Case No: 1801497/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr P Stanton

Respondent: Dunwood Specialties Limited

Heard at: Leeds via CVP **On:** 1st to 3rd August 2023

Before: Employment Judge Moxon

Representation

Claimant: Mr Rice-Birchall, solicitor
Respondent: Mr Mukherjee, counsel

JUDGMENT having been sent to the parties on 3rd August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

These reasons are supplied at the request of both parties.

Introduction

1. The Claimant joined Dunwood Polymers Services Limited ("DPSL") in 1993 and purchased the company in 1995. DPSL entered a Business Purchase Agreement ("BPA") with Dunwood Specialties Limited ("Dunwood"), the Respondent, and Richard Baker Harrison Limited ("RBH") in July 2021. RBH is a subsidiary of OBG Pharmaceuticals Limited ("OBG"). The purchase price was split between an initial payment of 75% followed by an earn-out of the remaining 25% over the following two years, dependent upon conditions being met. The Claimant's employment TUPE transferred to Dunwood at the time of the BPA.

2. By letter, dated 21st December 2022, The Claimant was informed that he was summarily dismissed for gross misconduct.

3. The Claimant claims that he was dismissed unfairly and that he was wrongly dismissed as there was a breach of contract as he was mot given the notice to terminate to which he was entitled. He was not given a payment in lieu of notice. The Respondent filed a response on 2nd May 2023, resisting the claim.

4. In summary, the Respondent defends the wrongful dismissal claim upon the basis that the Claimant was liable to have the contract ended summarily because of gross misconduct. The Respondent defends the unfair dismissal claim upon the basis that the dismissal was motivated by a desire to prevent him from securing the earn-out.

The hearing

5. At the outset of the hearing I had before me a 296-page hearing bundle and a 72-page witness statement bundle. I also had a 22-page '*Respondent's written opening*' provided by Mr Mukherjee.

6. The witness statements relied upon by the Claimant were from himself and his wife, Mrs Heidi Stanton.

7. The witness statements relied upon by the Respondent were by the following:

    a. Philip Didlick, Group Chief Operating Officer of OBG;
    b. Brendan Pope, Managing Director of RBH;
    c. Stacey Turner, business administrator whose employment with DSL was TUPE transferred to Dunwood in August 2021; and
    d. Martin Kaufman, Executive Chairman of RBH, who joined upon RBH acquiring his company.

8. Mr Rice-Birchall applied to rely upon a 25-page supplementary bundle and a supplementary witness statement from the Claimant, which related to the BPA and negotiations to vary the agreement. He argued that the documents were relevant as they related to the purported motivation for dismissing the Claimant.

9. I rejected Mr Mukherjee's objections that they were not relevant. I concluded that they were potentially relevant and that it was in the interests of fairness to admit them. Whilst Mr Mukherjee had previously had sight of the documents, I offered to stand the matter down for him to consider them further, which he declined.

10. The Claimant also sought to rely upon a recording and transcript of a telephone conversation between himself and Mr Didlick that had taken place on 27th September 2022. Mr Mukherjee confirmed that he had no objection to the late admission of that evidence and that he had included the transcript within a further supplementary bundle, which also contained further evidence relied upon by the Respondent. That supplementary bundle contained nine pages, which included the aforementioned transcript and details in relation to the ordering of a product called Emupol.

11. Mr Rice-Birchall told me that he had not agreed to the admission of the documents as the Respondent had opposed the admission of the Claimant's additional evidence. He confirmed that he had no objection to their admission. I concluded that it was fair to allow the evidence to be admitted given that they had been considered by Mr Rice-Birchall, their admission was not expressly opposed and they related to a potentially relevant matter in issue.

12. I heard oral evidence from the six witnesses named above.

13. I heard closing submissions from Mr Mukherjee, supported by a 23-page '*Respondent's closing submissions'*, and from Mr Rice-Birchall.

Issues

14. The following issues were agreed with the parties at the outset of the hearing:

    1) What was the principal reason for the Claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The Respondent asserts that it was a reason relating to the Claimant's conduct and / or some other substantial reason.

    2) If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that misconduct as a sufficient reason to dismiss the claimant? In particular the tribunal will consider whether:

        i. there were reasonable grounds for that belief;
        ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
        iii. the Respondent otherwise acted in a procedurally fair manner;
        iv. dismissal was within the range of reasonable responses.

    3) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed.

    4) Did either the Claimant or the Respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and, if so, should any adjustment be made to any compensatory award and, if so, to what extent.

    5) Was the Claimant wrongfully dismissed. Was he given appropriate notice of dismissal or, alternatively, did he commit a repudiatory breach so that the Respondent was entitled to treat his employment as summarily terminated.

The law

15. A wrongful dismissal arises where an employer terminates the contract of employment without giving notice of termination. If notice of termination is not given, a breach of contract arises, unless the employer was entitled to terminate the contract without notice as a consequence of a repudiatory breach by the employee. The burden is upon the employer to show, upon the balance of probabilities, that the employee was in repudiatory breach by acts of gross misconduct such that the employer was entitled to treat the employment as summarily terminated.

16. Upon the unfair dismissal claim, here is no dispute that the Claimant was dismissed by the Respondent. The Respondent must show that it had a potentially fair reason

for dismissing the Claimant, pursuant to section 98(2). The Respondent relies upon the Claimant's conduct as the permitted reason for the dismissal.

17. In conduct dismissals, the guidance in *British Home Stores Ltd v Burchell* [1978] IRLR 37 applies. I must decide whether the Respondent had a genuine belief in the Claimant's conduct; whether the Respondent held such genuine belief on reasonable grounds and reached that belief after having carried out a reasonable investigation. The objective standard of the reasonable employer must be applied to all aspects of the question of whether an employee was fairly and reasonably dismissed. The question is whether the employer's belief, investigation and decision to dismiss fell within the band or range of reasonable responses which a reasonable employer may have adopted.

18. If the Respondent shows that it had a potentially fair reason for the dismissal, I must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

19. Section 98(4) provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

20. It is immaterial how the I would have handled the events or what decision I would have made, and I must not substitute its view for that of the reasonable employer.

21. If I find that a dismissal was unfair on account of procedural unfairness, I may reduce any compensatory award to reflect that the employee may have still been dismissed had the employer acted fairly (known as a *Polkey* reduction following *Polkey v AE Dayton Services Limited (1988 ICR 142*). When applying Polkey, I must consider whether the employer could fairly have dismissed and, if so, what were the chances that the employer would have done so. I am not required to decide the question on balance of probabilities. I am required to assess the chances of what this employer would have done had they acted fairly (*Hill v Governing Body Great Tey Primary School [2013] IRLR 274)*.

<u>Factual background</u>

22. DSL had been a small organisation consisting of two employees: the Claimant and Mrs Turner. They both TUPE transferred to the Respondent in July / August 2021.

23. Mr Didlick explained that RBH had approximately 45 employees and PBG had approximately 250 employees. There was a Human Resources department with two members of staff.

24. The Claimant's contract of employment with the Respondent included the following pertinent clauses:

"*12.1 You will not (save in the proper course of your duties or as specifically authorized by the Employer) either during the Employment or at any time after its termination (however arising) directly or indirectly:*

12.1.1 use any Confidential Information;
12.1.2 disclose or permit the disclosure of Confidential Information to any person, company, or organization whatsoever; or

12.1.3 make or use any Copies.

12.2 You are responsible for protecting the confidentiality of the Confidential Information and shall:

12.2.1 use your best endeavours to prevent the use or communication of any Confidential Information by any unauthorised person, company or organisation; and

12.2.2 inform the Employer immediately upon becoming aware, or suspecting, that any such person, company or organisation knows or has used any Confidential Information.

…

16.1 The Employer is under no obligation to provide you with work and may (if either party serves notice to terminate the Employment or if you purport to terminate the Employment in breach of contract) require you not to perform any duties or to perform only specified duties"

25. Clause 22 provides that any notices under the agreement shall be in writing

26. Clause 1.1(d) defined "*Confidential Information*" as including:

    "*details of employees, officers and workers of and consultants to the Employer or any member of the Group, their remuneration details, job skills, experience and capabilities and other personal information*"

27. The Respondent also had an IT Policy which defined many of the terms within the contract, such as "*Confidential Information*". Receipt of that policy was signed for by the Claimant on 6th September 2021.

28. There are numerous allegations concerning the Claimant's behaviour, all of which he resists:

    a. Mrs Turner said that the Claimant had "*struggled to adapt to the new business environment*" and "*it became clear quite quickly that the Clamant had issues with other RBH employees…would get annoyed at people and the new processes*". She said that she often felt like "*piggy in the middle*". She detailed that the Claimant had asked another employee, Tom Lees, to start a project but that Mr Lees had said that he

would have to compile a cost report before starting, and so the Claimant did it himself without a cost report;

b. Mr Didlick and Mr Pope both detailed that the Claimant would often get "*heated*" in meetings and Mr Kaufman also described an occasion of the Claimant becoming "*heated*" and shouting at him. Mr Pope said in his oral evidence that he sought to discuss this formally with the Claimant, who was not receptive. He also sought advice from the Human Resources department;

c. Mr Kaufman said that in early 2022 there was a work event where the Claimant made an inappropriate comment to a female member of staff. In his oral evidence, Mr Kaufman accepted that he could not recall what the comment had been as he had been drinking that evening;

d. The Respondent witnesses said that an employee, Mr Nick Shilton, had resigned from the organisation and, during his exit interview with Mr Pope, said that the Claimant was one of the reasons for leaving. He has since returned to the Respondent's employ; and

e. Mr Didlick said that on the evening of 16th March 2022 the Claimant made a comment about Mr Cicognani, who had left his role as managing director upon being diagnosed with cancer. The Claimant said that the diagnosis may have been deserved because of the way that Mr Cicognani had treated him. Mrs Stanton had been present for part of the evening and said that such comment was not made. When that was put to Mr Didllick, he replied that it had occurred during one of the parts of the evening where he and the Claimant were discussing matters in the absence of Mrs Stanton.

29. There was an email from Mr Cicognani on 23rd September 2022 reminding employees to record any process quoted to customers on the "*CMR account*". The Claimant replied to all to say "…*a little training would be helpful. Also it would be useful if I could get onto the system….This email has come out of the blue and to be quite honest is more than a little disappointing when a simple phone call would stop any misunderstanding. I am on a none working day, please can you restrict any chastisements, valid or not, to a day when I will give it my attention*". Mr Didlick emailed the Claimant to ask him not to copy large parts of the business and added: "*There is currently a change of working for all concerned but this communication is not how we demonstrate respect for each other*". The Claimant replied in agreement but added: "*I am trying very hard to integrate into the new environment but the tools I have been given don't work and communications are poor until it comes to negative messages or criticism, received that is!*"

30. It was argued by some of the Respondent witnesses that the Claimant had not adhered to the company expenses policy and would often be accompanied by his wife on work trips. The Claimant said that his wife would administer his expenses and ensured that any costs relating to herself were not claimed. Mr Pope accepted that no documents related to expenses had been included within the evidence. I note one email, dated 13th April 2022 from Mr Pope, expressing dissatisfaction that the Claimant had expensed a meal with his lawyer.

31. Mr Pope also made allegations about the Claimant misusing his days in lieu and was having more days in lieu than authorised, although he again conceded that there was no documentation relating to this. The Claimant contended that, as he worked part time and was often required to work on his non-working days, he regularly and genuinely accrued days off in lieu.

32. There are also allegations that the Claimant provided sensitive company information to a competitor to allow that competitor to undercut the Respondent. However, that allegation was never investigated and presented as speculative. In any event, Mr Mukherjee accepted that the suspicion came to light after the Claimant's dismissal and so could not be accounted for as a reason for the fairness of the dismissal. Further, he accepted that the Claimant was not dismissed due to behaviour, but that his behaviour gave context to the relationship between the Claimant and Respondent. This contributed to the Respondent's decision to seek re-negotiation of the BPA to secure an earlier departure of the Claimant from the business.

33. The Claimant maintained an intranet, which he had used at DSL, which contained historical sales data and was updated by the Claimant with sales data from RBH.

34. On 12th January 2022 the Claimant sent an email to Mr Cicognani, the managing director of RBH at that time, and copied Mr Pope and Mr Didlick, in which he said:

    "*I have attached a copy of Aug 21 – Dec 22 sales from DPSL intranet and as you can see I am reporting £165k [gross margin] for the 5 month period*"

35. Mr Cicognani replied to the email the following day to thank the Claimant for his notes.

36. Mr Didlick and Mr Pope said that they had not known of the Claimant's intranet and do not always read emails in which they are copied.

37. In was discovered, on 3rd March 2022, that the intranet had somehow become accessible to the public. Mr Pope said that the Respondent's IT director had investigated the matter and had sent an email with his findings, but he does not know whether a report was compiled or the findings shared with the Claimant. Mr Pope said that the Claimant was responsible for the data being made publicly accessible and that it was his responsibility to block transmission.

38. The Claimant said, in his witness statement:

    "*Following the acquisition, DPSL transferred the website and product selector to OBG and it appears that they did not change the IP address and Domain Name System (DNS) for the product selector from the DPSL Server. Because of this, Web Traffic to the product selector found its way to the DPSL Intranet server, and because we had removed the product selector, the port forwarding found our default website which was our internal Intranet.*"

39. The Claimant was notified of the issue by e-mail at 10:40am on 3rd March 2022 and he sent an email to his own IT consultant at 11:40am the same day asking "*Can you have an urgent look at this pls?*". The following day the Claimant notified the Respondent that there had been a problem with the "*authentication module*" and that the intranet was now offline.

40. On 16th March 2022 Mr Didlick asked the Claimant to sign a letter arising from the data breach, which said:

    > "*We now understand that you have access to confidential financial information and data belonging to the Company, which you have been saving and storing on your personal intranet system…We understand that the website link has since been taken down and is no longer available to access on the internet…..We had no knowledge until this incident that you were saving this confidential information and data onto your personal system…At this stage, we do not propose to take this incident any further*."

41. The letter then asked the Claimant to sign to confirm, amongst other things, that he had deleted the data.

42. The Claimant replied that he would forward the letter for his lawyer's consideration. Ultimately, he did not sign the letter and explained during the hearing that this was on account of the fact that it had wrongly said that the Respondent was not aware that he was maintaining the data and the indication that there may be future action taken.

43. The Claimant sent an email to Mr Didlick on 23rd March 2022 to say that he was no longer populating the intranet and it is "…*no longer active internally*".

44. Between 24th and 28th June 2022 the Claimant was mistakenly given unrestricted access to RBH's '*Essentials*' HR database, which included personal and salary information for all employees.

45. Mr Kaufman said that, on 28th June 2022, he was called by the Claimant who said that he could see the confidential information and that he had seen that Mr Kaufman had not been paid that month. He said that he knew Mr Kaufman's salary. Mr Kaufman said that he considered the conversation unusual enough to make a contemporaneous note upon his iPhone '*Notes*' application, which detailed the time, date and length of the call and read:

    > "*He told me he had access to the HR page from day one of his employment, knew all the leavers, starters, wages of all staff. Thought I had left as I was on the leavers list and could see I had no salary for June 2022. Also new my salary and openly admitted would be rude not to snoop about and look at people salaries*"

46. The Claimant accepts that he had a conversation with Mr Kaufman around that time, but denies Mr Kaufman's account of the conversation. It was noted by Mr Rice-Birchall that there is nothing on the '*Note*' to show that it was made contemporaneously. Mr Kaufman, in cross-examination, explained that he had

been able to give the exact time and length of the call on the '*Note*' as it was accessible data off his phone that would only be available for a short period of time.

47. Mrs Turner said that in around June / July 2022 the Claimant called her and told her that he had been into '*Essentials'* and could access all employees' salary information. He said that he could see what people earned and he told her the salaries of employees such as Mr Pope. During her mid-year review, on 26th July 2022, she told her line manager, Ms Smith, about the disclosure. Ms Smith provided a written account to Mr Pope on 28th October 2022, in which she said that Mrs Turner had told he that the Claimant had told her other people's salaries.

48. The Claimant denies having disclosed people's salaries to Mrs Turner or otherwise and contends that he had only told her, in preparation for her mid-year review, that she should not undersell herself.

49. Mr Didlick said that on the evening of 28th June 2022 the Claimant told him "…*that I should be careful how I deal with him because he had been given open access to RBH's "Essentials" system which showed him how much Mr Pope earns, how much Ms Turner earns and how much others in in the business*". The Claimant denies making that comment.

50. The meeting between Mr Didlick and the Clamant on 28th June 2022 was to discuss the variation of the BPA. By email to Mr Didlick on 1st July 2022 the Claimant said that colleagues had asked him questions about how he had taken some news given to him by Mr Didlick. He detailed in the email: "*As far as I am concerned I have not been given any substantive news and my position, until otherwise, is that I will remain for the duration of my contract ie 31st July 2023*".

51. The Claimant was placed on gardening leave, by letter dated 1st August 2022, which referenced clause 16 of the Claimant's employment contract. The letter was signed by Mr Pope. There is no reference in the letter to it being a notice of termination nor is any date of termination provided. No allegations of misconduct or otherwise are included. The Respondent's case is that this letter did constitute a notice of termination, however Mr Pope, in his oral evidence, said that this could not be the case as no decision had been made at that time to terminate the Claimant's employment.

52. During a recorded telephone conversation between the Claimant and Mr Didlick, on 27th September 2022, there was a dispute as to whether a variation of the BPA had been agreed. During that conversation the Clamant asked why he had been placed on gardening leave and Mr Didlick said: "…*because we had agreed that we were going to terminate the employment and do ad hoc consultancy, so its normal if you terminate the employment to go on a garden leave*". The Claimant replied: "*No…part of me selling the company to you was based on two years at circa £50,000 salary a year, a salary*."

53. Mr Pope said that all managers, including the Claimant, required his approval before ordering consignment stock. That is evidenced by an email to Mrs Turner on 11th April 2022.

54. On September 2022 Mr Pope discovered that £233,357.42 worth of a product called Emupol had been ordered on 8th April 2022 and 12th May 2022 from a supplier called '*Kemiteks'*. He outlined that Emupol is a seasonal product which tends to be purchased by the Respondent's customers in January to March. The product has a one-year shelf life. Despite efforts to mitigate the loss, the consequence was a loss of £40,000 to Dunwood. I was told that Dunwood's profit that year had been £184,000 before tax and £130,000 after tax. RBH's profit was £1.17m before tax and £984,000 after tax.

55. The Respondent asserts that the Claimant had been responsible for the purchase of the Emupol. Mrs Turner said that he would direct her by telephone what to order. Mr Pope said that he had heard these conversations in the past and it was known that this was how they worked.

56. Mr Pope emailed Mrs Turner on 13th December 2022:

> "*I assume Peter* [the Claimant] *would have approved the ordering of this stock at that time in order to go ahead? Please can you search your emails and forward me any emails where he has provided his approval to place the orders*"

57. Mrs Turner replied by email on 14th December 2022, stating:

> "*I have checked my emails and I have nothing from Peter re these orders. Peter & I discussed what needed ordering on the telephone rather than emailing backwards and forwards*."

58. The Clamant, and other employees from the Respondent, had travelled to Turkey to visit the supplier, Kemiteks, in May 2022 and the Claimant and his wife remained as guests of the Kemiteks owners, with whom the Claimant had built a good relationship over a number of years. His Microsoft Outlook calendar shows that he had meetings with Kemiteks on 10th March 2022, 28th April 2022 and 10th May 2022.

59. Mr Pope said that, as a consequence of the overordering of Emupol, he decided to dismiss the Claimant for gross misconduct. He sought advice from the Respondent's lawyers, but not the HR department. He accepted that there was no disciplinary procedure undertaken, although he is aware of the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code").

60. The letter of termination, dated 21st December 2022, said:

> "*We are writing to confirm that your employment is being summarily terminated with immediate effect. The relationship between you and the Company has irreparably broken down, you have breached your fiduciary duties to the Company and the Company no longer has any trust and confidence in you.*
>
> *In particular:*

1. *You purchased significant quantities of Emupol xs costing the Company £223,357.42. You had no authority to make these orders in such volumes. You did so at the wrong time of the season and without a contract in place with an end user. The client that usually places an order for the product made an order with a competitor this year. As such, the Company has been left with significant stock levels that it could not sell. In light of this, the Company will make a significant financial loss on the stock as a result of steps to mitigate the loss as best as possible.*
2. *You saved company confidential information and data onto your personal intranet system.*
3. *You caused confidential information to be exposed to the public internet as a result of a website link connected to your personal intranet system.*
4. *You refused to provide the reasonable confirmation asked of you in the letter from the Company dated 17th March 2022.*
5. *You have used confidential salary information for non-business purposes and which destabilised the business, by telling a number of employees what other employees earned.*
6. *You have not acted in the best interests of the Company wen working with employees and the Company has concerns that you do not adhere to best practice in carrying out your duties*."

61. The letter did not provide a right of appeal.

Findings of fact

62. I am satisfied that, perhaps unsurprisingly, the Claimant struggled to adapt from being the owner of a small business to being an employee within a larger company. That is clear from some of the email correspondence early after the purchase, which is consistent with Mrs Turner's analysis of the circumstances.

63. I do not accept that he made an inappropriate comment to a female employee, given that the only evidence is from Mr Kaufman who accepts that he was in drink and cannot recall the nature of the comment. Without evidence of what was said, I cannot determine whether it was inappropriate. I do not accept that the Claimant acted inappropriately towards two employees: Mr Shilton or Mr Lees, as I only have second hand accounts and have not heard evidence from those employees. I do not have, for example, a copy of Mr Shilton's exit interview. I do not accept that there were any improprieties in relation to lieu days or expenses claims. This is upon the basis that there is a lack of any documentary evidence about this to support any concern that the Claimant was not fulfilling his contractual hours or that he was breaching the expenses policy, save for perhaps one occasion when he billed for a lunch with his lawyer.

64. I do, however, accept that the Claimant was often disparaging about his colleagues and was often heated in meetings. To that end, I accept the evidence from the four Respondent witnesses who have all given a consistent account of this behaviour. I accept that he made an inappropriate comment to Mr Didlick in March 2022 about Mr Cicognani's cancer diagnosis. I found Mr Didlick to be consistent in his account. The fact that the comment was not heard by Mrs Stanton is not material as she is not said to have been present at that time. For reasons outlined later, there are

features of the Claimant's evidence that I have rejected which undermines his credibility and so I prefer the evidence of Mr Didlick in that regard.

65. The Claimant's general behaviour was such that Mr Pope considered it serious enough to formally speak to the Claimant about it and obtain advice from HR, but appears not to have been serious enough to initiate any disciplinary proceedings or to have been a reason for his ultimate dismissal.

66. The Claimant had a personal intranet in which he stored and inputted sales data. He continued to utilise and update that intranet upon his transfer to the Respondent. It is argued that this was in breach of contract, particularly 12.1.3 which prohibits the copying of company information. However, the contract states that this is permissible if in the proper course of the Claimant's duties. The Claimant clearly thought that it was permissible and did not seek to use the intranet covertly. That is evidenced by the email he sent to Mr Cicognani, in which he copied Mr Pope and Mr Didlick, on 12th January 2022. He was not told in the response not to do so and, in fact, Mr Cicognani thanked him for the contents of the email. There was therefore no breach of contract and, in any event, any breach would have been as a result of a misunderstanding. There is no evidence to indicate that, when he was asked to stop uploading the data, that he failed to do so and he confirmed to Mr Didlick by email on 23rd March 2022 that he was no longer populating the intranet and it was no longer active.

67. In March 2022 the intranet somehow became available to the public. There is a dispute as to who was responsible. I am not an IT expert and cannot make reasonable findings without proper expert evidence. That has not been forthcoming as I have not heard, for example, from Mr Danny Dunwoody, the Respondent's IT Director at the time, nor have I been provided with the outcomes of any investigation. What is apparent is that the timing of the intranet becoming available to the public appears to have coincided with the Respondent seeking to transfer information from the intranet, which leads me to conclude that it is more likely than not that the error was the Respondent's. In any event, I am satisfied that if it became public as a consequence of the Claimant's actions, that this was a mistake. He would not have knowingly made the intranet public as it had the potential consequence of damaging the business and impacting upon his own earn-out. When notified of the intranet being accessible by the public on 3rd March 2022, he emailed his IT consultant an hour later to ask him to "*have an urgent look*". He emailed Mr Dunwoody the following day to say that it had been taken offline. These are the actions of a person who did not know that the information had been publicly accessible until told. I am therefore not satisfied that the Claimant breached either his employment contract or the IT policy. If wrong about that, I am not satisfied that any breach was intentional.

68. The Claimant was given a data breach letter to sign on 16th March 2022. He did not sign the letter. The letter presents as a confession to culpability that the Claimant did not accept, with the ominous comment that "*at this stage, we do not propose to take this incident any further*". Further, it states that the Respondent was not aware that the Claimant had maintained his intranet, which appears to be inaccurate given the contents of the aforementioned 12th January 2022 email to Mr Cicognani, Mr Pope and Mr Didlick. Given that the Claimant did not accept wrongdoing, and given that he does not appear to have been given access to any

investigatory findings from Mr Dunwoody, it was reasonable for him to refuse to sign the document. In any event, he confirmed that the intranet was taken offline.

69. In summary, I do not consider any of the Claimant's actions arising from the intranet data breach to amount to misconduct.

70. It is common ground that, between 24th and 28th June 2022, the Claimant was given access to the HR data for all RBH employees, which included personal information and salary details.

71. I accept the evidence that the Claimant looked at the data and made comments and disclosures about it to colleagues, in breach of clauses 12.1 when read in conjunction with clause 1.1(d) of his employment contract. I note that Mr Kaufman, Mr Didlick and Mrs Turner have all independently said that he made comments to them during the material period. The weight of that evidence outbalances the denials by the Claimant.

72. I accept that the Claimant called Mr Kaufman on 28th June 2022 and told him that he had access to the salary information, including Mr Kaufman's own salary. I found Mr Kaufman's evidence to be compelling and supported by his iPhone note of the conversation, which I accept was made contemporaneously. I accept that Mr Kaufman was "*shocked and appalled*" that the Respondent had allowed the Claimant access to the information and that the Claimant had looked at it and then contacted Mr Kaufman to tell him.

73. I accept that the Claimant called Mrs Turner and told her that he had access to the database and that he knew the salaries of a number of employees, including Mr Pope. I accept her evidence that he told her what those salaries were. I do not accept that Mrs Turner has pursued what would have been a wicked and unnecessary lie about this and I find it far more likely than not that she was telling the truth. The credibility of her account is supported by the fact that she reported it to her line manager during her mid-year review the following month, as evidenced by the written account by Ms Smith. The credibility of the allegation is underscored by my findings at paragraphs 71 and 72, above.

74. I also accept the evidence from Mr Didlick that the Claimant told him on the evening of 28th June 2022 that he had access to the information and so Mr Didlick should be careful of how he deals with him. I note that this gleeful declaration of having access is consistent with the account of Mr Kaufman. I also note that the assertion that he told Mr Didlick that he knew Mr Pope's salary is consistent with the account from Mrs Turner that he told her the same thing.

75. The disclosure by the Claimant of confidential salary information, particularly to Mrs Turner, was a significant data breach and sufficient to constitute gross misconduct. His actions strike at the heart of the trust and confidence essential to the employment relationship

76. By letter, dated 1st August 2022, drafted by Mr Pope, the Claimant was placed on gardening leave. Mr Pope said in his oral interview that at that time there had been no decision to terminate the Claimant's employment and, as such, the letter could not be considered notice of termination.

77. That is further clear from the contents of the letter itself as it makes no reference to termination nor a date of termination. The Claimant's employment contract incorrectly stated that he was entitled to one month's notice, but he remained employed a month after he was sent the letter. He was statutorily entitled to 12 weeks' notice, but he remained employed 12 weeks after he was sent the letter. The cross-referencing to clause 16 was not sufficient to render the letter a notice of termination. Clause 16 states that if either party serves notice of termination the employee could be placed on gardening leave. There was no notice of termination. In any event, clause 16 does not specify that the only circumstance that someone could be placed on gardening leave is if the employment was to be terminated. When he was dismissed, on 21st December 2022, the Claimant was notified that he was summarily dismissed, with no mention of any previous notice of termination, which further undermines any assertion that the 1st August 2022 letter was a notice of termination.

78. I am satisfied that the letter did not constitute a notice of termination, nor was it its intention, given Mr Pope's evidence that no decision had been made at that time to terminate the employment. Whilst there had been negotiations between the Claimant and Mr Didlick, that was about the BPA. The evidence does not support the assertion that Mr Didlick gave notice of termination of employment. Whilst it is asserted that Mr Didlick gave verbal notice of termination, the evidence is unclear as to when this was given and, in any event, the Claimant's employment contract clearly states that notice of termination must be given in writing. As such, I am satisfied that no valid notice of termination was ever given to the Claimant and that his subsequent dismissal was summary and without notice.

79. It appears to be common ground that an unusually large amount of a product called Emupol was ordered by someone at the Respondent in April and May 2022 from Kemiteks and that there was no secured customer for onward sale. The order was for over £220,000 and resulted in a loss to the business of £40,000.

80. The issue between the parties is who was responsible for ordering the Emupol. The Respondent claims that the Claimant instructed Mrs Turner to do so, whereas he disputes this and places blame upon Mrs Turner.

81. I am satisfied that it was the Claimant who decided to order the Emupol and that he instructed Mrs Turner to do so. I found that Mrs Turner was a generally more credible witness, whereas the Claimant had otherwise given evidence denying disclosure of salary details and denying poor behaviour in the workplace, which I have rejected. This taints my view of his credibility. I accept that the ordering instructions would come from the Claimant and that there would be no documentary evidence as his working practice was to mostly give the instructions verbally to Mrs Turner.

82. I accept Mr Pope's evidence that it was known that the Claimant made the decisions on what to order and then instructed Mrs Turner to do so as it was known to be his practice and Mr Pope had himself heard him do so. I do not accept the argument that Mr Pope's email to Mrs Turner on 13th December 2022 undermines his evidence. His phrasing that he presumed that the Claimant had approved the order of the stock is not inconsistent with his evidence that this was the standard

practice. I do not accept that Mrs Turner's response to that email was evasive in any way. She was asked if there was an email trail and she answered to say that there was not and that the Claimant had discussed with her what needed ordering by telephone.

83. I also take into account that the Claimant had profit responsibly for Emupol and that Mrs Turner was his subordinate and held the role of business administrator. It therefore follows that it is far more likely than not that he would be responsible for deciding the level of stock to order and would then instruct Mrs Turner to administer the order. I also note that at the material time he continued to have visits with the supplier, Kemiteks. His Microsoft Outlook Calendar shows that he had meetings with them on 10th March 2022, 28th April 2022 and 10th May 2022. The orders were placed in April and May.

84. I therefore find as a fact that it was the Claimant who was responsible for the overordering of the stock, resulting in a loss to the business.

85. I agree with Mr Mukherjee's analysis that this was reckless. He ordered too much of the product, without the requisite authority, at the wrong time of the season, resulting in a financial loss to the business. I do not find that the overordering was done in any way to sabotage the Respondent's business and I note that it had a significant risk of causing financial detriment to the Claimant himself. Nevertheless, the action amounted to gross misconduct given its consequences. Gross negligence in performance of an employee's duties can amount to repudiatory conduct and I find this to be the case here.

86. The Claimant was notified of his dismissal by letter dated 21st December 2022. That letter gave the six reasons outlined above. The first related to the Emupol order; the second, third and fourth related broadly to the intranet data breach; and the fifth related to the salary data breach. The sixth reason, not acting in the best interest of the company, was not explored in evidence and I consider it to effectively be a sum up of the five other reasons.

87. I am satisfied that the decision to dismiss the Claimant, as communicated on 21st December 2022, was as a consequence of the Emupol order, which Mr Pope, the author of the dismissal letter, genuinely believed had been the Claimant's responsibility. At that time the level of loss to the company was not known but was reasonably believed to be significant. I am satisfied that the Respondent reasonably believed that the Claimant was guilty of gross misconduct. I also find as a fact that this was gross misconduct.

88. Whilst I accept that the breach of confidentiality concerning the intranet was believed by the Respondent to constitute misconduct, and did form part of the reason for the dismissal, I do not accept that this was a reasonable conclusion for the reasons outlined earlier. I do not have evidence to show that the publication of the intranet was the Claimant's responsibility or that it was anything other than a mistake. I have not been given evidence of any reasonable investigation by IT specialists. As outlined above, I do not accept that the updating of the intranet was unknown by the Respondent or that it was unreasonable for the Claimant to fail to sign the date breach letter.

89. I am satisfied that the breach of confidentiality of salary details was also believed to be misconduct by the Respondent and was one of the reasons for dismissal. It was plainly inappropriate for the Claimant to tell people that he had access to their salary details and then to tell Mrs Turner the salary details of other people. Whilst I do not accept the Respondent's assertion that the Claimant had sought to destabilise the business, as that would have been contrary to his own interest given the BPA, I am satisfied that his actions had the real potential of destabilising people and accept Mr Pope's written assertion that salaries are "*an extremely emotive subjec*t". I am satisfied that the Respondent reasonably believed that the Claimant was guilty of gross misconduct. I also find as a fact that this was gross misconduct for the reasons already given.

90. Whilst Mr Pope told me that he was aware of the ACAS Code of Practice, he failed to adhere to any of its guidelines. Despite the Respondent having a HR department, Mr Pope did not seek their advice and instead spoke to lawyers.

91. The investigations into the Claimant's failings were rudimentary. There does not appear to have been an investigation officer appointed and written accounts were not obtained by witnesses nor an investigation report prepared. There is no IT report about the intranet data breach. Fundamentally, the evidence against the Claimant was never put to him and he was never asked to respond or give an explanation. He was not invited to an investigation interview or a disciplinary hearing. No disciplinary hearing took place. He was not given any right of appeal against the dismissal.

92. Given the size of the Respondent, and the fact that it has a HR department, the failure to undertake any adequate investigatory or disciplinary process was unfair.

93. However, the evidence against the Claimant in relation to the Emupol order and the breach of confidentiality relating to salary details was compelling. The Claimant's response to those allegations was to deny responsibility. It is likely that his response would have been rejected had a fair procedure been undertaken, as I have rejected it today. It is therefore far more likely than not that, had a fair process been undertaken, the Claimant would nevertheless have been dismissed for gross misconduct.

94. I do not accept the submission that it would have been 100% likely. In relation to the breach of salary details, consideration would have had to be given to the fact that the Claimant had not sought to access the information inappropriately but had been given access. He had notified the Respondent of the matter. A proper and reasoned consideration would have to be given to his motives. In relation to the Emupol order it would have to be considered that the failure was reckless, albeit the failure to obtain authorisation was deliberate. At the time of dismissal the losses were not calculated and a proper investigation, and the passage of time that would have taken, may have resulted in the level of loss being known rather than speculated upon. It would have to have been considered that whilst, the subsequent losses to the business were significant, in the region of £40,000, this was within a large and profitable business. Consideration would have to have been given to the Claimant's continuous period of employment, which was almost 30 years.

95. None of those potentially mitigating features appear to have been considered by the Respondent when they made the decision on 21st December 2022 to summarily dismiss.

96. Whilst finding that the probability of dismissal following a fair procedure would have been extremely high, I do not accept that it was 100%. I assess it as 80%.

97. It was not argued there would have been delay in the dismissal had a fair procedure had been undertaken, nor were any of the Respondent witnesses questioned in that regard.

Conclusions

Wrongful dismissal

98. I do not accept that the Claimant was given notice of dismissal. He was summarily dismissed.

99. I do find as a fact, upon the balance of probabilities, that he breached the contract of employment having committed gross misconduct in relation to the Emupol order and the breaching confidential information relating to salary.

100. It is not argued by the Claimant that the Respondent affirmed the breach and such argument would not have merit. To the extent that any investigation was undertaken by the Respondent, it continued until 13th December 2022 when Mr Pope emailed a query to Mrs Turner. The dismissal was only eight days later.

101. The Respondent was entitled to terminate the employment contract without notice. The claim for wrongful dismissal therefore fails.

Unfair dismissal

102. I accept that the Respondent believed the Claimant to have been guilty of misconduct in relation to the Emupol order and the salary data breach. It had reasonable grounds for that conclusion. It would have been reasonable to dismiss the Claimant as a consequence of that misconduct had a fair procedure been followed.

103. The dismissal was unfair, however, as a consequence of the Respondent's failure to follow a fair procedure.

104. The claim for unfair dismissal therefore succeeds.

105. However, I have found that there was an 80% chance of dismissal had a fair procedure been undertaken and so I reduce any compensatory award by 80% under the *Polkey* principle.

106. Given the failure to adhere to the ACAS Code, I uplift the resulting compensatory award by 25%. The ACAS Code was not followed at all, despite the Respondent being a reasonably large organisation with a HR department. It therefore follows that the maximum uplift is appropriate.

Remedy

107. Mr Mukherjee indicated that there would be no challenge to the basic award. He did not argue that it should be reduced due to blameworthy conduct and, given that both parties were professionally represented, I did not consider it appropriate to interfere with elements of the case that they had agreed. Mr Mukherjee claimed that there would be a challenge to aspects of the compensatory award. He confirmed that it was not being argued that the Claimant could have reasonably mitigated his loss in the period between termination and the start of the hearing. However, he argued that there should be no award of future loss as the Claimant had always intended to leave the employment at the end of the BPA period on 31st July 2023, which in fact coincided with the start of the hearing.

108. The Claimant was re-called to give evidence on that narrow issue. He said that, in light of the restrictive covenant on future employment for 12 months after leaving the Respondent, he would have probably extended his employment. Whilst the BPA expired on 31st July 2023, there was no end date specified for his employment contract.

109. I do not accept the Claimant's evidence. By email, dated 1st July 2022, he made it clear to Mr Didlick that he intended to leave the employment on 31st July 2023. He made similar reference to working for the Respondent for two years from July 2021 within the telephone call to Mr Didlick on 27th September 2022. When initially questioned by Mr Mukherjee during the liability stage of proceedings, the July 2022 email was put to him and he was asked if he intended to remain until July 2023 and he answered "*correct*". It was put to him that his position was that he would have left on 31st July 2023 and he replied "*I have no issue with that*". It was put to him that he was being questioned on 1st August 2023 and that by that date he would have left and he replied "*yes*". I reject his assertion now that he intended to remain with the Respondent after that date under the employment contract. Whilst he may have sought to remain as a consultant, that would have been a different contract and dependent on it being successfully negotiated. I therefore limit the compensatory awards to 30 weeks, which is from the date of termination to the date of hearing, and do not award anything for loss of earnings after 31st July 2023.

110. The only other area of dispute was in relation to an award for loss of statutory rights. The Claimant claimed £1,000 whereas Mr Mukherjee argued £350. I considered the appropriate amount, having had regard to the Claimant's length of employment, was £500, which is the higher end of what is commonly awarded by Tribunals for loss of stator rights. I determined that the higher amount was appropriate in light of the Claimant's length of service.

111. The sums for loss of earnings, loss of pension and loss of car allowance were agreed between the parties.

112. The remedy was therefore calculated as follows:

Basic award

1. The respondent shall pay a basic award of £19,290.

Compensatory award

2. The respondent shall pay a compensatory award of £7,785.16, consisting of the following:

Loss of earnings:	£24,890.67
Loss of statutory rights:	£500
Loss of pension:	£2,626
Loss of car allowance:	£3,125.10
Total:	£31,140.67

3. There shall be an 80% deduction from the award under the principles in *Polkey v AE Dayton Services Limited*.

   £31,140.67 reduced by 80% = £6,228.13

4. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. The award will be increased by 25%.

   £6,228.13 plus 25% = £7,785.16

Total

5. The respondent shall pay the basic and compensatory awards to the claimant in the aggregate sum of £27,075.16 (£19.290 + £7,785.16)

Employment Judge **Moxon**

Date: 14th August 2023

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