said that he thought Mr Ball would have integrity and would act correctly, he had told Mr Allsop he had not read them and that Mr Allsop was not aware Mr Ball would be a witness. If found this difficult to understand from a HR professional

leaving aside the inherent probability of the last two points, such a practice can hardly be described as a good one. The Claimant took issue with Mr Ball's statement during the Disciplinary Hearing, in particular that it made no mention of the intense pressure he and the others were put under in relation to the August target and that Mr Ball had not told them it could go in a September/August order or that Mr Le Mezec had questioned the figures. Mr Allsop's investigation report which accompanied the interview notes and relevant emails is at page (157-159). Mr Allsop conducted further interviews with Mr Le Mezec and Mr Newbould again on the 06 September. He refers to the time pressures to get the order in for August. There has been some debate over whether the instruction came from Mr Le Mezec or Mr Newbould to backdate the signature. Mr Allsop's report reflects what is in the statements from Mr Newbould, namely that he gave the advice to Mr Le Mezec and Mr Zhao during a telephone meeting on the 31 August 2016 (158).

Mr Allsop identified that this advice, given by Mr Newbould was wrong and went against the company business ethics. His conclusion was that as a senior person at the meeting, Mr Le Mezec should have disregarded that advice and not allowed to be acted on and delivered to ITS or the customer.

His view was that both Mr Le Mezec and Mr Newbould showed a failure to apply sound professional judgment, may have brought the company into disrepute and may also have broken trust and confidence between themselves and the company(159).

A Disciplinary Hearing was convened and the Claimant suspended on the 07 July 2016 (174). By letter dated the 07 September the Claimant was informed of the disciplinary allegation (175) namely:-

- Falsification of company records
- A failure to apply sound professional judgment
- Bringing the company into disrepute
- Resultant breach and breakdown in trust and confidence between yourself and the company.

The letter goes on to state that if the allegations were proven, it could result in his dismissal without notice. Mr Le Mezec received the Disciplinary Pack with this letter together with a copy of the Disciplinary Policy.

The Disciplinary Hearing took place on the 19 September 2016 but it was conducted by Mr Reynolds and Mr Goolam.

Before going on to make findings about that meeting, it is pertinent and relevant to set out the findings about emails on pages (148-156). On the 06 September, Mr Reynolds (apparently before the Disciplinary Investigation was completed as the last interviews with Mr Le Mezec and Mr Newbould did not take place until that date) Set out the Respondents position in two emails to Jane Chen in Shanghai. He refers to further interview statements from Mr Le Mezec suggesting that the interviews were completed by the investigation report had not yet been prepared. I know from Mr Allsop's evidence that the investigation report was finished on the 07 September and Mr Zhao was interviewed on the 08 September.

As Mr Reynolds states in his first email to Jane Chen, which seems to have been

received in China at 0.56 on the 06 September (153- 156) the investigation was still going on. Jane Chen was to carry out an investigation in China as Ming Zhao and Robin Chang were known to have been involved (page 154) his second email reiterates what needs to be done in China and giving guidance on how to do it. Kelvin Coe actually carried out the investigation in China.

On the 07 September, Mr Reynolds write to Mike Fortia (in the USA), presumably reporting on what was happening to more senior people in IDEX. On page 149 I see an email in which Mr Reynolds writes “nothing new or unexpected came up with Silvane, he admitted he had directly or indirectly changed the date on the order by deed or action to try to get it into the August orders, he gave some mitigation around pressure, nothing new, the issue for Isra and I, is whether this as a first offence in 23 years service constitutes enough for a fair legally type dismissal in our company in the UK, I think it may, but I would like this guidance”.

It is also clear from this email that Mr Reynolds had received the statements from China before any decision was taken in respect of Mr Le Mezec.

On the 13 September, Mr Reynolds, by now having taken legal advice, states that he and Mr Goolam had discussed the potential penalties for Mr Le Mezec and the nub of the legal advice was that “Silvaine has committed an acted of gross misconduct and dismissal is a reasonable course of action”.

By the 14 September, Mr Fortia is informing Mr Reynolds, Mr Allsop and Mr Ball that legal advice in China is recommending a verbal warning for Robin Chang and a written warning for Ming Zhao (148).

Aside from the emails, on the 07 September, Mr Reynolds had written to Mike Fortia, Mr Ball and Mr Allsop about having a telephone call later that morning, he states that the key issue for him is that they won't have the statements from China until the next day and whether they were material to the investigation or not. The reply from Mr Fortia at page (150-151) shows that a telephone meeting would take place at 10.am. Mr Reynolds confirmed it took place, but he explained that it was to discuss the Chinese situation and to keep Mr Fortia informed of progress. He denied it in cross-examination discussing what should be done in terms of sanction. However, emails on the 10 September to Mr Fortia and the 13 September present a different picture (148-149). Both emails are however after the Disciplinary Hearing had take place on the 09 September. I deal with the issue of pre-Judgment raised by the Claimant in the conclusions.

The Disciplinary Hearing – 09 September 2016

The notes are at pages (194-199). Of relevance from the notes are the following points: Mr Le Mezec explained in some detail about the seven digit figures being required, the IDEX visit in September, the size of the target for August and the actual orders being nil on his return from holiday. He sets out how critical it was to get the Chang Ying order in, in August. He accepted that the purchase order from ITS had been a crazy idea and Mr Ball had been right to say so.

At page 196, Mr Le Mezec described what happened in the telephone call with Ming Zhao, as he states

“We asked MZ to ask the client to sign the order, but not to date it and a contract was prepared with a typed date on the 31/08.16. The instruction to MZ was to

get the contracts signed by the Client (SFH) and either to leave the date blank or if the Claimant dated it, it needed to be dated the 31 August 2016 even if the Client signed it on the 01 September 2016. SLM did ask for this and give this instruction so if this is the charge, then SLM admitted he did say it.

When Mr Goolam asked the Claimant “do you think it is reasonable to ask the client to do this and backdate the order, the Claimant’s reply was “no I don’t think it was the correct thing to do, but I was under great pressure and I was not thinking then in the way I’m thinking now, I sometimes have crazy ideas.

Mr Goolam asked, “do you think this is unethical and can bring Matcon/IDX into disrepute with the Client, Mr Le Mezec’s reply was this borderline, it wasn’t changing anything for the Client, there was a discount payable to the Client if he signed it by the 31 August 2016. He goes on to say I think now it was a crazy idea to what I instructed.

“Mr Le Mezec explained that his motivation was to make the numbers look better to help the meeting with Idex (197). When he was asked by Mr Goolam should you not lead by example, Mr Le Mezec’s reply was I understand I could hve on reflection of course.

In relation to pressure, Mr Le Mezec explained that he can take pressure, put this one was over inflation and things burst as a result (197)”. (I went beyond where I should have been). Again on page 198, he admitted “if changing the date is the charge then I did do that”.

In explaining why Mr Newbould, a person who was so rule bound had broken the rules, the Claimant responded that it was the pressure to get sales orders in and his desire the help. Further on. 199, the Claimant stated “my head was down, I was chasing the order, I guess I didn’t see what I was doing was incorrect, I should have been more cautious”.

The meeting was adjourned, reconvened and Mr Le Mezec was told the decision would be communicated to him, not that day and probably not personally. The outcome letter is on pages (200-202) and is dated the 20 September. The Claimant was dismissed without notice for gross misconduct.

The dismissal letter sets out that the misconduct was potentially an act of gross misconduct and the band of outcomes range from no action through to summary dismissal. The Dismissing Officer’s recognize that they heard mitigation and considered it in conjunction with the written statements and other documents. Whilst recognizing the Claimants honesty, in accepting that he had made the instruction to Mr Zhao to request at customer to sign and date an order as if it was being completed on the 31 August when it was known that the customer would not do so until the 01 September, that Mr Le Mezec had a number of opportunities to prevent this action being taken or to stop it progressing, but continued.

They found that the charge of falsifying a company record and failing to apply sound professional judgment had occurred. They did not find that the Company had been put into disrepute, but that this could be of future consequence.

The four allegation, the resultant breakdown in trust and confidence was a consequence of the action that Mr Mezec had taken and how they judged the ability of the employment contract to continue.

The letter goes on to state how important compliance was considered to be in the company. Indeed, the letter set out “compliances of the utmost importance, something that is reinforced by the regular training that is a required element of your role”. What also played a part in the decision making was that Mr Le Mezec was “a senior leader upholding the standards is a fundamental matter; one is expected to be a leader of good practice and a role model for others”. Taking all of these points into account, the Managers decided that the above allegations amounted to gross misconduct (201).

Whilst noting in mitigation that the Claimant had failed to undertake ***** their view was in light of his role and level of experience it was not sufficient to mitigate against what he had done. Having decided that there was insufficient mitigation, the letter states “we have decided that dismissal does fall within the reasonable band of responses for the offences” and it was their decision to summarily dismiss him from the company.

This was rather a strange sentence to in a letter of dismissal. It is no usually for the Manager who makes the decision to dismiss to assess their own actions against the band of reasonable responses, but one open to the Tribunal to apply.

The dismissal letter concluded that Mr Le Mezec “did make an instruction to Ming Zhao to request a customer to sign and date in order as if it were being completed on the 31 August 2016 in the full knowledge that the customer could not do so until the following day on the 01 September 2016. This was found to be sufficient to uphold the charge of falsifying a company record and failing to apply sound professional judgment. In fact, it had not been Mr Le Mezec who gave the instruction and what Mr Le Mezec admitted to was that he was accountable for the advice given by Mr Newbould. (199). There is simply no evidence that the Claimant himself had given such an instruction. Indeed Mr Allsop’s investigation report did not find that the Claimant himself had given the instruction, what the report found was that the instruction had come from Mr Newbould and the Claimant did not disagree or stop the advice being carried out. The conclusion that the Claimant had made the instruction is not supported by the evidence which came out in the Disciplinary Hearing or from the investigation itself. Mr Newbould had always accepted he had given the instruction.

The letter also failed to deal in any significant way with the points that Mr Le Mezec was making about the intense pressure he was being put under by Mr Ball.

In his letter of appeal at page 203 – 205 the Claimant sought to make the point that all the Claimant had been seeking to do was as the effective date of the contract was the 31 August 2016 was to give effect to what had been agreed with the customer on the 31 August. He pointed out that there had been no intention on his part mislead, act fraudulently or to falsify records and he did not accept he had done so. He reiterated that he believed what he had done was to ask the Client to reflect the true contractual position.

The Claimant repeated the enormous pressure he had been under from Mr Ball and set out details of it again in his appeal letter.

Mr Le Mezec also pointed out in his appeal letter that whilst the main focus of the investigation into the allegations related to the code of conduct and business ethics, that no point had the company set out what the relevant rules and breaches of that code of conduct were.

Whilst not accepting that he had failed to apply sound professional judgment, Mr Le Mezec states that even if he had not applied sound professional judgment, this would not constitute gross misconduct justifying summary dismissal. He states that he did the best that he could in the circumstances making what he felt to be the right decision at the time.

Mr Le Mezec set out further points in mitigation, his length of good service, bringing in the Nestle orders, his moves on behalf of the company and relocating to the UK and the US and that he had always been honest and upfront in his decisions and actions.

In fact the appeal was heard by Mr Mike Buxton and Mr Cuttell. I have only heard evidence from Mr Cuttell. They met with the Claimant on the 06 October 2016, the notes of that meeting are at pages (207-212).

Mr Le Mezec explained to the two Managers the order book situation at the time, that the Idex visitors were due in September, that there was no personal benefit to him and that Mr Ball needed the figures and numbers.

When Mr Le Mezec was asked why there was a recommendation to sign and date differently, his reply was that he sought guidance from Dave Newbould, further on in the appeal meeting (210) Mr Le Mezec explained again the pressures he had been put under.

On page 213, when questioned, Mr Le Mezec accepted that with the benefit of hindsight, he has reconsidered and perhaps would view the position differently, as he stated, the order should have been booked into September (213).

Having spoken to Mr Le Mezec, Mr Buxton and Mr Cuttell met with Mr Goolam. 216.

Mr Goolam sets out his view of the situation mainly indicated that the situation came down to compliance knowing and understanding the rules about the Order then compliance (DN) coming up with a way around the system (IG) indicated that (SLM) was essentially looking to (DN) to tell me what to do in order to make this go through, implied a pressure to get the order processed”.

When Mr Buxton raised with Mr Goolam about how much a compliance process would ***** into, Mr Goolam indicated there was nothing specific. That is in marked contrast to the amount of reference made by the Respondents to me about the code of conduct. It appears that at the Disciplinary Hearing and in the investigation, the same level of scrutiny and reference was not made by the investigating or dismissing officers.

The interview between the Appeal Officers and Mr Reynolds took place on the 11 October 2016.

Mr Reynolds made the following pertinent points:

- “The pressure during the month did not appear to be any different than other months”.

Mr Reynolds confirmed that legal advice had been sought and that it came down to misconduct

- “It was clear that (SLM) gave instruction to change the date to the customer and to the team (RR) believed that (SLM) was intent on finding a way around the rules. Dave was complicit and gave the advice on what to do to (SLM)” (217)
- It seems that Mr Reynolds was actually giving advice to Mr Buxton and Mr Cuttell – the notes record “may not change the outcome (PC – in terms of the discipline approach), but maybe the punishment may be different. Consideration needs to be about setting an example for all”. Mr Reynolds then goes on read extracts about the legal advice that had been sought.

Oddly, there is then a discussion about with Mr Reynolds about an alternative punishment where Mr Reynolds confirmed that a final written warning may not be enough (219).

It seems that what should have been an enquiry by the Appeal Officers into the decision making by the dismissing officers, as indeed it had been with Mr Goolam” when Mr Reynolds was interviewed by them, it changed into him giving them advice about what they could or could not do.

Indeed, it was Mr Reynolds who suggested to Mr Cuttell and Mr Buxton that they interviewed Mr Ball in the light of his challenges to Mr Ball’s evidence. This had not been done in the Disciplinary Hearing stage. The Appeal Officers themselves did not speak to Mr Ball about pressure. They commissioned Anita Soghi to investigate the Claimants allegations about pressure and a copy of her investigation appears at page 224 of the bundle of documents. The conclusion of that investigation appears to be that there was little untoward pressure applied by the Respondent on the Claimant and it seemed that most of the pressure came from the Claimant himself.

The curious thing about the report and investigation by Miss Soghi is that it went beyond what the Claimant was alleging specifically about pressure from Mr Ball and reached conclusions which enhanced the Respondent’s position rather than simply investigating what the Claimant had been complaining about. We know that there was a telephone call with Mr Ball, I do not know what he specifically told Miss Soghi. As Mr Cuttell records in his evidence (everyone who was interviewed was aware of the importance the Respondent places on compliance and the Compliance Team had no associated pressure in relation to sales targets because their performance was not based around numbers) rather than simply investigating what Mr Le Mezec was complaining about in respect of the specific pressure he was put under by Mr Ball, the inevitable conclusion finding about Miss Soghi’s investigation is that it was not even-handed and simply shored up the Respondent’s position at the Appeal stage.

The other point that should be made about Miss Soghi’s investigation is that while it fed into Mr Cuttell’s view, that the Claimant had not been put under undue pressure. Mr Le Mezec was not provided with this Report.

In cross-examination, Mr Cuttell accepted that his view in the Appeal outcome

letter (page 226) “moreover if the Order had been allowed to go through as an August Order, the customer would have gained with a discount of 7% of the Order value, a sum of £21,000.00 which was a clear material deception. Mr Cuttell accepted it was unfair to make such a finding without having put it to Mr Le Mezec at the Appeal Hearing.

The Appeal outcome letter is at pages (226-228) and is dated the 28 October 2016. Mr Cuttell and Mr Buxton upheld the decision to dismiss.

In the Appeal outcome letter, the panel found that the Claimant had changed his explanation in respect of falsifying company records from that which he had said in the Disciplinary Hearing that he had asked the customer to date the contract the 31 August 2016 even if signed on the 01 September and whilst the Claimant was not putting forward a new defence, he did not deny this at the Appeal. What seems to have played a part in the decision was the point about the discount. The Appeal concluded that there was nothing in respect of the allegation to apply sound professional judgment that the Disciplinary Panel had reached was unsound. On the confirmation that the Claimant had asked the customer to change the date of the contract, taking into account the Claimants senior position of responsibility, the Appeal Panel agreed with the Disciplinary Panel that there had been a failure to apply sound professional judgment. Mr Cuttell and Mr Buxton then go on to consider the resultant breakdown in trust and confidence between yourself and the company. The Appeal Panel did not interfere with Mr Reynolds’s decision that this was a consequence of the action the Claimant had taken and how the Respondent judged that to affect the ability of the Employment Contract to continue.

It is also clear from the evidence of Mr Cuttell that the Claimants change in his explanation at the Appeal stage and what was seen as a lack of recognition of wrongdoing at that stage when compared with what had been said at the Disciplinary Panel indicated a breakdown in trust and confidence. This was in fact inaccurate and did not represent the Claimants position at the Appeal, where Mr Le Mezec clearly explained that Mr Newbould confirmed that if a date was applied to the signature, then it should match the effected date.

The outcome letter also dealt with two other matters raised by the Claimant. It is referred to as a further point being the considerable pressure from Steven Ball at the time, but in fact as these Findings of Fact show, the Claimant had raised this early on. The other matter which was raised that the Claimant was contending other contracts had been handled in the same way in the past at Matcon. The Appeal letter deals with the investigation by Anita Soghi, but concludes that the pressure the Claimant experienced could not excuse the decisions he took, or provide sufficient mitigation to change the decision. However, it was stated that the conclusions of the investigation was that there was not a environment of undue pressure.

In respect of the other contracts, the Respondent investigated each one and found no evidence to suggest any of these contracts were handled incorrectly. Indeed, this was recognized by the Claimant in the course of cross-examination that the circumstances in respect of the other contracts were not comparable. This argument has not been pursued by the Claimant in the closing submissions. The Tribunal have heard evidence, particularly from Mr Piepereit about subsequent meetings during October 2016 following the Claimant and Mr Newbould’s dismissals. I make no findings about these meetings as Mr Piepereit

later accepted in cross-examination that if he had had any worries about predetermination, these were allayed by later meetings on the 23 September and the 05 October. There was a later meeting on 31 October following the meeting on the 05 October and a further meeting on the 31 October. I understand we were provided with the evidence of Mr Piepereit for the Claimant to challenge the reason for dismissal. It was put that Mr Ball had said that Mr Newbould and Mr Le Mezec were not coming back and this was a pre-determined position. In the event, the Claimant's arguments on predetermination are not put in relation to events or comments made after the Appeal outcome and I make no findings of fact about these matters.

The final issue which the Claimant contends, should go to the fairness of the sanction is around the treatment of the Chinese employees. The Claimant relies upon the treatment between himself and Ming Zhao. Ming Zhao was the senior manager in China and passed on the advice given by Mr Newbould, the advice/instruction given by Mr Newbould to Robin Chang who in turn passed it on to the customer. Mr Zhao received a written warning. He was not dismissed. The explanation for the differential treatment given by the Respondent is that the Claimant had been the more senior manager and that he was a Chinese employee subject to Chinese law. It is to be noted however that he was equally bound by the ethics code as that is stated to apply globally.

Employment Judge Cocks

Date: 09/03/2018