Case No. 1303258/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr A Billingham

Respondent: EMKA (UK) Limited

HELD AT: Birmingham (via CVP) **ON:** 16th & 17th October 2023

BEFORE: Employment Judge Anderson

REPRESENTATION:

Claimant: Ms Van Den Berg (Counsel)

Respondent: Mr Rozycki (Counsel)

RESERVED JUDGMENT

1. The Claimant was unfairly and wrongfully dismissed.

2. Findings relating to Polkey and Contributory Fault are contained within the reasons below.

3. Within 30 days of the date on which this Judgment is sent to the parties, the claimant must write to the Tribunal, copying in the Respondent. That correspondence must state either a) a remedy hearing is required or b) that remedy has been resolved and no further hearing is required and that the file may be closed.

REASONS

Introduction

1. The Claimant, Mr A Billingham brings claims of unfair and wrongful dismissal against his former employer EMKA (UK) Limited.

Procedural Matters

2. Both parties were represented by solicitors and counsel. There was no pre-agreed list of issues.

3. After discussion, it was agreed that the issues were as follows:
    a. Dismissal – In order to determine the issue of dismissal, it is necessary to ask 'who really terminated the contract of'… employment?
    b. If the Claimant was dismissed, is the Respondent able to prove that he was dismissed for a potentially fair reason, namely conduct?
    c. Did the Respondent hold a belief in the guilt of the Claimant and hold that belief on reasonable grounds?
    d. Did the Respondent undertake such investigation as was reasonable in all the circumstances of the case,
    e. Was the decision to dismiss within the range of reasonable responses open to the Respondent?

4. In respect of wrongful dismissal, the issues were agreed as follows:
    a. Is the Claimant able to prove that he was dismissed?
    b. If the Claimant was dismissed, is the Respondent able to prove that the Claimant committed an act of gross misconduct so as to be in repudiatory breach of the contract of employment?

5. The parties also agreed that the Tribunal would consider Polkey and Contribution, if appropriate.

6. During the course of the hearing, I raised with the parties the applicability of s.111A Employment Rights Act 1996 and the associated ACAS Code. This gave the parties

the opportunity to make submissions on its applicability. It was common ground that the issue affected the unfair dismissal claim only, not the wrongful dismissal claim. I have therefore made my findings of fact and will deal with admissibility as part of my conclusions.

7. As dismissal was in issue, it was agreed that the Claimant would give evidence first.

8. The hearing took place by way of CVP. During the course of the hearing on day one, there were some sound problems and on each occasion extra time was taken to ensure that matters were repeated properly so that all could hear.

9. There was an agreed bundle of documents. The Claimant called himself as a witness. The Respondent called Mr Borge-Sanchez, Mr Tigges and Mr Hunn. All witnesses provided witness statements and were cross-examined.

Findings of Fact

10. I made the following findings of fact on the balance of probabilities.

11. I begin with the following observations relating to credibility.

12. I found the Claimant to be relatively straightforward in his evidence, generally seeking to answer the question asked. I considered that I could generally rely on what I was being told, but more so where there was corroboration in some form.

13. It is fair to say that the Respondent's witnesses were naïve as to their obligations under UK employment law and were not familiar with general processes or concepts and had difficulty in engaging with these points. There were also common problems with key conversations or points omitted entirely from their witness statements, which

were then relied upon in oral evidence. Where an internal communication was potentially prejudicial to the Respondent's position, this wasn't explicitly referred to or dealt with. This in turn had the added effect of making the fact finding process more laborious.

14. The Respondent UK Company (EMKA (UK) Limited), is in turn owned by EMKA GmbH, a German Group Company. The Group sells locks latches hinges and seals housed in switch and control cabinets. The Group operates worldwide. I am told that there are around 2100 employees worldwide of which around 13 are employed in the UK Company.

15. The Claimant commenced employment on 1st November 1991 as an External Technical Sales Engineer. Through the years, the Claimant was internally promoted on a number of occasions. In March 2005, he became the Manager of the UK Company.

16. The Claimant's most recent contract was entered into in August 2017. That contract is in a style more indicative of a German style employment contract. The contract contains an express nine month notice pay clause.

17. The contract contains an express clause staring that the implantation of the contract shall be governed by German law. The Jurisdiction clause attaches to the location of the Company registered office. No party has sought to raise any question of jurisdiction or interpretation based upon these clauses.

18. In respect of the Respondent witnesses, Mr Hunn joined the Group Company in November 2021 as Sales Director Central and SW Europe. Mr Borge-Sanchez previously worked for the Group Company between 2008 and 2012, returning in

March 2018 with the position of Director Sales Export. Mr Tigges commenced employment with the Group Company in January 2020 as Head of Controlling.

19. It was the responsibility of Mr Hunn as Sales Director Central and SW Europe to monitor stock levels and sales figures across his designated region. Mr Hunn joined in November 2021 and was keen to gain a greater understanding of the business operations within his region. He began to email the Claimant with general questions. He also sent questions to other Managers in his region. Mr Hunn describes 'ambitious sales targets' being implemented by the Group and he wanted to understand the strategies that were in place to achieve these targets.

20. Mr Hunn describes himself as concerned with the level of feedback that he received from the Claimant. He felt that the Claimant could have answered questions more fully, particularly with regard to stock levels. On the 21st February 2022 and thereafter, further emails were sent to the Claimant and further discussions took place between the Claimant and Mr Hunn. It was these further discussions which Mr Hunn says the Digitus stock accounted for a large proportion of the Respondent's historical and current stock levels.

21. I find that Mr Hunn was new to his role and that he had an understandable wish to gain knowledge and get to grips with his area. At the same time, I also find that the information regarding the Digitus stock levels were on the Respondent's systems, available as part of the monthly report, with this being the case since 2018. These figures were in no way concealed or hidden. I also accept in full the Claimant's evidence that he did not hide the stock value on the Respondent's systems. In both written and oral evidence, the Claimant explained how the Respondent's systems operated and how information was available. In contrast, when asked about this, the Respondents witnesses struggled to explain why these matters were being

discovered at this point in time in 2022 when they had been on the system throughout.

22. Mr Hunn discussed the situation with Mr Borge-Sanchez. Mr Borge-Sanchez noted the high stock across all areas save for Switzerland. He instructed Mr Hunn to analyse the problem, develop a system to check new orders and to involve the branch countries. He was also clear on the need to reduce high levels of current stock and the capital that was tied up in that stock.

23. Mr Hunn continued to look into the high stock levels within the UK Respondent company. This was an attempt to understand the situation. It was not a disciplinary or capability investigation.

24. From 28th March 2022 to 30th March 2022, Mr Hunn was in the UK for a Sales Meeting. He raised the issue of Digitus stock with the Claimant and the need to reduce the high level of stock.

25. Mr Hunn spoke with Mr Borge-Sanchez, who in turn spoke with Dr Hesse, Managing Director of the Group Company.

26. In a letter dated 14th July 2022 from Dr Hesse to Mr Hunn, ccing Mr Borge-Sanchez, Mr Tigges and Mr Rugge Dr Hesse sought via Mr Hunn a 'final report' from the Claimant.

27. However, the letter also refers to the "now imminent replacement of management at EMKA UK." It goes on to conclude "In addition, please keep me updated weekly on the progress of the search for a Managing Director."

28. Based upon the context in this letter, it is clear that it was the Claimant being referred to and given the casualness with which the issue of management replacement was being referred to, it is clear that a decision had been taken in to replace the Claimant in advance and most likely significantly in advance of this communication. There was no reply, seeking clarification or indicating surprise or generating discussion. I therefore find that all parties in the correspondence were aware of and had resolved themselves to the fact that the Claimant's employment was to be ended. No additional disclosure has been provided by the Respondent relating to this or earlier events leading to this.

29. On the 3rd August 2022, the Claimant received an email from Mr Hunn, which contained the specific questions. Mr Hunn sought information regarding the writing off of stock from Digitus electronic locking systems.

30. At Mr Hunn's request, the Claimant prepared a report. Dated 5th August. The Claimant identified that he was responsible for the purchase of the Digitus stock.

31. The potential loss to the Respondent from the unsold stock was in the region of 500,000 Euros. The stock remained unsold and therefore the loss had not formally crystalised.

32. At an unspecified point in August 2022, Mr Hunn spoke with Dr Kloth, Group Head of Sales and Marketing. No record of Mr Hunn's discussions with Dr Kloth are available.

33. This led to Mr Hunn becoming aware of an email from Nov 2015 from Dr Kloth to the Claimant in which the claimant is told that if he wishes to purchase Digitus Stock then he must obtain written consent.

34. I have not heard from Dr Kloth in these proceedings or been provided with wider disclosure regarding this document. In oral evidence, the Claimant stated that he did not recall receiving this document.

35. No one has positively suggested that the email isn't genuine. It is more likely than not that it was sent, but there is little by way of additional context. No formal investigation was commenced.

36. Because of this vagueness, I have placed limited weight on this document. It would have been straightforward enough for the Respondent to call wider witness evidence on this point given the source of the discovery of the email and also provide wider disclosure or at the very least attempt to find wider disclosure given the time elapsed. I do not know whether this instruction was later rescinded, I do not know if it applied to certain types of future stocks, I do not know why this became an issue in 2022 given the purchasing was occurring in 2018 and occurring on an open basis.

37. I find that the Respondent had already settled on its position regarding the removal of the Claimant prior to Mr Hunn becoming aware of the 2015 email. I find that Mr Hunn and Mr Borge-Sanchez viewed the email as further justifying the position that had already been reached.

38. In an email of 14th September, drafted by Mr Hunn to Uwe Steinke, ccing Mr Borge-Sanchez and Dr Hesse, a specific way forward was identified. This involved meeting the Claimant on the 29th September, and "….we inform him and recommend him to submit his termination immediately." Various deadlines and dates were referred to. The email concludes "If he does not comply with this recommendation, we will take appropriate legal steps."

39. The email also referred to a number of allegations against the Claimant.

40. On the 28th September, Mr Borge-Sanchez and Mr Hunn met with the Claimant at the Crowne Plaza Hotel.

41. I broadly accept the Claimant's version of what occurred in this meeting. He gave relatively straightforward and consistent evidence on the point.

42. Shortly into the discussion, I accept that the Claimant was told that management had decided that his employment was no longer required or words close to this. He was further told that he could leave amicably or the company had enough evidence to dismiss him for gross misconduct This finding of fact is consistent with the contents of the Respondent's internal documents, created prior to this meeting.

43. The claimant was told that he would not be getting his nine months notice pay but that the company invited him to propose a sum that would be suitable. I also find that when the Claimant raised the possibility of changing the mind of his superiors, he was told "no" and that this was in categorical terms.

44. On the 29th September, the Claimant replied with his settlement sum. The Claimant did this without seeking legal advice. This was ill-advised. The Claimant was a senior employee on a significant salary and would have been able to access legal advice.

45. The figures offered by the Claimant totalled £34,040. I accept the method of calculation as set out in the Claimant's witness statement as to how this figure was arrived at.

46. On the 30th September 2022, Mr Borge-Sanchez replied indicating that the sum was accepted. That same day, a resolution was passed removing the Claimant as a Company Director effective 31st October 2022.

47. Until the 31st October 2022, the Claimant continued to have access to the Respondent's systems, process bank payments for purchase orders, salaries,

expenses and he remained the sole signatory on the UK company accounts with HSBC.

48. It was around the 19th October 2022 the Claimant became concerned as to the absence of a settlement agreement or at least something akin to that. The onus appeared to be on him to generate an agreement.

49. On the 26th October Mr Hunn in discussion with the Claimant made reference to the company possibly seeking to recover losses from the Claimant in respect of the stock if there was no agreement.

50. The parties did not reach agreement on all of the core terms of the Claimant's departure. At the heart of the financial point was whether or not the Claimant was to receive the sums gross and who was responsible for any tax.

51. Each party may have made assumptions as to the tax position. However, there was no settlement agreement to interpret and what had been discussed between the parties represented two differing positions without a meeting of minds.

52. I do not accept the position stated by Mr Tigges in his witness statement that the Clamant was seeking to re-negotiate at this point in time, though I do accept that he may subsequently have sought more (see para 43 of the Claimant's witness statement). No settlement agreement had been drafted and the emails between the parties were sufficiently unclear so as to leave room for genuinely different interpretations. This lack of clarity is normally resolved through the parties negotiating draft terms of a settlement agreement.

53. Both parties have treated the 31st October 2022 as the end of the Claimant's employment. No party has suggested that the employment is ongoing. At no time has the Claimant been paid any sum of money on termination beyond his normal salary that was owed.

54. In his witness statement, Mr Tigges states that the financial package is 'outstanding to the Claimant' and that "it remains our intention to honour this payment and we have not sought to retract away from this position." He adds "whilst however the Tribunal case remains outstanding, we have withheld from making this payment to the Claimant until this matter is resolved." I do not find this explanation to be convincing. Either the Respondent accepts that it has a liability or it does not. If it has a liability then the sum should be paid. Even if it turns out that more is owed, the sum has still been paid. Conversely, the only reasons not to pay is that you do not believe the sum is owed or that your liability is less than the sum. There is unnecessary and somewhat confusing ambiguity in the position adopted.

55. The Claimant has not made a contractual claim for this money on the basis that no contract has been formed that he would be able to enforce.

The Law

56. The Right not to be unfairly dismissed is contained within s.94 Employment Rights Act 1996.

57. The parties were agreed that the Claimant was an employee and had sufficient service to bring a claim.

58. It is for the Claimant to prove that he was dismissed. This has been formulated in a number of ways over the years. The parties were agreed that the core question is best formulated as 'who really terminated the contract of employment'.

59. In **Sandhu v Jan de Rijk Transport Limited [2007] ICR 1137** the Court of Appeal considered the correct approach to the question of termination. The authority is also

useful because it draws upon a number of previous authorities on the point and considers them at Court of Appeal level. The facts of Sandhu are not identical to the present case in that in the present case, post the meeting that took place, further correspondence was entered into.

60. For example, a dismissal occurred in **East Sussex County Council v Walker (1972) ITR 280** when an employee was told that she was no longer required and expressly invited to resign.

61. In **Sheffield v Oxford Controls Co Ltd [1979] ICR 396** identified "We find the principle to be one of causation." Reference is made to a resignation occurring where the employee "…the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him….. In such a case he resigns because he is willing to resign as the result of being offered terms which are to him satisfactory terms on which to resign."

62. It is for the Respondent to prove that the reason or principal reason for the dismissal was one of those listed within s.92(b) Employment Rights Act 1996.

    In this particular case, the Respondent relies upon conduct as the reason for dismissal.

63. A reason for dismissal is a set of facts or belief held by the employer which cause them to dismiss the employee: **Abernethy v Mott Hay and Anderson [1974] IRLR 213** per Cairns LJ. This has been subsequently affirmed on numerous occasions and has most recently been analysed by the Supreme Court in **Jhuti v Royal Mail [2019] UKSC 55.**

64. If the Respondent does prove a potentially fair reason for dismissal, then reasonableness under s.98(4) ERA 1996 must be considered. The classic formulation of a conduct case based on **BHS v Burchell [1978] IRLR 379** requires the Tribunal to consider a) whether the Respondent formed a belief that the employee had committed the act of misconduct and whether that belief was held on reasonable grounds b) whether the Respondent had undertaken such investigation as was reasonable in the circumstances of the case and c) whether the decision to dismiss was within the range of reasonable responses open to an employer.

65. It is also necessary to look at whether the employer followed a fair procedure in dismissing the Claimant.

66. The range of reasonable responses test applies throughout the Burchell test. The leading authority of **Sainsbury's Supermarket v Hitt [2003] IRLR 23** makes it clear that I must apply the range of reasonable responses test to the investigation and not substitute my own view as to what a reasonable investigation would have been.

67. The burden of proof for the purposes of s.98(4) is neutral.

68. Key to understanding the Burchell test is the concept of a range of reasonable responses. It is not for the Tribunal to substitute its own view for that of the Respondent. Rather the Tribunal must answer the questions posed from the perspective of whether or not the actions taken fall within the range of reasonable responses open to an employer, having regard to the size of the undertaking and the administrative resources available to it.

69. On a separate point, section 203 of the Employment Rights Act 1996 contains a clear restriction on the ability of an employee to contract out of their employment rights under the Act unless a settlement agreement conforms to the mandatory elements

provided for in the statute. In the present case, there is common ground that there was no such agreement in place.

Approach to s.111A Employment Rights Act 1996

70. During the course of the hearing, the Tribunal raised the applicability of s.111A Employment Rights Act 1996. This had not been raised by either party in the pleadings or as part of the initial discussion of the case. It is important to note this context because there is a starting position of the wording of the statute yet neither party is motivated to ensure its application. Both parties had the opportunity to make submissions on the point.

111A Confidentiality of negotiations before termination of employment

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.This is subject to subsections (3) to (5).

(2) In subsection (1) " pre-termination negotiations " means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved

71. I also had regard to the ACAS Code on Settlement Agreements, but I do not repeat the contents of that Code in full as part of this Judgment. A failure to follow the code does not create liability, but Tribunals take the code into account when considering relevant cases.

72. Section 111A only affects admissibility in relation to unfair dismissal. Therefore, it does not apply to the claim of wrongful dismissal which is based upon a claim of breach of contract as permitted by the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

73. It is not possible for the parties to waive the applicability of s.111A Employment Rights Act 1996. However, the parties witness statements have been drafted on the basis that it does not apply. In respect of without prejudice principles (which are distinct from s.111A), then admissibility had been waived by the pleaded cases, the witness statements and inclusion of documents in the bundle.

74. I have decided to admit all of the evidence. I do not do so lightly and recognise that s.111A has a high threshold that is not easily met.

75. The first stage is the threshold to admission. Given my findings regarding pre-judgment of this situation, I regard that as ‘improper behaviour’ for the purposes of the statute. The Code makes clear that ‘what constitutes improper behaviour’ is ultimately for a tribunal to decide on the facts and circumstances of each case.

76. Whilst, I accept that the Claimant was invited to effectively put an offer in by return, this was in the context of him being told that his employment was coming to an end. The pre-meeting documents support the fact that this was the Respondents position. The findings that I have made above support the conclusion of improper behaviour, notwithstanding the high bar.

77. I also note that the Code references parties being given a reasonable time to consider the proposed settlement agreement. The phrase “written terms” is then subsequently referred to. That did not happen in the present case. It matters in the present case because the failure to handle these negotiations with competence is ultimately what led to the lack of a meeting of minds. However, I would not have made the evidence admissible on the basis of the contents of this paragraph in isolation. The pre-judgement point carries far more weight.

78. The second stage is the extent of the admissibility of the evidence. The extent is what I “consider just.” In this case ‘just’ is allowing everything in because a pick and mix exclusion is invidious and unfair to one party or the other. The parties wish to rely on different parts of what occurred in order to make their point. The just conclusion is to allow it all in and to make findings of fact.

79. Furthermore, both parties have proceeded in this litigation on the basis that all of the evidence was admissible ‘just’ in this case allows the parties to rely on their evidence as drafted and given in Tribunal.

80. In the alternative if I am wrong in respect of the above, if evidence regarding the negotiations were inadmissible, then the Tribunal would be left with very limited evidence to determine the question of dismissal. s.111A renders inadmissible the very fact that pre-termination negotiations have taken place, not just the details of the negotiations: **Faithorn Farrell Timms LLP v Bailey [2016] IRLR 839**.

81. In this alternative, the evidence regarding the intention to dismiss the Claimant would remain admissible because it was prior to the meeting with the Claimant and did not form part of the negotiations. There would then be the fact of the Claimant leaving employment. In this alternative scenario. There would be few if any factors remaining

without the evidence of the negotiations that would support the Respondents contention of a mutual termination. In this vacuum of evidence, there would be a dismissal. The Tribunals conclusion regarding dismissal below remains the same, albeit it is based on less evidence, due to less evidence being available.

Conclusions

82. I start with my conclusions in relation to the question of dismissal. The central question is 'who really terminated the contract of employment'?

83. It is clear that the idea of and motivation for ending the employment relationship originated with the Respondent. This however, isn't determinative. In a mutual decision, the genesis of the idea must still come from somewhere.

84. I reject the suggestion in oral evidence that Mr Borge-Sanchez went into the meeting with the Claimant with an open mind. He did not. The Claimant's employment was to come to an end. That is the position as set out in at least two internal documents prior to the meeting. It is also consistent with the Claimant not being told the specific purpose of the meeting in advance.

85. No notes were taken of the meeting. If the meeting was about finding a way forward, some record of the possibilities discussed would be likely.

86. I also note that the facts as to whether this was a dismissal or a mutual termination are not all one way in this case. I must look at all these factors and answer the question of who really terminated the contract of employment?

87. It is right to say that the parties agreed on an effective date of termination, albeit led by the employer. I do not regard this in isolation as conclusive. Rather, I must look at

all of the circumstances. The wider circumstances include the fact that there wasn't a meeting of minds regarding the terms of the mutual termination. This matters, because for a termination to be mutual, it must be the mutual agreement and consent of the parties. Agreement on the basic terms of the mutual termination are essential, The key terms would include key financial points.

88. I also accept that the Claimant himself was putting forward sums and only he is responsible for not taking prompt legal advice immediately after the 28th September.

89. However, the Claimant putting forward sums and on the face of it there being a measure of agreement as to the termination date aren't sufficient when balanced against the other findings of fact regarding what the Claimant was faced with in the meeting of the 28th September. Those findings of fact point towards the Claimant being told that his employment was ending. Everything post that point was about negotiating terms and ultimately, terms were not agreed.

90. I would add that this is not a case whereby the employer acted improperly but then the conduct of the parties was such that there was still a mutual agreement as to dismissal. The Claimant had exceptionally long service and basic employment rights. He cannot be deprived of those rights unless he consents to this. He did not.

91. Having taken into account all of the factors, I conclude that this was a dismissal.

92. I would also record at this point that this was a situation that turned into an unnecessary mess. It was avoidable. If the Respondent wished to go down this route, it should have sought legal advice about how to go about it and produced draft settlement terms in the form of a settlement agreement. At the same time, the Claimant was a senior individual on a substantial salary. It was open to him to seek proper legal advice at the earliest stage once he was aware of the Respondent's intentions. Each party subsequently complains as part of their pleadings about the

other not contacting them and the result is two subsequently professionally represented parties ending up at a final hearing.

93. Having found that the Claimant was dismissed, I must turn to the question of the reason for dismissal.

94. Utilising the classic formation in **Abernethy**, I do not find that the reason for dismissal was conduct. Firstly, the issue over the written instruction from 2015 was not known to the decision makers at the time at which the decision to dismiss the Claimant had been taken. It was utilised to bolster that decision.

95. Secondly, is clear from the written documents, but also the underlying logic of what is being said, that the Respondents lack confidence in the Claimant's ability to manage and his competence. These are all capability reasons. I find that this was the true reason for the dismissal. This is still a permissible reason for dismissal within s.98(2) Employment Rights Act 1996.

96. This being a capability dismissal, the question then becomes more focussed on whether the Respondent took reasonable steps to manage the capability issue and follow a fair procedure in doing so.

97. The dismissal is unfair. The Respondent followed very little, if any procedure. The outcome was pre-judged. The only way of reading the written documentation was that a decision had been taken that the Claimant would be dismissed.

98. If I am wrong in respect of the reason for dismissal and it is necessary to consider Burchell in the alternative, then my conclusions would have been as follows. I only state them briefly as they are in effect alternative conclusions. The dismissal remains unfair because no reasonable procedure was followed in the form of investigatory or

disciplinary meetings. Furthermore, the point regarding the Respondent having formed a pre-existing view remains.

99. The investigation was not within the range of reasonable investigations open to the Respondent. The Respondent seeks to rely upon the Claimant answering questions In written format to establish the investigation. To a certain extent it is permissible for the Respondent to rely upon this, but given the nature of the issue, the nuance surrounding it, the need to understand detail and the issue of understanding intent when it comes to conduct issues, the written responses are insufficient to amount to a reasonable investigation.

100. The Respondent did not hold a belief on reasonable grounds. It was aware of a potential problems, but did not have a reasonable basis for believing that it amounted to misconduct.

101. The decision to dismiss was outside the band of reasonable responses because this was a pre-judged dismissal.

102. I now turn to consider Polkey. I remind myself that the question in respect of Polkey focuses on what this specific employer would have done had the errors identified above not been made.

103. From the correspondence, it is clear that the leadership team of the Respondent had reached the conclusion that it no longer wished to employ the Claimant.

104. This is a cold, harsh reality. The Claimant was in a senior position and it is unrealistic to suggest that his employment would have continued indefinitely without the support of the most senior management in the group company.

105. **Software 2000 Ltd v Andrews [2007] ICR 825** together with a number of other appellate authorities require the Tribunal to use common sense, experience and sense of justice when looking at this question. Whilst some speculation is involved, there is relevant evidence available. The present case is a case where there is clear evidence as to the Respondents position towards the Claimant.

106. The fact that the Claimant is a senior employee provides important context. The level of autonomy that person has, the importance of the role to the success of he company are all factors which point to the importance of the board believing that individual can deliver. These are business decisions that can fundamentally affect the companies bottom line.

107. On balance, the most likely outcome would be that this Respondent followed a fair process, discussing the problems that existed with the Claimant, that would not have resulted in the Group Company having (i.e. regaining) trust & confidence in the Claimant. The reason for the dismissal would have been capability or SOSR in the form of loss of trust and confidence in the ability of a senior employee. The employment relationship could have been fairly ended by the Respondent as part of a process concluding around 31st October 2022, with the Claimant being lawfully given his notice of nine months to run from that date. If there was garden leave and no payment in lieu of notice, the effective date of termination would have been 31st July 2023.

108. The alternative, namely that a Managing Director remain in post whilst a Group Company actively try to remove him is not sustainable. Trust and confidence is fundamental as is a belief in an employees ability to perform. No sensible business could operate on that basis for a sustained period of time. It would also be artificial and removed from reality to so conclude.

109. A percentage approach to Polkey is not the best approach to this case. The seniority of the claimants position, the certainty within the Group as to its position, the entitlement of a business to take clear steps to improve performance, the lack of alternative roles and alternatives to dismissal, means that identifying a period of loss is more reliable than simply putting a percentage on what was a settled Group position.

110. Turning to the issue of contributory fault, it is for the Respondent to prove that the Claimant engaged in culpable and blameworthy conduct.

111. Notwithstanding the fact that I have found the real reason for the dismissal to be capability, this does not preclude a finding of contributory fault.

112. The fact of the purchase of the stock and the fact that is has yet to be sold after many years are proven facts.

113. In respect of the basic award, s.122(2) ERA 1996 requires that I must consider whether it is just and equitable to reduce the basic award and if so, by what percentage. In respect of the compensatory award s.123(6) ERA 1996 requires that where I have found there to be culpable and blameworthy conduct, I shall reduce the compensatory award by such percentage as is just and equitable having regard to that finding.

114. I have decided that the appropriate deduction to reflect contributory fault in this matter is 25%. I apply the same figure to both the basic and compensatory awards and see no determinative reason in this case why it should not apply to both.

115. The level of contribution reflects the findings that the Claimant is responsible for the purchase of the stock and is responsible for a commercial decision that has

cost (or at the very least is likely to cost) the Respondent a significant amount of money. I have not reduced by a higher sum because the Respondent has not proven malign intent or other, more serious factors.

116. Wrongful Dismissal – This is a separate and distinct claim, I have already concluded that the Claimant was dismissed for the purposes of the unfair dismissal claim. I make the same finding in respect of wrongful dismissal. The core facts remain the same.

117. Therefore the remaining issue to determine is whether or not the Respondent can prove that the Claimant committed an act that amounted to gross misconduct.

118. There are known facts of the goods having been purchased, the goods remaining on stock and the goods having yet to be sold. The size/amount of the goods is also known.

119. The Respondent has also failed to prove that the Claimant deliberately went outside the correct purchasing process. I accept the Claimant's evidence that he has followed the same purchasing processes throughout the last decade or so. I also accept that the information regarding his purchases were reported to management and that the relevant data was available to management.

120. I find that the Respondent has failed to prove that the Claimant committed gross misconduct. The Respondent was clearly dissatisfied with the Claimant. Gross misconduct is conduct sufficiently serious that it amounts to a fundamental breach. i.e. a party demonstrating that they no longer intend to be bound by the core terms of the contract. Here, the Claimant has made a commercial decision, that as things stand has cost the Respondent a substantial sum of money.

121. The Respondent put its case squarely on the question of conduct. It did not put its case on the basis of gross negligence.

122. This dismissal should have been on notice. The Claimant was therefore wrongfully dismissed.

Further Directions

123. I direct that within 30 days of the date on which this Judgment is sent to the parties, the claimant must write to the Tribunal, copying in the Respondent. That correspondence must state either a) a remedy hearing is required or b) that remedy has been resolved and no further hearing is required and that the file may be closed.

124. If a remedy hearing is required, parties must inform the Tribunal immediately of any dates to avoid as the Tribunal will then seek to liaise with me to set a date when I am available. My current estimate is that 1 day should be put aside for remedy. It may take less time than this, but given the difficulties that the parties have had agreeing to date, I would presume that a remedy hearing is needed because there remains core disagreement and therefore time is needed to resolve that.

125. The Claimant has already confirmed that reinstatement/re-engagement is not sought as a remedy.

126. The issues for determination at the remedy hearing will be:

a. What is the Claimant entitled to by way of basic award?
b. What are the Claimant's losses?

c. Mitigation – is the Respondent able to prove that the Claimant has failed to take reasonable steps to mitigate his loss? If yes, by what date could the Claimant acting reasonably have obtained employment?

d. ACAS Code – Did the Respondent unreasonably fail to follow the ACAS Code? If so, by what percentage is any award to be increased?

e. Wrongful dismissal – what sum is payable by way of damages for wrongful dismissal? Does the Income Tax (Earnings and Pensions Act) 2003 as amended require that this calculation is performed first?

f. Is it appropriate to make an award of two to four weeks pay under s.38 of the Employment Rights Act 1996?

g. To what extent must any awards be adjusted to cover taxation? If so, by how much?

h. In what order are the calculations applied?

i. Application of the statutory caps (if appropriate)

127. If any party disagrees with the above list of issues, this can be raised with the Tribunal on the day of the remedy hearing. However, any party wishing to raise a point regarding the list of issues should ensure that they have given sufficient notice of the point to the other side.

Employment Judge Anderson

14th November 2023