Case No: 3323446/2021

EMPLOYMENT TRIBUNALS

Claimant: Mrs Tanya Hill

Respondent: Lil Packaging Ltd

HEARD AT: Cambridge: 24 & 25 November 2022

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: In person
For the Respondent: Mr Hale (legal executive)

WRITTEN REASONS

1. I gave oral reasons for my decision at the conclusion of the hearing. Mr Hale requested written reasons. These are produced in response to that request.

BACKGROUND

2. The claimant worked as an account manager for the respondent from 10 March 2014 until her dismissal with a PILON on 1 October 2021.

3. Following compliance with the early conciliation process, by a claim presented to the tribunal on 7 December 2021, the claimant asserted that her dismissal was unfair. Liability is denied. In the grounds of resistance, it is said (amongst other things) that the reason the claimant was dismissed was because the respondent "did not think the claimant had been wholly honest in the handling of the situation which caused the respondents some distrust". It is also said that the respondent believed the claimant had a "clear conflict of interest between her partner and the respondent" and that the respondent was not prepared to risk "the commerciality of the company".

The hearing

4. At the hearing, I was referred to various pages from a 153 page bundle. I heard evidence from the claimant. For the respondent, I heard evidence from Louise Ricketts, head of finance and HR, from Fred Lill, sales director, from Richard Kindell,

head of operations, and from Barry Lill, managing director and brother of Fred Lill. I was also provided with a chronology and cast list.

5. The fact of dismissal was not in dispute. The respondent asserts the dismissal was fair, and was for 'some other substantial reason', namely "a conflict of interest" it was perceived the claimant had between her partner and the respondent.

FACTUAL FINDINGS

Claimant's work

6. The respondent is a family owned business. It is a packaging manufacturer, and produces a variety of products, the 'off the shelf' costs for which can be seen on its website. At all material times, it employed about 85 people. One of the products it produces is a patented 'breeze box', which is a lined cardboard product. One of its two largest customers was Samsung, which generated about £1.2 million in business per annum, and had done so for several years.

7. Until the outbreak of the COVID in March 2020, the claimant worked at the respondent's premises in Huntington. From March 2020, she worked from home, whilst her partner, Mr. James Harley, continued to work on site at the respondent. He had many years of sales experience, and that was the job he did for the respondent. (It was not suggested that he ever worked on the Samsung account.)

8. The claimant worked for a time in the supply chain department as well as, and sometimes instead of, performing her sales role.

9. By July 2021, the claimant worked from home, in her sales role. She had access to at least some sensitive commercial information in that role, though none of the detailed pricing strategy documentation. In respect of the Samsung account, she had no sensitive information. In particular, although she would have known the 'off the shelf' prices which the respondent charged for its breeze boxes, those prices were publicly available on the respondent's website. She did not have details of the specific price Samsung paid in respect of its arrangements with the respondent. Nor did she have access to the breakdown which would have revealed how much profit was made, net and gross, on sales to Samsung.

Mr Harley

10. Mr Harley had also worked for the respondent for some time. Apparently when he joined, he offered the respondent access to a database of his previous employer's customers. This fact did not dissuade the respondent from hiring him. But it meant

the respondent was perhaps more suspicious with him when the events forming part of this claim unfolded.

11. In June 2021, Mr Harley was dismissed for alleged gross misconduct. (It is not suggested that his dismissal had anything to do with misuse of confidential information.) In July 2021, he brought tribunal proceedings against the respondent. Thereafter, on 9 August 2021, he commenced work for Woodway UK Ltd (Woodway), which is a competitor of the respondent -albeit a supplier rather than a producer. He put up details of his new job on his LinkedIn account in mid-September 2021.

12. Mr Hale correctly observed in his submissions before me that if Mr Harley was going to misuse confidential information, he could have done so before he obtained his new job. However, despite the fact that Mr Harley had a long track record in sales, and was therefore very likely to look for a sales job, at no point between his dismissal and mid-September 2021 was the claimant asked any questions about Mr Harley's intentions or activities.

13. On 16 September 2021, a colleague, Anna Desmond, asked how Mr Harley was doing. The claimant said he was "OK and had another job doing what he loves". She did not mention where he was working, and she was not asked. However, she did not give a dishonest answer.

14. On 17 September 2021, Ms Desmond observed that the LinkedIn profile for Mr Harley showed him to be working at Woodway. She did not revert to the claimant about that.

15. The fact that Woodway was Mr Harley's new place of work was something which Nigel Mann, another employee of the respondent, came to know about. In the statement he gave on 27 September 2021 (headed 'Investigation into… a potential breach of loyalty"), he says he talked with the claimant about it. (He does not specify the date.) He asked how long Mr Harley had been at Woodway. She told him, truthfully, it was since August 2021. He allegedly asked questions about whether it would be awkward having two competitors in the same household. (He does not say why he asked this question, or why he would know both might work from home). In reply, she said, amongst other things, Mr Harley was "not silly enough to get sight of our customers and create a conflict of interest". She was (amongst other things) clear he would not have access to "our customers". He opined it was "odd" she did not bring Mr Harley's new job to management attention.

16. Mr Fred Lill became aware of Mr Harley's role at Woodways. He asked the claimant questions about it, too, on 23 September 2021. He said he was pleased Mr Harley had found a new job, and commented that it was "at least not too far a drive every day" to Woodway's Northampton base. He may have been fishing to see if the claimant was going to be truthful in her response. But the claimant answered

straightforwardly. She said he did not have to go to Northampton every day, as he was "home based", or "worked from home". So, once again, the claimant was candid as regards her partner's place of work.

17. Insofar as Mr Lill had concerns at that point, he did not raise them with her. In evidence, he explained this was because he had "lots to consider" and he was "under prepared". He explained in his evidence that the fact both the claimant and Mr Harley were working only or partly from home was the issue, **not** the mere fact that Mr Harley was working for a competitor, because (he said) he knew the owner of the competitor.

18. He did not, though, raise with the claimant the possibility of her working somewhere other than home.

19. On 22 September 2021, Mr Lill left a cordial message on LinkedIn for Mr Harley, congratulating him on his role and wishing him well. He expressed regret that he had not taken "better care of you", and for his "rough-ride" at the respondent. At no point did he suggest that Mr Harley had done anything wrong, or that he had issues as a result of where the claimant and he did their work. When asked in cross examination why he messaged Mr Harley if he had concerns, he said that the message was sent prior to his conversation with the claimant. With respect to him, this does not really answer the question of why he did not raise concerns with the claimant when he spoke with her; or, indeed, with Mr Harley..

Investigation

20. Miss Ricketts returned from some time off work on 22 September 2021, whereupon she was asked to undertake an investigation. (In her witness statement, she says that part of the reason for this investigation was because the company had lost over £1 million worth of Samsung's business. However, both Miss Ricketts and Mr Lill confirmed to me in their evidence that it was not until 30 September that the respondent came to appreciate that it had in fact lost Samsung's business - albeit the respondent knew quite a lot earlier than that date that Woodway was doing some business with Samsung, and albeit it is still not clear how much, if any, of the respondent's 'lost' business Woodway itself obtained in about September 2021.)

21. The claimant was suspended on 24 September 2021, and her computer access was removed. The letter of suspension was written by Barry Lill. In that letter, it is explained that the claimant was suspended pending investigation into allegations of "breach of confidentiality". When the claimant later that day asked for details in respect of that allegation, she was told by him "we have only just started our investigations so don't have all the detail yet". In fact, prior to the investigatory meeting, the claimant was given no detail at all.

22. Miss Ricketts interviewed the claimant on 27 September 2021. In preparation for that interview, she drafted some questions in writing, and at the meeting filled in the answers the claimant had given. In her witness statement, she says that the claimant was “evasive and disengaged”. However, for the most part it appears from the notes that the claimant answered the questions which were put to her, and I accept that was what she did. She explained that she and her partner worked in separate rooms when they were both at home. She stated he did not have access to her computer or her password.

23. I asked Miss Ricketts whereabouts in the notes the claimant is recorded as being, or appearing, “evasive”. She conceded that that could not be seen anywhere particular in the notes. Nor is it recorded that the claimant said “none of your business” in response to a range of questions, as is claimed in Miss Ricketts’ witness statement. Indeed, she is not recorded as having said any such thing, at any time. The fundamental point is that the claimant did not think she had anything wrong, whereas the respondent considered it had been ‘kept in the dark’ by her.

24. At the meeting, the claimant was asked “how Woodway came to find out what prices we were charging a customer to enable them to come in with a quote 30% cheaper”. Her response was “I don't know anything about that”. However, this was perhaps unsurprising given that the customer in question was not named.

25. In her witness statement, Miss Ricketts said she put to the claimant that if she had informed the company of the working arrangements at home, it may have been possible to put some “workarounds” in place, and that it was the “secrecy and evasiveness” that was unsettling. However, none of that appears in the notes she has provided of the investigatory meeting. Certainly, it is not one of her pre-prepared discussion points.

26. When I asked her what workarounds she had in mind, Miss Ricketts explained this referred to the fact that the claimant could have been asked to work in the Huntington offices. But she accepted this was not something which was raised by her with the claimant.

27. In her witness statement, Miss Ricketts asserts that the claimant refused to accept that the circumstances needed “reassurances” from the claimant in terms of confidentiality. This assertion would have been very much more persuasive if the claimant had been offered the opportunity to work in the Huntington offices, but had refused to do so.

28. The notes of the interview record the claimant's contention that another employee had a partner who worked for a competitor without issue. In questioning, Miss Ricketts accepted that was correct. Of course, all factual scenarios are different. But this suggests that such a scenario was potentially capable of management, if dealt with in the appropriate way.

29. After the investigation, the following day the claimant was sent an invitation to a disciplinary hearing on 30 September 2021. The letter explains that the main topics to be discussed were her "failure to inform the company that she was working at home with a direct competitor of the company", and "failing to secure confidential sales information which she had at home including holding sales meetings in her home environment with the competitor there". The last allegation does not make clear precisely what confidential sales information she had not made secure.

30. The following day, after writing an email to explain how she felt "discriminated against" and alleging there was a "slur against my professional character", the claimant attended her GP and received a fit note signing her off work for 2 weeks with stress and an ongoing skin condition. She sent that fit note to Miss Ricketts, asking if the meeting on the following day could be adjourned. Miss Ricketts indicated that the fit note did not say she was too sick to attend a disciplinary hearing. However, she did send a later email indicating that the date could be rearranged, but that in the interim the claimant would only be paid SSP. In response, the claimant said she would attend the following day for the meeting.

31. Later in the day on 30 September, Mr Lill rang an ex-employee who worked at Woodways, Mr Hall, to request the contact details of Woodway's CEO so that he could ask questions about loss of Samsung's business. Mr Lill explained he was unable to get that information. He also explained in his evidence, and I accept, that Mr Hall told him that he had recruited Mr Harley, and that Mr Harley had been hired in order to get new business. He said this meant for him that "the penny dropped".

32. However, he did not ask the claimant questions on that issue at the meeting the following day. (He also did not make any further inquiries of Woodway, insofar as he suspected that the respondent's confidential information had been wrongfully obtained to gain the Samsung business. Nor was any legal action threatened against Woodway or anyone else thereafter. Mr Hall later made a statement for the purpose of these proceedings in which he asserted there was evidence to demonstrate that Samsung work was won by Woodway some time before Mr Harley joined, and that he was not involved in the contract. I do not know if that evidence is right or not. It may not be. But it might have been of assistance, particularly given Mr Barry Lill's reference to "industrial espionage" etc in his note made after the appeal meeting. I will return to this in a moment.)

Disciplinary hearing and dismissal

33. Mr Fred Lill dealt with the disciplinary hearing on 1 October 2021, accompanied by Richard Kindell. The claimant had a work colleague with her, too.

34. Before the meeting, which started at 9:00 AM, the claimant informed Miss Ricketts that she would have to leave for an appointment by 2:00 PM. In her evidence, Miss Ricketts said she passed that information on to Mr Fred Lill and Mr Richard Kindell. However, in their evidence, both those gentlemen confirmed they were unaware of the claimant's prior engagement.

35. At the hearing, mention was made of the company having been undercut by 30% on a "main customer". The customer was not identified in the notes, but in her evidence the claimant confirmed that Samsung was named. The claimant responded to the effect that she could see why that would be a concern. It was not suggested to her that Mr Harley had been responsible for the loss of any business. Nor was it suggested that the claimant might have in anyway been involved in giving information to Mr Harley to facilitate taking Samsung's business. In the light of the limited information she had relating to Samsung, as I have already outlined, it is very hard to see how that charge could have been levelled against her in any event.

36. Mr Lill's evidence was that he did not mention Samsung at all. When I asked Mr Lill why Samsung was not mentioned in the disciplinary hearing by name, insofar as the issue was relevant, he said that the discussion had to be about the claimant.

37. In his witness statement, Mr Lill asserts that the claimant "frustrated all attempts at a meaningful discussion with contradictory statements and the avoidance of questions". But that does is not how the notes read; nor is it how I consider the claimant conducted herself. He says in his statement that the claimant refused to accept the issue of company commercial confidentiality was real. But such a refusal does not appear in the notes, and I accept from the claimant she said no such thing..

38. In his witness statement, Mr Lill also asserts that the claimant had "made no suggestion that a change, for example returning to the office to work, would be considered [by her]". That is correct. But it is also the case that Mr Lill did not himself make that suggestion at any point, for example to see whether or not the claimant would accept it- despite the fact that such an arrangement would (on the respondent's evidence) have been acceptable to the company.

39. Mr Kindell when asked about this in his evidence said that the disciplinary hearing did not get as far as discussion the prospect of the claimant working in Huntington, and that "we'd have looked at options". (In other words, those options were still viable, if

the claimant's attitude was sufficiently constructive.) He asserted that if an employee finds themselves in a conflicting position, the employee should themselves propose a solution. In my judgment, that is not a satisfactory or persuasive assertion. If -as was confirmed by Mr Lill and Mr Kindell to me to be the case- a solution for the company would have been for the claimant to work at Huntington, it ought to have proposed that to her.

40. In her evidence, the claimant confirmed that she would have been "more than happy" to move to Huntington if so required. I accept that evidence. (She also said she would have been content to do a job involving less access to confidential information, such as the supply chain work she had been doing previously.)

41. The meeting concluded at about 11:30 AM, and was due to convene at 1:00 PM for a decision to be given. However, the decision was delayed. This caused the claimant some anxiety, given her prior engagement. The decision was not given until shortly before 2:00 PM. The claimant was keen to leave, but Mr Kindell was equally keen for her to sign off his notes of the meeting (and those of the claimant's companion) before she departed, and said that she should not leave until she had done so. He accepted in hindsight that this may have been unnecessarily stressful for the claimant, and that matters could have been delayed so that she could consider the notes and sign them off later. This concession was, in my judgment, apt – especially given Miss Ricketts had been told about the prop appointment, and in light of the fit note she had provided for the period in question.

42. Mr Lill says in his statement that he found it "implausible" when the claimant said she had to attend an appointment. This was unfair, given that, as I have said, she notified Miss Ricketts of her 2:00 PM appointment, and given that as the meeting started at 9:00 AM, there should have been more than enough time for the meeting to have been dealt with, and for the claimant then to be able to go to her appointment (and if necessary, return after it).

43. I do not think that, objectively viewed, Mr Kindell behaved towards the claimant in the threatening and bullying manner the claimant describes in her 1 October 2021 email. However, I do accept that she felt upset and pressured by being told she needed to sign off the paperwork before she left.

44. Later on the same day (1 October 2021), the claimant was sent a letter of dismissal by Fred Lill. The letter explains, as per the invitation letter, what issues the meeting was called to discuss. But the letter does not actually say what it was the claimant was dismissed for.

Appeal

45. The claimant appealed her dismissal in her 1 October 2021 email. In her appeal, she asks for "actual evidence of the points made in the outcome of disciplinary letter". Such evidence was not forthcoming.

46. The appeal meeting took place on 7 October 2021. Barry Lill dealt with the matter. Miss Ricketts also attended.

47. Prior to the meeting, on 4 October 2021 Mr Lill wrote to the claimant in response to her email earlier that day. Amongst other things, in his letter he explains that "employment law" provides that the company makes decisions "based on reasonable belief not proof". He says "We don't have the proof you are asking for and therefore will not be providing it. Our decisions are based on our reasonable belief of what occurred".

48. That last sentence rather reads as if the outcome of the appeal may have been a foregone conclusion. It may be that the letter was simply not very well phrased. But that part of the letter does not read well. He did not spell out the basis for "our reasonable belief".

49. He also explains in his letter that the company had agreed to rearrange the disciplinary hearing to the following week, but that when the claimant realised that putting in a sick note meant she would be paid SSP, not full pay, she decided to attend. That is right, but it also points to the somewhat hurried nature of the process, especially as the claimant was suspended, and her access to her laptop and work data was removed at that time. So, she posed no ongoing threat.

50. At the appeal hearing, Mr Lill asserts in his statement that the claimant behaved "very aggressively", was unable to accept the reasons for dismissal, and continued to "rehash the same arguments". He said in cross examination there were "no tears" from her -the implication being that she did appear sufficiently upset. (For what it is worth, the disciplinary notes record the claimant as crying in that meeting.)

51. He explained that he asked questions to elicit a response from her, but she "simply avoided" these. Reading the notes of the meeting, that is not how the claimant's answers read. And I accept it also overstates matters by some margin. Plainly, she firmly believed that she had done nothing wrong by not proactively informing the company of Mr Holly's new job at the competitor. She also insisted she did not think there was a risk (because of the safety measures she had in place), that she was a team player, and that she had been loyal for seven years. That is not the same thing has avoiding questions.

52. Miss Ricketts asserts in her witness statement that the claimant denied the need for commercial sensitivity. Such an assertion would, of course, be unrealistic. But Mr Ricketts sensibly accepted that the closest the claimant came to saying any such thing was when she said "I did nothing wrong". in my judgment, that is not the same thing as denying the need for commercial sensitivity at all.

53. Once again, no details or questions relating to Samsung were put to her, if relevant. Nor was the prospect of the claimant returning to the Huntington office to work, rather than working from home, if (as I was told) the danger of home working in the same property as Mr Harley was the primary issue for the respondent.

54. Mr Lill produced some handwritten notes after the appeal meeting, which he gave to the claimant. In those notes, he says that if the claimant had told him at the time that her partner had started working at Woodway, "we would have been able to make changes to your place of work and we wouldn't be in this position". He goes on to say that in the light of the potential for "GDPR breaches" and the loss of a significant customer during the time Mr Harley was working from the claimant's home and place of work, "I have to take into consideration whether this was negligence or industrial espionage. You may be hearing from our solicitors."

55. As I have already said, the claimant did not in fact have any information which would have assisted in winning the Samsung account- and it was not suggested otherwise. So if (as it reads) this was a potential threat of legal action made against the claimant, it was not well founded. And she was, as I have said, asked nothing about it.

56. Following her dismissal, the claimant managed to obtain alternative work within 11 days. A promotion a few months later meant that she had no continuing loss of salary thereafter.

57. Mr Harley's unfair dismissal claim was settled on 19 October 2021.

THE LAW

58. The following principles are material:

    a. When considering whether or not a dismissal was fair for s.98(4) purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of responses reasonably open to the employer. See for example **London Ambulance Service NHS Trust v. Small** [2009] IRLR 563, CA, para 43 *per* Mummery LJ.

b. The same 'band of reasonable responses' test (and prohibition on substitution by the tribunal) applies to the investigatory process adopted by an employer. **Sainsbury's Supermarkets Ltd v. Hitt.** [2003] IRLR 23, CA.
c. As regards that process:
    i. It is incumbent upon an employer conducting an investigation both to seek out and take into account information which is exculpatory as well as inculpatory information.
    ii. Section 98 ERA does not require an employer to be satisfied on the balance of probabilities that the employee whose conduct is in question had actually done what they were alleged to have done. It is sufficient for the employer to have a genuine belief that the employee has behaved in the manner alleged, to have reasonable grounds for that belief, and to have conducted an investigation which is fair and proportionate to the employer's capacity and resources. **Santamera v. Express Cargo Forwarding t/a IEC Ltd** [2003] IRLR 273, *per* Wall J, at paras 35 & 36.
    iii. An employer does not need to pursue every line of enquiry signposted by the employee in the context of a disciplinary process. The question for a tribunal when considering the reasonableness of an investigation for misconduct is not, could further steps have been taken by the employer? Rather, it is, was the procedure which was actually carried out reasonable in all the circumstances? **Rajendra Shrestha v Genesis Housing Association Limited** [2015] EWCA Civ 94.
d. In the event of a finding of unfair dismissal:
    i. If the dismissal was 'procedurally unfair' but the tribunal is satisfied that the employee would or could have been fairly dismissed at a later date or if the employer had followed a fair procedure, this may merit a reduction, of up to 100%, to any compensatory award under s.123(1) of ERA.
    ii. If the tribunal finds that a claimant by their own culpable or blameworthy conduct contributed to their dismissal, compensation may be reduced under s.123(6) of ERA -by as much as 100% in an appropriate case.
    iii. Any basic award also falls to be reduced, by up to 100%, under s.122(2) of ERA if it is just and equitable to do so having regard to the conduct of the employee before the dismissal. (The test is different to that set by s.123(6) of ERA, which requires a 'blameworthy' causal link with the dismissal.)

e. The fact a partner works for a competitor can give rise to fair grounds for dismissal for 'some other substantial reason. It all depends on the facts. See

Talbot J in **Simons v. SD Graphics Ltd** 1980 WL 664427, to which Mr Halse referred me[1]:

"…*it would be quite wrong to try to derive, from the decision of the industrial tribunal and of this Employment Appeal Tribunal, any rule that because two employees form a close relationship or have a close relationship - employees of different companies - where there is confidential information held by each of them, that that would be any reason on its own for causing one of the companies to terminate the employment of that employee. … it is not possible to lay down any general principle as was instanced in the course of the argument and, indeed, as was the subject matter of one of the authorities quoted to us. There may be, and no doubt have been, cases where actual confidential information has been passed by one employee to an employee of another company, and that may be a ground for dismissal, depending on the facts. It may be in other cases that it would be right to investigate whether there was a reasonable belief on the part of the employer that there was a likelihood of such confidential information being leaked to rivals; or, it may be that the information is of such a vital nature that the mere possibility of it might justly cause an employer to dismiss an employee. In between those three examples there may be an infinite gradation of cases*."

APPLICATION TO FACTS

Reason for dismissal

59. I suspect that Mr Harley's tribunal proceedings would not have endeared him to the respondent. However, I do not think (as the claimant suggested) the primary reason for the claimant's dismissal was retaliation for Mr Harley bringing a claim. I say this because otherwise action would probably have been taken against the Claimant at an earlier stage.

60. Any retaliation was more to do with loss of the Samsung account, and the respondent's suspicion that Mr Harley may somehow have been involved in it because he had joined Woodway, who were doing business with Samsung. But I accept that the principal reason for the claimant's dismissal was concerns relating to the claimant and confidentiality in the light of the fact that Mr Harley was working for a competitor, as highlighted by loss of the Samsung account. The respondent did not want to lose more business.

[1] Mr Hale did not produce copies for the tribunal or claimant, but I read the passage in this judgment out to the parties when giving oral judgment.

Fairness of dismissal

61. A primary contention by the respondent was that the claimant had not been honest, Or at least not sufficiently proactively forthcoming, in respect of Mr Harley's move to Woodway. As to this:
    a. An employee is usually obliged truthfully to answer questions reasonably put to them by their employer[2]. But as already noted, when the claimant was asked questions, she gave essentially truthful answers.
    b. I do accept the respondent may have been more amenable had the claimant volunteered the relevant information about Mr Harley earlier on. I also accept that, given what had happened with Samsung, the respondent was suspicious at that time regarding possible "industrial espionage". But I do not consider the claimant was in breach of any legal obligation by not proactively telling her employer where her partner's new job was.
    c. But most crucially of all, it was not the respondent's case that, because Mr Harley had gone to Woodway, the claimant could not continue at the respondent because the potential threat for leakage of information was simply too great. Or, that the claimant may have given Mr Harley information which assisted Woodway in obtaining Samsung's business. Rather, it was that, as Mr Harley was working sometimes at home, it was too much of a threat for the claimant to physically work near to him (i.e. in the same home). And, that such a threat could have been avoided if the claimant had been working elsewhere. (e.g. in the respondent's Huntingdon premises).

62. With these points mind, I make the following observations regarding process and the dismissal decision which go to 'fairness' :
    a. There was no discussion prior to the investigation as to whether or not the claimant would be prepared to move to Huntington.
    b. The claimant was not given a proper explanation as to what the investigation was about. As I have already explained, the invitation letter gave no detail.
    c. The claimant was not, as Miss Ricketts suggests, "secretive", "evasive" or "disengaged". But still, no attempt was made to discuss "workarounds". Instead, the matter progressed as if the claimant had indeed been "evasive and disengaged". But, if a move to Huntingdon would have satisfied the respondent - I was told it would- it ought to have been raised by the respondent.
    d. The disciplinary hearing, which followed very shortly after the investigation, did not give the claimant the opportunity to respond to anything about Samsung in

[2] There are some exceptions to this. See for example **MPT Group Ltd v. Peel**, [2017] IRLR where Mr Edward Pepperall QC, when considering the ambit of the implied contractual obligation to answer questions truthfully as part of the duty of good faith, observed that "*employees are entitled to refuse to answer questions about their private lives*". Of course, the respondent does not explicitly rely on breach of any such duty.

any detail if (which appears not to have been the case) that was an issue *in relation to the claimant.* Nor, once again, was the claimant asked whether or not she would be prepared to return to work at the Huntington offices.

e. The fact that the claimant believed, and therefore said, she had done nothing wrong ought not to have been a determining or important issue unless (which was not put before me) there was any evidence to suggest that she had facilitated loss of Samsung to Woodway, or loss of other business, or unless she was offered, and refused, the move to Huntingdon (or other sensible precautions acceptable to the respondent).
f. Mr Hale put to the claimant in questioning that if she acknowledged the risk and proposed a move to Huntingdon during the disciplinary process, "that could have avoided the dismissal". In my judgment, it was not simply for the claimant to propose a possible move, if that was a solution. The respondent should -even making due allowance for the range of reasonable responses which were open to it- have spelled out its concerns in an open handed way, told the claimant that the only way those concerns would be prevented would be if the claimant moved to Huntington, and offered that as a 'take it or leave it' to her.
g. It is said in respondent's witness statements that the claimant was obstructive during the disciplinary meeting. Although not verbatim, the notes do not support the allegation that the claimant was obstructive and I do not accept she was.
h. I consider that it was inapt to insist the claimant signed off the notes at the end of the meeting, in the circumstances I have outlined. This is the kind of minor detail that would be highly unlikely of itself to render a dismissal unfair. But it did contribute to the overall impression that the respondent was rushing through the process with an outcome in mind.
i. The outcome letter does not explain why the claimant was dismissed.
j. The 4 October 2021 response to the claimant's appeal suggests a degree of pre-judgment on the part of the company.
k. The appeal meeting was dealt with by the same person who had suspended the claimant. Once again, the possibility of a workaround was not raised, and no detail relating to Samsung was put at the appeal hearing, either. If (which I was told was not the case) the claimant was being dismissed on suspicion of some form of 'leakage' to her partner which caused loss of the Samsung business, that ought to have been articulated to her. But it was not.

63. I fully accept how, in some situations, an employer may well consider two people working for competitors in one house is wholly impracticable. And it might well be said that getting the employee to work in an office, rather than home, would not solve the problem. It may very well be within the range of reasonable responses to dismiss in such instance. But, crucially, this was not said to be the case here. It was said in

evidence before me that working from home was the issue and that, had the claimant proposed working at Huntington instead of at home -even at the disciplinary stage- that would be a solution. Therein lies the fundamental weakness with the dismissal. If that was really the respondent's required solution, it should have put it to the claimant.

64. I also understand that if the respondent had reasonable grounds to believe Mr Harley had obtained the confidential information from the claimant and used it to obtain the Samsung work, that may very well have given grounds to dismiss the claimant, even in the absence of 'balance of probability' proof. But the disciplinary process was begun before the respondent apparently found out it lost Samsung's business. The Samsung question was not explored with the claimant in the process. And the claimant's evidence that she had no sensitive information relating to Samsung was unchallenged.

65. I do have some sympathy for the respondent. The background to the dismissal was a major commercial loss, which may have been galling given Mr Harley's recent hire by Woodway. But in the light of the matters set out above, I did not consider that dismissal of the claimant was within the range of reasonable responses open to this employer. It was unfair.

66. Mr Hale did not initially address me on **Polkey** or contributory fault in his submissions. However, I considered both such matters. If, as I found, a fair process would have involved discussion as regards possible safety measures- in particular, moving the claimant to Huntington- and if, as I have found, that move would have been agreed by the claimant and been acceptable to the respondent, I do not think a **Polkey** argument can succeed. Nor, in the light of my findings above, do I consider it can really be said that the claimant was, by way of blameworthy conduct, responsible, in whole or in part, for her dismissal.

67. Remedy was not contentious. A basic award of £3,605; lost earnings of £1,135.80 (net); and lost pension contributions of £34 (net) were all agreed figures. I awarded £400 loss of statutory rights. (The claimant had sought over £2,000. Mr Hale proposed £350.) This yielded a total of £5,174.80.

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26/11/2022

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Employment Judge Michell, Cambridge

JUDGMENT SENT TO THE PARTIES ON

20/12/2022.

N Gotecha

FOR THE SECRETARY TO THE TRIBUNAL