EMPLOYMENT TRIBUNALS

RESERVED JUDGMENT

Claimant: **Ms. Terri-Anne Reeves**

Respondent: **IFancyone.com Ltd**

Heard at: Birmingham **On:** 12 and 13 March 2018
16 March 2018 (without the parties)

Before: Employment Judge Battisby - sitting alone

Representation

Claimant: Mr J. Feeny, counsel
Respondent: Miss T. Ranales-Cotos, counsel

RESERVED JUDGMENT

1. Upon the Claimant withdrawing her claim for arrears of pay, the Respondent agrees to pay the Claimant the sum of £1,000 and, upon the parties confirming to the tribunal that payment has been made, the said claim is dismissed.

2. The Claimant was wrongfully dismissed, but is not entitled to any compensation, having received the notice pay to which she was entitled.

3. The Claimant was unfairly dismissed and is entitled to compensation.

4. The basic award of compensation shall be reduced by 35% pursuant to section 122(2) Employment Rights Act 1996 due to her conduct before dismissal.

5. The compensatory award shall be reduced by 35% pursuant to section 123(6) Employment Rights Act 1996 as the Claimant's actions caused or contributed towards her dismissal.

6. The basic and compensatory award shall be reduced by 25% due to the *Polkey* principles.

7. The Claimant is entitled to a further award of compensation pursuant to section 38 Employment Act 2002, such amount to be assessed.

8. Unless the parties notify the Tribunal within 28 days of the date of this judgment being sent to the parties that terms of settlement have been agreed, the case will be relisted for a Remedy Hearing with a time estimate of one half day.

REASONS

1. By a Claim form received on 14 July 2017, the Claimant brought claims against the Respondent for unfair dismissal, wrongful dismissal, arrears of pay and also made a contractual claim for repayment of a loan. The Respondent filed an ET3 on 4 August 2017 strongly contesting all the claims and indeed urging the Tribunal to strike them out. No application was made and the case was listed for Final Hearing.

2. Case Management Orders were made including one that the Claimant should serve a Schedule of Loss. The most up-to-date Schedule dated 5 March 2018 claims the sum of £29,000.

3. At the commencement of the hearing, the parties confirmed settlement had been agreed in relation to the claim for arrears of pay and an order was made withdrawing the claim and dismissing it once payment has been made.

4. For the Respondent, I heard evidence from Mr Jonathon Forrester , a solicitor of Pickerings Solicitors (Tamworth) Limited. His firm was retained by the Respondent to advise and assist them with matters of Employment Law and Human Resources that arose from time to time within their business. He was delegated by the Respondent to deal with the disciplinary hearing and make the decision concerning the allegations of misconduct against the Claimant. His evidence was contained in a witness statement signed and dated 28 September 2017. For the Claimant, I heard the Claimant herself and her evidence was contained in a signed Witness Statement dated 26 September 2017. I received a bundle of documents (numbered 1-253) marked "R1", to which documents were added on the morning of the hearing (namely pages (71A, 71B, 231A and 231B). Hereafter, where I refer to page numbers, they are contained in the bundle.

5. The hearing of evidence and submissions concluded mid afternoon on the second day of the hearing and judgment was reserved.

The Issues

6. Following discussion with Counsel at the commencement of the hearing, I recorded the issues to be decided as follows:

Wrongful Dismissal

- Was the Claimant's dismissal wrongful or did the Claimant

- fundamentally breach the contract of employment by an act of so-called gross misconduct.

- Was the Respondent entitled to terminate the employment and make a payment in lieu of notice. If so, did the Respondent make a payment in full in respect of the notice period and this concerns whether a fixed monthly dividend paid to the Claimant actually formed part of her contractual remuneration.

Unfair Dismissal

- What was the principal reason for dismissal and was it a potentially fair one in accordance with section 98(1) and (2) Employment Rights Act 1996.

- Did the Respondent believe that the Claimant was guilty of misconduct.

- Did the Respondent have in mind reasonable grounds for that belief.

- At the stage at which that belief was formed on those grounds, had the Respondent carried out as much investigation into the matter as was reasonable in the circumstances.

- If the answer to the questions at 6.2 to 6.4 is in the affirmative, was the dismissal fair or unfair in accordance with section 98(4) Employment Rights Act 1996 and, in particular, did the Respondent in all respects act within the band or range of reasonable responses of a reasonable employer.

Remedy for Unfair Dismissal

- Should there be a reduction of compensation due to the *Polkey* principles.

- Would it be just and equitable to reduce the Claimant's basic and/or compensatory award for blameworthy or culpable conduct under section 122(2) or section 123(6) Employment Rights Act 1996.

- It was agreed that all other issues relating to remedy would be left until after the judgment was given on the above issues.

The Facts

7. The only witness as to events in question prior to 3 April 2017 was the Claimant herself. However, the liability issues in this case were less concerned about what actually happened, and much to do with her perception of those events and her motivation for acting as she did on 3 April, and she was challenged about these on cross-examination. I am satisfied that she was an honest and straightforward witness and I had no reason to disbelieve her testimony as to her perceptions and reasons for

acting as she did.

8. Rather unusually, the only witness for the Respondent was their solicitor, who had been asked to deal with the disciplinary hearing following events on 3 April 2017. He was admitted as a Solicitor in 2010, having previously been employed in the police service. He mainly deals with employment law and normally took his instructions from Ms. Rebecca Jones, a director and shareholder of the Respondent. He was asked by Mr Feeny whether he was aware of the principle of professional conduct that a solicitor should not act in litigation if it was clear that he, or anyone else in the same firm, would be called as a witness in the matter, unless satisfied that it would not prejudice his independence as an advocate or litigator, or the interests of the client or the interests of justice. Somewhat surprisingly, Mr Forrester said that he had been unaware of this principle. When asked whether he had felt at any time conflicted by this principle, he said that he did not think so. He confirmed that he had drafted the ET3 in these proceedings. He gave his evidence in a very forthright manner. If anything, he was too forthright and he came across as someone who saw things very much in black or white terms with no grey areas in between. I could not help but think that, at times, he must have found it very difficult to maintain his independence and objectivity.

9. The Respondent is a manufacturer and supplier of E-cigarette liquids and a supplier of E-cigarettes. It has two shops and an online presence operated from its head office address in Tamworth. It employs around 15 people. The Respondent company was set up in May 2011. The Claimant, the Claimant's partner (Scott Seal) and the two current directors (Ms. Rebecca Jones and Mr Ashley Heaton) formed the company, were all directors and each held 25% of its ordinary shares. From the outset, the Claimant was the Human Resources Director, Mr Seal was the Production Director, Ms. Jones was the Financial Director and Mr Heaton was the Managing Director.

10. In early 2016, a restructuring of the Respondent company took place. Mr Forrester's hearsay evidence was that this took place because the Claimant and Mr Seal were not able to contribute to a further significant investment needed to be made in the company. The Claimant's evidence, which I accept, was that tension had been building up between the four director shareholders, largely because Mr Heaton and Ms. Jones felt they were doing most of the work and building the business, and presumably felt they deserved to be paid a more. This led to conflict, which the Claimant and Mr Seal wanted to avoid since, apart from being effectively partners in the business, they were all friends. Negotiations took place. All parties took legal advice. Various versions of a new shareholder's agreement were drafted leading to a new agreement ("the Agreement") being signed on 28 May 2016 (**pp41-68**). In essence, the Claimant and Mr Seal agreed to resign their directorships, staying on in the company as employees. They agreed to exchange their shares for a new class of shares with reduced rights. The changes meant the Claimant and Mr Seal each gave up 15% of the value of the company's equity. The dividend payment policy was set out at clause 18 of the agreement (**p60**) the relevant parts of which are as follows:-

18.1 The parties agree that the Company shall not declare, pay or make

any dividend or other distribution (including such dividend in accordance with Clause 18.2 below):
18.1.1 without Shareholder Consent; and
18.1.2 which is or would be prohibited by the Act.

18.2 The parties agree that Shareholder A and Shareholder C shall only be entitled to a fixed dividend of £500.00 five hundred pounds) per month.

18.3 It is agreed that Shareholder A and Shareholder C will be entitled to a further dividend based on the profitability of the Company……which is to be payable on top of their fixed dividend referred to in clause 18.2 above….

11. Under the Agreement, the Claimant was Shareholder C and Mr Seal was Shareholder A. Under the Definition Clause of the Agreement, "Shareholder Consent" meant "the prior written consent of the Principal Shareholders". The Principal Shareholders were Ms. Jones and Mr Heaton.

12. If ever the Claimant or Mr Seal left the Respondent, there were provisions enabling the Principal Shareholders to require them to transfer their shares to them and the valuation of those shares would depend on whether they were a "Bad Leaver" or a "Good Leaver". Under the Definition Clause (**p45**) a "Good Leaver" meant: "*An Employee who becomes a Departing Employee by reason of*:

(a) retirement, permanent disability or permanent incapacity through ill-health; or
(b) redundancy (as defined in the Employment Rights Act 1996); or
(c) dismissal by the Company which is determined, by an employment tribunal or at a court of competent jurisdiction from which there is no right of appeal, to be wrongful or constructive."

13. Under Clause 9.3.4 of the Agreement, a "Bad Leaver" would, in effect, only be entitled to £1.00 per share, whereas a "Good Leaver" would be entitled to a fair value to be computed in accordance with terms of the Agreement. Before the Agreement was signed, Ms. Jones sent an email on 3 March 2016 to Mr Andrew Coles, the company's accountant setting out the essential basis of what was agreed between the parties (**pp39-40**). The note recorded among other things that both the Claimant and Mr Seal would receive a salary of £30,700 and "*a dividend for the remainder of their salary (which will then amount to a total take home of £2,500)*".

14. No contract of employment was ever issued to the Claimant, although, of course, as the Human Resources Director, then Manager, it would have been her responsibility to draw up such contracts for employees.

15. The Claimant's pay slips (**pp239-240**) confirm she received about £2,553

gross per month and £1,902 net per month. In addition, she received a separate payment of £500 per month by way of bank transfer, which the Respondent says was the fixed dividend referred to at clause 18.2 of the Agreement. The Claimant argued before the Tribunal that it was part of her remuneration. Following the signing of the Agreement, the said sum of £500 per month was paid in every month until the Claimant was dismissed in April 2017, apart from in two months and which the Respondent has now agreed to pay.

16. In November 2016, Mr Seal was suspended from work facing allegations of gross misconduct, which he strongly disputed. He eventually left the company and sold his shares back under a compromise agreement which took effect on 27 December 2016. Mr Forrester advised the Respondent in relation to Mr Seal's departure and prepared the compromise agreement. It was at this time he became aware of the agreement and knew there were "Good" and "Bad Leaver" provisions, but he had not had to look into the detail of those in the context of Mr Seal as the question of the shares and their valuation were dealt with by colleagues in the firm's commercial team.

17. Following Mr Seal's departure from the company, the Claimant felt isolated. She felt excluded from communications on various issues such as new starters and wage rates. From slightly earlier than his departure, she had also felt that her own position as the Human Resources Manager was being undermined. Specifically, she referred to various emails criticizing her for her performance and also, she felt that many of her previous job functions were being taken away from her without any proper communication or explanation until she questioned it. She became concerned that she might be forced out of the Respondent and end up getting very little for her shares.

18. On 9 December 2016, the Claimant had a short meeting with Mr Heaton. She pointed out, that despite the difficult situation with Mr Seal, she had continued to remain professional at work and he agreed with her. She said they needed to draw a line under that event and improve their communication and working relationships.

19. On 23 and 24 January 2017, the Claimant had an exchange of emails with Mr Stuart Styles, the Respondent's Strategic Director (**pp241-245**). This concerned the need for disciplinary proceedings to be taken against another employee and it was asking her to arrange for the Respondent's solicitors to prepare the letter inviting the employee to a disciplinary meeting. The Claimant responded to the effect that this was normally her responsibility and she received a reply from Mr Styles suggesting that was no longer appropriate as she was not properly qualified to do so. Until this time, the Claimant had always handled disciplinary matters from the outset including writing such a letter. At the time, the Claimant was studying for a CIPD qualification and asked whether she would get the functions back upon qualification. Mr Styles responded that until then, the Respondent would be better served by the solicitors handling such matters. The Claimant responded that she would greatly appreciate any

further communications in regard to issues that she would no longer be administering until she became qualified and would hope communication would improve regarding any future employee issues. The Claimant was hoping to receive her CIPD qualification in June 2017.

20. On 30 January 2017, the Claimant had another exchange of emails with Mr Styles. She was told that her previous function of creating standard operating procedures for laboratory manufacturing was to be taken away from her (**pp241-251**). She saw this as another example of job functions being taken away from her without prior discussion.

21. On 1 February 2017, the Claimant received a further email from Mr Styles which she took as hostile and very critical (**p252**). It strongly criticised her for a decision she had taken and the fourth paragraph summed up his feelings: "*stop wasting my time with this nonsense immediately. Do not make decisions that are beyond your capacity, ever*". In the final paragraph she was instructed to "*stay away from high-end management decisions unless you are instructed to complete a task*". He signed off the email as "*disappointed and tired*". This email was sent not only to the Claimant, but also to Mr Heaton, Ms. Jones and three others. The Claimant protested about this email in a response dated 02 February 2017 (**p253**). She explained the circumstances giving rise to the decision she had taken about which she was being criticised. She pointed out that: "*emotionally ranting via email whilst copying colleagues into the email is very unprofessional and quite frankly I am surprised. This could of (sic) been discussed personally between you and I*". The Claimant was concerned that the Respondent was looking to find fault with her job performance.

22. Later the same day she had a meeting with Ms. Jones to discuss the situation and the emails. She told Ms Jones that she needed to have better communication and felt job functions were being taken away from her. Ms. Jones denied it. On 28 and 29 March 2017, the Claimant had a further email exchange with Mr Styles and Ms. Jones which reinforced her impression that they were totally dissatisfied with her performance. (**pp211-215**). This exchange was immediately prior to the sequence of events leading to her dismissal.

23. On 28 March 2017 the Claimant had circulated a staff holiday overview for the year to-date. She received a highly critical response back from Ms. Jones and subsequently from Mr Styles. The Respondent was concerned that the holiday records were inaccurate leading to some employees taking more holiday entitlement than that to which they were due. The Claimant responded to the emails on 29 March (**p211**). She explained the difficulties she was having with the records but went on to complain about duties having been taken away from her without communication or explanation, the fact that she was no longer involved in discussions regarding recruitment or staff changes and that she was no longer as involved in the disciplinary processes. She concluded by saying that she was now "*unsure of my duties and the involvement I have in any issues relating to HR*". She requested a list of duties and responsibilities to clarify matters, but reiterated that she remained fully

dedicated to her role and reminded them that she was studying to further develop her skills, but she was looking for more structure.

24. Due to her concerns about her position, the Claimant took some legal advice. She then decided to offer her shares in the company to Mr Heaton and Ms. Jones subject to agreement being reached over the value. She felt that selling her shares might improve her employment position and job security, and might reduce the tensions. She felt that her retaining shares in the company might be one of the factors behind the deteriorating job situation and relationship. Accordingly, she wrote to Mr Heaton and Ms. Jones on 14 March 2017 (**p170**). Aside from the offer to negotiate a sale of her shares, she reiterated that it did not alter her commitment to the job nor to her intention to continue working constructively for the Respondent. Mr Heaton responded by email 14 March 2017 (**p69**). He asked for a day to digest her request and asked her how she would like to move it forward. The possibility of bringing in accountants was mentioned. On the following day, Mr Heaton sent the Claimant a further email (**p171**) saying that he had instructed the Company's solicitor and had formally requested the accountants to supply a valuation in relation to her shareholding. He said that, once he had the information, he would arrange a meeting with her. On the same day, the Claimant had an unscheduled meeting with Mr Heaton and Ms. Jones who asked her why she wanted to sell her shares. She said she felt communications had been affected due to her having ownership of shares.

25. On 27 March 2017, the Claimant received a short email from Mr Heaton saying it had been 14 days since her letter and asking her for an update. She replied saying she understood they would be contacting their solicitor and accountant, but she would be happy to have another meeting to discuss her shares. She than had a further email from Mr Heaton on the same day, saying he thought she would be naming a valuation for her shares and offering a meeting that week.

26. On 28 March 2017, the Claimant emailed Mr Heaton agreeing that they needed another meeting. She said she thought it unrealistic for her to suggest a sale price, as she did not have any figures to base it on. She suggested they should invite the Company's accountant to the next meeting.

27. On 29 March 2017, the Claimant was aware that the Respondent's solicitor, Mr Forrester, had arrived at the offices. This was on the same morning as the exchange of emails over the holiday records referred to above. The Claimant was asked to attend an informal meeting with Mr Forrester and Mr Heaton. She expected it would be about the sale of her shares. Mr Forrester told her that her role was being outsourced and that, whilst not definite, her job would become redundant. He proposed an agreement for her employment to end by reason of redundancy and for the Respondent to buy her shares in return for both of which she would be paid £8,000. Mr Forrester explained the proposition that most of her job functions would be outsourced and any administration would be distributed to other colleagues. He said, there was no offer of alternative

employment available.

28. Mr Forrester also mentioned her recent performance and the issue with the holiday figures. He went on to ask her why she wanted to sell her shares and she explained, as she had told Mr Heaton and Ms. Jones. Mr Heaton then said, if they bought her shares, she would probably leave her employment. The Claimant replied that they could buy her shares and then dismiss her later in any event, to which Mr Heaton responded: *"we could sack you now"*. At this point, Mr Forrester suggested that she collect her belongings and go home to consider the proposal. She asked if she was being suspended and he said she was not. She said she felt it was like a punishment, but he replied that it was giving her time to think. This was on the Wednesday morning and he asked her to return to discuss it further on Monday 3 April 2017. The Claimant said she had urgent tasks to complete, but she was reassured that these could wait until the Monday and that other members of staff would be told she was going home as she was unwell.

29. During the next few days, the Respondent decided that she did not wish to accept the proposed agreement, mainly because she did not believe it included a fair price for her shares. On 2 April 2017, the Claimant sent Mr Heaton an email confirming she did not wish to accept £8,000.00 in return for the redundancy payment and the value of her shares and explained that she would be coming into work as normal on the following day and was open to further discussion (**pp71a-71b**).

30. On 03 April 2017, she returned to work. She found the atmosphere strange as if her colleagues knew what was going on. She felt nervous and under stress. She was expecting to be either suspended or dismissed. She thought they might do so for performance reasons and was even more concerned now that the suggestion of redundancy had been brought into the equation. She thought that, if she were suspended or dismissed, she would then not have access to various emails which she had sent or received which she felt would be relevant to any subsequent case. Because of her state of mind, she was not thinking properly, in particular as to whether she was entitled to take copies of the emails or not. She decided to print a small amount of e mails and take them away with her.

31. It so happened that while she was doing so, she was being observed by Mr Heaton on the Respondent's internal CCTV. He saw her printing documents on the printer next to her desk, then bending down under her desk, placing them in a folder before taking the folder out to her car. As a result, the Claimant was asked to attend a meeting on the same day with Mr Heaton and with Mr Styles taking notes, which were later typed up (**pp72-73**). Mr Heaton asked her to explain what she had been doing. She acknowledged that she was taking copies of certain emails and explained that she wanted to be able to refer to them as evidence as to what had been happening to her over the previous four months in case her employment was terminated. Of course, at this point, Mr Heaton was unaware of the contents of the documents that had been printed off. He accused her of a pre-meditated intention of removing official business

communications and said he could not allow her to *"bring that kind of risk to my business"*. He suspended her on full pay pending a full investigation by the company solicitor. She handed over the printed documents and the meeting concluded.

32. On 4 April 2017, the Respondent instructed Mr Forrester to deal with the matter and he agreed to conduct the disciplinary hearing which was scheduled to take place at 2.30 pm on Monday 10 April 2017. It was decided, as Mr Heaton had conducted the investigation meeting, the Respondent would delegate authority to Mr Forrester to make any decision on its behalf. Ms. Jones did not want to be involved because she considered the Claimant to be a close personal friend. The Claimant received an undated letter from Mr Styles on behalf of the Respondent inviting her to attend the disciplinary hearing (**pp74-75**). The letter explained that the purpose of the hearing was to consider an allegation of gross misconduct, namely that the Claimant had stolen or attempted to steal confidential company information on Monday 3 April 2017. The letter enclosed a schedule of the documents printed (but not copies of the documents themselves) (**pp74-75**) and it was confirmed that the CCTV footage would be available for viewing. It was explained that the hearing would be conducted by Mr Forrester and Mr Styles. The right to be accompanied was set out.

33. At the disciplinary hearing on 10 April 2017, the Claimant chose not to be accompanied. The Respondent's minutes of the meeting are very short (**pp76-77**). It may be because it was agreed at the meeting that the Claimant could take a recording and that a transcript would be produced later. The transcript was agreed (**pp78-90**). It would appear that the meeting lasted for 45 minutes. Mr Forrester indicated that he had copies of the emails available to look at, but he also wanted to put to her that it had come to light that on Sunday 6 November 2016, the Claimant was in the office building and had apparently printed off a spreadsheet entitled "retail sales stats 2016" which is a spreadsheet. The Claimant explained that she had printed it because she had been doing employee engagement feedback forms. The shop takings had been going down and she wanted to see if staff morale had affected the takings as opposed to anything else. She was then asked why she had come into the office on a Sunday afternoon to print it. She then said that it could not have been her because she did not then have access to the building. She thought that the pass-code to the building had been altered because of the issues leading to Mr Seal's departure and so, at this meeting, it was left that the issue needed to be checked again. After dealing with some points about the accuracy of the notes of the first investigation meeting on 3 April 2017, Mr Forrester went on to discuss the allegation of theft of confidential company information (**pp80-81**). The Claimant explained she did not think there was any theft involved because the Respondent had its own copies of the various emails. Anything printed they would also have access to, so she did not consider that she was depriving them of anything. The Claimant accepted she did not have permission to take the material away with her, but she was going to keep it for further reference if anything came up regarding her employment. She felt that the documents might not be made available to her in the future once she had

been dismissed. The Claimant reiterated she did not believe the information was confidential. Mr Forrester then turned to deal with some specific documents that had been printed by the Claimant. The first document was an email from Ms. Jones to the Claimant dated 24 August 2015. It was giving her access to a human resources website with useful

34. templates and Ms. Jones gave the Claimant her own log-in details so that she could have a look at it. Mr Forrester wanted to know why the Claimant had printed this, especially as it contained log-in details. The Claimant replied (**p82**) that she printed it off as they had had an issue with employees' contracts and some of the other documents. She said that Mr Styles had highlighted that some parts of the contracts used were not quite right and so she wanted this document as proof that she had been requested to use the templates from this source. She denied that she was ever going to use or pass on the log-in details. She accepted the log-in details were confidential. However, she felt she had made it plain that the email was only going to be used for her own purposes to prove this particular point. Mr Forrester pursued this at some length. The Claimant reiterated that she felt her position was under threat because she had refused the redundancy offer.

35. The next document discussed was an email dated 8 November 2016 and the thread of emails following (**pp157-163**). This thread started with an email from an employee claiming she had not been paid for the last week in October. The employee was Kerrie Styles who had started with the Respondent at the beginning of the last week in October as Retail Regeneration Manager. In fact, she was the person who had assumed some of the Claimant's responsibilities in the retail restructure. The Claimant had been waiting to receive the name of her bank, but accepted she had made a mistake and the subsequent emails contained her sincere apology. Ms. Jones had been copied into the email exchanges as she was responsible for making the salary payment. The chain concludes with an email from Mr Styles which was critical about this error and also referred to errors in the National Insurance numbers being passed to Ms. Jones as a result of the Claimant's mistakes. It ended with a request that the Claimant should make sure that all new employees starting information should be given promptly to Ms. Jones in the future. The Claimant explained to Mr Forrester that she printed this chain of emails for the record to show that whilst a mistake had been made, it had been dealt with conclusively and was never discussed again.

36. The Claimant went on in the meeting to explain how she felt she was in a *"hugely vulnerable position"* after signing over a significant valuation of shares for nothing in return in order to help build relationships, but that this had not worked. She said she could be dismissed at any time and then the remainder of the shares would have a much lower value. Mr Forrester's response was that she would have legal remedies so that, if she were dismissed unfairly and her shares taken at an unfair price, she would have a remedy for that. He went on to put the next document to her, an email from the Claimant to Ms. Styles dated 8 November 2016 (**p159**) which was her apology to Ms. Styles for not having paid the wages for the last week in October. The Claimant explained again that this was

to confirm that the mistake made had been rectified.

37. The next document produced was an email from Mr Styles to the Claimant dated 1 February 2017 (**p164**). The Claimant replied it was simply an email confirming a deadline date for completion of a task. No further documents were shown to the Claimant so she was not able to give her explanations as to the rest. On the schedule of printed documents taken by the Claimant **(p153**) the items covered at this meeting were 1-14.

38. Mr Forrester turned to the CCTV footage. The Claimant did not seek to deny what she had done but was consistent and repeated several times why she had done it. She summarised this in saying (**p86**): *"Because of the next step that I felt the company were going to take to terminate my employment, all of those emails there are in terms of email conduct and also highlighting, that although there has been performance issues, they have never been raised with myself in a formal manner up until this point, and over the last four months, my job roles have been taken off me and then I get offered redundancy which I didn't agree with, so the reason why I was taking those was because I wasn't quite sure where the direction was going to take, so I wanted to make sure I had documents to help my case…."*. Mr Forrester responded that the Claimant must not have trusted the Respondent. She replied that the Respondent did not obviously trust her. When asked why, she replied *"because they believe I have taken information to use unlawfully and I don't trust my employer because of what they have done to Scott"* (**p86**).

39. Mr Forrester then repeated the allegation against her that she had stolen or attempted to steal confidential company information. He said she had admitted it. She denied admitting she had taken confidential information. A little later Mr Forrester put to the Claimant that*: "nobody has accused you of taking the information for any other purposes than to fight your case Terri, what people have accused you of is stealing or attempting to steal from the company…"* (**p87**).

40. Later Mr Forrester put it to the Claimant: *"would you trust the employee who is printing emails surreptitiously"*. She replied: *"I would have to find out obviously what they were printing which you have found out what I was printing and then the whole, this is a difficult situation because it is not as black and white, there are other issues involved here, so you cannot just say if it was another employee would you then trust them because you wouldn't trust them if it was another employee, but there is lots of different situations and things that have happened to make that happen on Monday. It's not an isolated case, it's a sequence of things that have happened, so you can't compare that to another employee that is just sat in that office out there, you cannot compare that because there's history. There's four years of history, there's me relinquishing 50% of my shares for no money to improve to help and it didn't help"*. (**p89**).

41. After this, the meeting came to an end. Mr Forrester said he was going to

carry out some further investigations. He promised to send the Claimant copies of all the emails and further documents to her that day and he would fix a date for the resumed meeting.

42. The Claimant received an undated letter from Mr Styles on behalf of the Respondent requiring her to attend a disciplinary hearing at 12pm on Wednesday 19 April 2017. The allegation remained as before. Copies of all the emails printed off by the Claimant on 3 April were enclosed together with the screen shot and spreadsheet to which she was referred to the meeting on the 10 April 2017.

43. The resumed hearing took place as planned. Again, notes were taken by Mr Styles (**pp93-93**) and the Claimant recorded the meeting, the transcript being later prepared (**pp94-97**). No issue was taken with either set of meeting notes. Once again, the Claimant chose not to be accompanied. Her recording of the meeting on 10 April and the transcripts were not then available.

44. Firstly, with regard to the documents printed 6 November 2016, the Claimant said that she had had a chance to reconsider and that, although it had been on a Sunday, she did in fact go into work on that day. She had been able to check her log of daily tasks which confirmed this. She explained that, at the previous meeting, she had not had the chance to do so. In his evidence before the Tribunal, Mr Forrester pointed out that the Claimant had changed her explanation here. Previously, she had said it could not have been her, and this time she said it was. He said that he was not aware that the alarm code to the building had been changed and he hadn't checked. He said, in his opinion, usually the first account given by someone is the most accurate and, if given time, they will come up with excuses. Accordingly, he had held that changed explanation against her.

45. After dealing with the November 2016 documents, Mr Forrester asked the Claimant if she had anything else to say. There was no discussion about any of the documents that had not being shown to the Claimant at the previous meeting. The Claimant said she had nothing more to add, as they had covered in the last meeting the reason why she had printed off the documents, and she reiterated her opinion that it was just email communications between them and nothing confidential.

46. At this stage, only five minutes had passed according to the transcript and Mr Forrester said that he would adjourn to reach a decision. Interestingly, whilst the transcript does not say more than that, the Respondent's note (**p92**) records that Mr Forrester was adjourning the meeting to "*take time to consult with my clients as to a final decision. I will then instruct them on how to proceed. We will then communicate that decision with you*". It then records in bold print and upper case: "***MEETING PAUSED FOR CONSULTATION WITH SENIOR MANAGEMENT TEAM.***"

47. After a few minutes Mr Forrester returned to confirm the decision taken. The two sets of notes are very similar, but the transcript is a little longer and I take the relevant parts from it of what Mr Forrester said together

with the Claimant's responses in the following passage set out exactly as transcribed(**p96**): -

> "JF - *I've had a think about what you've said and I have had a think about the evidence what we've got in front of us, and we've reached the decision, or I've reached the decision that the trust and confidence that ifancyone.com can have in you has broken down.*
> *TR – OK*
> *JF – I take into account that the majority of the emails that you took didn't have any confidential information in them.*
> *TR – None of them did.*
> *JF – I disagree with that and that you took an email that had passwords and usernames for a product the company has bought, and I believe that is confidential information, however I taken into account that the majority of the information you took didn't have confidential information in it. But what I can't get around is the fact that you attempted to steal company information. And it doesn't matter in my view whether the information was confidential or not what matters is that you attempted to steal things that belonged to ifancyone. Therefore, the decision has been reached that your employment will be terminated with immediate effect.*
> *TR – OK*
> *JF – However it will be a misconduct dismissal, not a gross misconduct dismissal and you are therefore entitled to be paid your notice. That notice will be paid in lieu and you will receive your notice at the end of May in May's payroll run. You will be paid up to and including today in the usual manner and then obviously your notice period on top of that in May and your holiday pay that has been accrued but not yet taken……"*

48. He concluded with the usual formalities and mention of a right to appeal.

49. In his evidence to the Tribunal, Mr Forrester said that he had adjourned the meeting and formed the view that the Claimant had attempted to steal from the Respondent and dismissal was the appropriate sanction believing that the Claimant was lying and trying to make up a story to account for her actions. Mr Feeny sought to assert from the way the notes were recorded that the decision to dismiss had not been that of Mr Forrester solely and that Ms. Jones and/or others were also involved. In his evidence, Mr Forrester confirmed that having come to the view that it would be reasonable for the Respondent to dismiss the Claimant, he discussed this view with Ms. Jones and that she confirmed he had delegated authority to make the decision on behalf of the Respondent. However, if the decision was to dismiss the Claimant, Ms. Jones wanted to ensure she would be *"OK financially"*, to which he had explained that the Respondent would be able to make a payment in respect of notice pay if it wished. He said that he went on to decide that dismissal was appropriate and that he would normally have summarily dismissed an employee in such circumstances, but he was conscious that the Respondent wanted to try and help the Claimant out of loyalty. I accept that evidence.

50. I am not sure how paying somebody five weeks notice pay for loss of their job equates to ensuring that they would be "OK financially". I find Mr Forrester did satisfy himself there were grounds for dismissing the Claimant, but he wanted to run that past his client before implementing it. After the conversation as found above the decision was then taken by him to dismiss the Claimant with notice and this is what happened with the notice payment being made in lieu. At that time, I find Mr Forrester had not considered the effect of there being no contract of employment and therefore no operative payment in lieu clause.

51. Following the meeting, Mr Forrester wrote a letter to the Claimant on his firm's notepaper confirming the dismissal. Somewhat oddly in the circumstances, it states: *"we have been asked to communicate the decision to terminate your employment".* It sets out the reason for dismissal in the following terms (**p98)**: -

> "*… you have stolen or attempted to steal property belonging to the company on 3 April 2017 namely a number of emails. Whilst it is accepted that the majority of those emails were not confidential, the fact remains that you attempted to steal company property that you could very simply have obtained by making a request for them. The manner in which you attempted to cover up your attempted theft means that the company can no longer have any trust or confidence in you and therefore your employment has been terminated.*
>
> *It has been decided that your employment will terminate with immediate effect and your last date of employment will therefore be 19 April 2017. However, the company is going to make a payment to you in respect of your notice of five weeks. That notice pay will be paid to you in the payroll run at the end of May. You will receive your wages and any accrued but untaken holiday pay up to the 19 April 2017 in the usual manner at the end of April."*

52. The spreadsheet printed on 6 November 2016 is not included in the category of property that the Claimant attempted to steal.

53. The Claimant sent a letter of appeal with reasons dated 21 April 2017 (**pp101-102**). The Respondent made arrangements for the appeal to be heard at 10am on 10 May 2017 by Mr S. King, one of Mr Forrester's solicitor colleagues at the Respondent's solicitors. The Respondent prepared handwritten and typed minutes of the appeal meeting (**pp108-136**). Once again, the Claimant recorded the meeting and the transcript was later prepared (**pp137-148**). Again, the Claimant chose not to have a companion. Mr King had a schedule of the documents that had been printed on 3 April 2017 (**p153**) and copies of all the documents listed. He did not have the spreadsheet from 8 November 2016. It was a very thorough meeting and Mr King went to every document on the list and sought the Claimant's explanation for printing them. The Claimant gave the same explanation as to why she had printed the documents as that given to Mr Forrester previously. Towards the end of the hearing, he went to some trouble to find out what the Claimant was seeking as an outcome to the appeal and indicated that possible outcomes might

include reinstatement with a final warning or a written warning. When pressed, the Claimant said she was looking for "*justice*" and that she did not want to be "*branded a thief*".

54. He took some time to consider the appeal and 12 days later confirmed the appeal was dismissed in a letter to the Claimant dated 22 May 2017 on the Respondent's letter heading. In the letter (**pp149-152**) he stated that: -

> "*Whilst much of the information contained in the document related to fairly routine and mundane management issues, there was information which in the ordinary course of business I would have expected to have been kept as confidential such as the names of employees, their salary review dates and the name of a supplier. Most significant was the secretive way in which this information was removed by you from the company's offices without any authority.*
>
> *I appreciate that you felt justified in taking the information because you considered it probable that your employment was going to be terminated but the reality was that it had not been terminated and you did not have authority to take those documents".* (**p150**).

55. Further on in the letter, he states:

> "*It is evident to me that you had access to confidential information in the company. So the unauthorised removal of documents containing company information is a serious matter. It goes to the heart of the employment relationship*.
>
> *I have to conclude that acting in the way that you did, and doing something that you knew you should not be doing (or at its very best doing something which you knew that if you had asked permission would have been denied) amounts to a disciplinary offence.*
>
> *The question then to be answered is how serious that misconduct was and what sanction (if any) should be imposed".* (**p151***).*

56. He concluded the letter by stating:

> *"I have deliberately avoided using emotive language such as theft, or referring to what you did as stealing and I have not labelled you as a thief. In reaching my conclusions, I am not attaching any criminal labels to you or your conduct but because I am satisfied that you knew you were doing something you should not have been doing and because that has led to a breach of trust and confidence I dismiss your appeal against dismissal and uphold the finding that you should be dismissed.*
>
> *When you were summarily dismissed you were told that you would receive 5 weeks' pay being payment in respect of notice. That is unusual and if I had conducted the original disciplinary procedure that may not have been my decision but as you have been informed that*

the monies would be paid to you at the end of May I am not proposing to alter that decision and the notice monies will be paid as previously indicated." (**p151**)

57. The Respondent paid the Claimant her salary up to the termination date of 19 April 2017 and subsequently paid her in lieu of five weeks' notice, applying her normal rate of pay, but excluding the fixed monthly payment of £500 from the calculation.

58. There remains a dispute over terms of the Claimant's now compulsory share transfer as a "Departing Employee" under clause 9.1.4 of the Agreement, including the value of the shares, which is unresolved, but is not a matter that concerns the Tribunal.

59. After the Claimant was dismissed, the Respondent checked its servers to see if the Claimant had taken any other documents. The Respondent prepared a schedule of emails which the Claimant had sent to her personal email address (**pp176-179**) between 20 June 2016 and 29 March 2017. Mr Forrester contended in his evidence that there was no reason for the Claimant to forward company emails to her personal email account because she was in possession of a company laptop from which she could access her work emails at any time required. The Claimant accepted she was in possession of a laptop which had been given to her and the other original Director shareholders. She said that occasionally she emailed documents to her personal account because she was unable to log on with the laptop. She said this was from about September 2016 onwards and prior to that there had been password problems so she could not always access the system. It is common for employees Intending to work at home to email documents to themselves in advance to ease the task and I accept the Claimant' evidence on this.

60. Mr Forrester further contended that the dates of these extra emails were important. The Claimant had contended that she thought she was going to be dismissed and also was concerned as to her vulnerability following the departure of Mr Seal from the Respondent. Many of the emails were before those events. The Claimant's case is that the emails related either to tasks that she was performing, and the Agreement in its various versions and nothing contentious. The only specific documents referred to in the evidence were an email the Claimant forwarded to herself on 16 November 2016 and another one dated 30 November 2016 to which were attached a document change request and a draft confidentiality agreement (**pp188-200**). Mr Forrester asserted that the body of the emails identified individual employees by name, but the one dated 30 November 2016 (**p194**) only identified employees by their first names and gave their starting dates. There is nothing to identify anybody in the confidentiality agreement.

61. Mr Forrester continues to advise and assist the Respondent in matters of employment law and human resources. I was told by Miss Ronales-Cotos in her closing submissions that the Claimant has not been replaced in her role by the Respondent. However, no evidence was adduced on this and I cannot make any positive finding.

62. The Claimant presented her Claim form on 14 July 2017

The Law

63. The Claimant referred me to the following cases:-

Department for Employment and Learning v. Morgan [2016] IRLR 350
Dugdale –v- DDE Law Ltd UKEAT/0169/16/LA
Brandeaux Advisers (UK) Ltd –v- Chadwick [2011] IRLR 224

64. The Respondent referred me to the following cases:-

Secretary of State for Justice –v- Lown [2016] IRLR 22
Eversheds Legal Services Ltd –v- De Belin UKEAT/0352/10
Stonehouse Coaches Ltd –v- Smith [2014] ICR D14

65. A claim for wrongful dismissal is based on a breach of contract. It is very different from a complaint of unfair dismissal. The reasonableness or otherwise of an employer's actions is irrelevant and all the Tribunal has to consider is whether the employment contract has been breached. That is a decision for the Tribunal based on the evidence. If the Tribunal determines the contract has been breached and dismissal is the result, then it is wrongful, but it is not necessarily unfair. Conversely, an unfair dismissal is not necessarily wrongful.

66. In a case where contractual notice due was not given to an employee on the termination of employment, in order to establish a claim of wrongful dismissal, an employee only needs to prove that either the proper notice or pay in lieu thereof was given. However, for the latter to apply, there must be a "pay in lieu of notice" clause in the contract. An employee having proved one or the other applies, then the burden of proof shifts to the employer, who must prove on the balance of probabilities that:-

- the employee did the act/s or omission/s on which it relies
- the act/s or omission/s amount to a fundamental breach of contract and
- it dismissed for that reason or, having already dismissed, does not pay because of that after-discovered reason

67. As to the question of what amounts to a fundamental or repudiatory breach justifying summary dismissal, this was dealt with in some detail and with reference to the authorities by Jack J in the case of *Brandeaux Advisors (UK) Ltd –v- Chadwick* at paragraph 44 of the report and it is worth setting out much of it here as it is so relevant to the issues in this case:

> "The Court of Appeal was concerned with employment in *Briscoe v Lubrizol Ltd* [2002] EWCA Civ 508; [2002] IRLR 607, where Ward LJ stated:
>
> '108. To draw a distinction between gross misconduct and repudiatory conduct evincing an intention no longer to be bound by

the contract is in my judgment to make a distinction without a real difference. It may be more common in employment cases to deal with gross misconduct, but that is essentially a form of repudiatory conduct. The two propositions appear to have been so treated by Lord Jauncey of Tullichettle in *Neary and Neary v Dean of Westminster* [1999] IRLR 288 when he said at paragraph 20:

"The question of whether there has been a repudiatory breach of that duty justifying instant dismissal must now be addressed. Whether misconduct justifies summary dismissal of a servant is a question of fact."

109. The question turns upon what degree of misconduct justifies summary dismissal or amounts to repudiation. *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, 700–701 Lord Evershed MR analysed the authorities and stated that the proper conclusion to be drawn from them was this:

"... since a contract of service is but an example of contracts in general, so that the general law of contract would be applicable, it follows that the question must be – if summary dismissal is claimed to be justifiable – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the masters, and that unless he does so the relationship is, so to speak, struck at fundamentally.

I think it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious nature. I do, however, think ... that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one or its essential conditions; and for that reason, therefore, I think that you find in the passages I have read that disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions."

Lord Jauncey also analysed the authorities and concluded at paragraph 22:

"There are no doubt other cases which could be cited on the matter, but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

I take that to be the test.

A subsidiary question arose in the course of the argument: must the conduct be considered subjectively from the point of view of the employee or objectively? That question is answered by *Mapleflock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148, 155 ....

Devlin J put it succinctly in *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, 436:

"The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating was acting in such a way as to lead a reasonable person to conclude that he does not intend to fulfil his part of the contract."

111. What then would a reasonable person conclude from the claimant's conduct?"

68. Further, in *Brandeaux Advisors (UK) Ltd –v- Chadwick,* again at paragraph 44, Jack J referred to the judgment of Etherington LJ in the case of *Eminence Property Developments Ltd v Heaney* [2010] 1 All ER(D) 193 where it was stressed that whether or not there has been a repudiatory breach is highly fact sensitive. Comparison with other cases is of limited value. It was held that:

> "64…..all the circumstances must be taken into account in so far as they bear on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person. So, Lord Wilberforce in *Woodar* (at p.281D) expressed himself in qualified terms on motive, not by saying it will always be irrelevant, but that it is not, of itself, decisive.".

69. With regard to claims for unfair dismissal, the starting point is section 98 Employment Rights Act 1996. In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or if more than one, the principal reason) for the dismissal, and that it is either a reason falling within section 98(2) or some other substantial reason of a kind such as to justify dismissal. A reason relating to the conduct of the employee is a potentially fair reason within section 98(2). By virtue of section 98(4), where the employer has shown a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer), depends on whether in the circumstances (including the size and administrative resources of the employers 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.

70. This approach to the enquiry under section 98(4) has long been regarded to have been set out in the judgment of the EAT in *British Home Stores Ltd –v- Burchell* [1978] IRLR 379. This is reflected in the issues listed at paragraph 6 above. In the case of *Secretary of State for Justice –v- Lown* [2016] IRLR 22 at paragraph 25, it was pointed out that this guidance had been fleshed out by the Court of Appeal in *Graham v The Secretary of State for Work and Pensions (Job Centre Plus)* [2012] IRLR 759, where it was stated at paragraphs 35 and 36:-

> "35. once it is established that employer's reason for dismissing the employee was a 'valid' reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.
>
> 36. If the answer to each of those questions is 'yes', the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'. An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see s.21(1) of the Employment Tribunals Act 1996."

71. Accordingly, as already stated above, in comparison with the exercise to be performed by the Tribunal in determining a wrongful dismissal claim, the Tribunal's task here is completely different.

72. Once there has been a finding of unfair dismissal, if compensation is to be assessed, the assessment of future loss may be affected by the principles in the case of *Polkey –v- AE Dayton Services Ltd* [1988] ICR 142. This is

considered before the question of any reduction for contributory fault under section 123(6) Employment Rights Act 1996. In the case of *Eversheds Legal Services Ltd –v- De Belin* UK EAT/0352/10 at paragraphs 44-45, the EAT reviewed the relevant authorities repeating the relevant principles and indicating where tribunals often go wrong in applying the principles. I take those into account. I have also considered what is set out in the report of *Stonehouse Coaches Ltd –v- Smith.*

73. I have already referred to the fact that the compensatory award may be reduced for any conduct of the Claimant which to any extent caused or contributed to the dismissal. The same principle applies to the basic award by virtue of section 122(2) Employment Rights Act 1996 where such an award may be reduced on account of any conduct of the Claimant prior to dismissal to the extent that it would be just and equitable to do so.

74. Finally, where a Claimant is successful in relation to claims brought under any of the jurisdictions listed in Schedule 5 of the Employment Act 2002, by virtue of section 38 of the Act, where the employer Respondent was in breach of his duty for the employee Claimant under section 1(1) or 4(1) of the Employment Rights Act 1996, the Tribunal must, unless there are exceptional circumstances rendering it unjust or inequitable to do so, increase the award in the manner described.

Conclusions

75. I will deal first with the question of the fixed monthly payment of £500 and whether, as contended by the Claimant, it formed part of her normal remuneration, or whether, as contended by the Respondent, it was an entirely separate dividend payment. For the Claimant, this is only relevant in the context of the five weeks' notice pay and it is claimed that an additional sum of £575 should have been paid to reflect this part of the alleged remuneration that was left unpaid. Having taken into account the respective submissions made, I prefer those on behalf of the Respondent. Whilst the email from Ms. Jones to the Respondent's accountant dated 3 March 2016 (**p39**) referred to "a dividend for the remainder of [her] salary", the position was later and finally confirmed and encapsulated within the Agreement at clause 18 (**p60**). Before the Agreement was signed, it went through various drafts and all parties had the benefit of independent legal advice. Clause 18.1 of the Agreement makes it clear that the Respondent shall not declare or pay any dividend including such dividend payable in accordance with Clause 18.2 without "Shareholder Consent", meaning the prior written consent of the Principle Shareholders, namely Ms. Jones and Mr Heaton. This meant that the monthly fixed dividend of £500 payable to the Claimant under Clause 18.2 would only be payable if Ms. Jones and Mr Heaton consented to the company making a dividend declaration and payment. Obviously, the intention was that the company would only declare such dividends, including the monthly fixed dividend of £500 when the conditions were right, i.e. the business had made sufficient profits and had the cash to pay. The Claimant accepted all this under cross examination.

76. Consequently, there can be no doubt in my judgment that the fixed monthly payments of £500 were on account of dividend payments not connected in any way to the Claimant's remuneration for services rendered.

77. The next issue to be determined is whether the Claimant's dismissal was wrongful and, if not, whether the Respondent was entitled to make a payment in lieu of notice; and, if so, whether payment in full was made. Mr Feeny submitted I should focus on the Respondent's conduct prior to 3 April 2017, the Claimant's motive for taking the documentation, and the severity of her misconduct in taking the documents and information contained within them. Miss Ranales-Cotos submitted there had been nothing untoward in the Respondent's conduct towards the Claimant, which had all been justified at the time, and that the Claimant had done nothing about it, for example, by raising a grievance. On the contrary she said it was the Claimant's conduct that had been repudiatory and she posed the question as to what reasonable employer could have trusted her after the events that took place on 3 April 2017. Her conduct had been sufficiently serious to amount to repudiatory conduct justifying summary dismissal. She submitted that an employee, who takes sensitive company information, even if to give themselves a defence in subsequent proceedings, is still in breach of the duty of fidelity so that trust and confidence goes.

78. The conduct relied upon was the Claimant's undoubted and admitted printing of the emails and document listed in the schedule (**p153**) and removing them to her car in an attempt to take them home. There can be no doubt that this was all done furtively. When she was observed doing this by Mr Heaton on the CCTV, he did not know what she was printing and taking away. He held a meeting with the Claimant before he had had the opportunity to recover the printed material and so, no doubt from the way he observed the situation, jumped to the conclusion that it was sensitive and confidential material about the company and was concerned about there being a risk to the business as a consequence. As matters progressed with the disciplinary hearings on 10 and 17 April 2017, it came to be accepted by Mr Forrester that only very limited parts of the material were confidential, namely log in details to some HR software (which might well have been out of date in any event), some employee names (but not addresses) and start dates or salary increases. Certainly nothing had been taken that was of a highly sensitive nature or which could damage the company or assist any competitor. Indeed, Mr Forrester professed that, notwithstanding the Claimant's explanations, he could not understand to what use the Claimant might wish to put the information contained in the documents.

79. It is for the Tribunal to decide objectively whether the conduct was repudiatory in that it was likely to destroy trust and confidence.

80. I find that the Claimant took a small amount of material, very largely emails, which were emails between and common to the parties containing hardly any confidential information and certainly no information that could be harmful to the company. Nevertheless, the Claimant was not entitled

to do this. She had used the Respondent's printer and paper for personal use and acknowledged that she would probably have been denied permission to take the material, had she asked in advance. The Respondent has set great store on the fact that, as the HR Manager, she had access to highly confidential information and that, had they continued to employ her, they would no longer have been able to trust her due to the fact that she had removed the material in question without permission and furtively. I take the view that jumping to this conclusion does not follow at all and exaggerates the seriousness of the conduct.

81. Each case must be judged on its own facts and it has to be said there is no comparison at all between the facts of this case and the case of *Brandeaux Advisers (UK) Ltd –v Chadwick* where a vast amount of documents were taken which contained sensitive information about the companies' affairs. Nevertheless, that case does correctly state the principles to be applied. Even where there has been a breach of good faith in removing documents, the Tribunal should still look at the justification put forward. I refer to the passage cited at paragraph 67 above.

82. I accept that the Claimant was feeling extremely vulnerable on the morning of Monday 3 April 2017. She thought it likely that she was going to be dismissed at some point in the near future, whether for redundancy or capability. She had seen what she believed had been similar conduct on the part of the Respondent towards her partner, Mr Seal and, since his departure; relations between her and the two directors had not been the same. She had received highly critical emails. Even if those might have been justified (and I make no finding), there had been no proper discussion between the parties and the critical emails had been copied to others. She was under stress and without really thinking about the consequences, the Claimant decided to print off some emails which she thought might help her case if any accusations were brought or made against her in the future. It is clear from the documents and listening to the Claimant's explanation that this can have been the only purpose for removing them, whether misguided or not. I am also mindful that the Claimant did not, in any event regard the material as being confidential or harmful, but simply thought it would be useful to her and that the material might not be made available to her in the future, if she were dismissed.

83. The question is whether the taking of a small quantity of documents containing some confidential, but harmless information, is sufficient to undermine the trust and confidence inherent in the contract of employment. Here, I find the misconduct was relatively minor and a one-off event and did not go so far as to evince an intention on the part of the Claimant not to be bound by the essential conditions of her employment and was not conduct which, in all the circumstances and given the Claimant's explanation, should have caused a reasonable person to conclude that she did not intend to fulfil the essential conditions her employment then, or in the future. Whether the Claimant was right to

have had her suspicions about the Respondent's conduct or not, it did explain why she took those documents. There was nothing to suggest on

any objective basis that the Claimant would breach her duty of good faith in the future.

84. As far as the documents found after dismissal are concerned, I find they come into the same category. They were taken either for the performance of work related tasks at home, or with regard to the relationship between the Claimant or her partner and the Respondent, i.e. in the context of the Agreement. It was all harmless for which there were perfectly justifiable explanations.

85. Accordingly, in so far as the Claimant was dismissed without notice, I find her dismissal was wrongful. Her conduct was due to an error of judgment in difficult personal circumstances, but could not be described as gross misconduct justifying summary dismissal.

86. A dismissal without notice may be rendered lawful if there is a "pay in lieu" clause in the contract of employment. Here, the Respondent made a payment of five weeks' pay in lieu of notice, but there was no contract of employment and so no contractual term entitling the Respondent to make such a payment. The Claimant was entitled to receive and be paid to work her notice for five weeks. Her dismissal was in breach of contract and so wrongful on account of this failure. However, there will be no entitlement to compensation for wrongful dismissal. Five weeks' notice pay was paid. I have already determined that the Claimant's pay did not include the fixed monthly payment of £500 on account of it being a separate dividend payment in respect of her shareholding.

87. I turn now to the question of whether or not the Claimant was unfairly dismissed.

88. Regarding the first step of establishing the reason for dismissal, Miss Ranales-Cotos submitted there could be no doubt that conduct was the reason and that it was the Claimant's conduct that led to a breach of trust and confidence and her dismissal. Mr Feeny submitted that the Tribunal should not be taken in by the Respondent's evidence on this and that the real reason for dismissal was to do with removing the Claimant from their employment in order to gain possession of her shares. In response to the point of rebuttal that, if that were the Respondent's intention, why would they have been offering her a redundancy package, he submitted it was not necessarily about whether she would have been a good or bad leaver; put simply, the Respondent wanted her shares.

89. I do not agree with Mr Feeny's submissions here. Had this been the Respondent's intention, steps could have been taken at an earlier stage to dismiss the Claimant, whether for reasons relating to her performance or for redundancy. The former might have led to her departure as a bad leaver with minimal value for her shares; the latter would have meant a departure as a good leaver with a fair valuation for her shares.

90. It was the Claimant herself who started off the process for a possible sale of her shares to the Respondent's directors for a price to be negotiated. They took this as a sign that the Claimant also wanted to leave the

Respondent's employment, though I find there was no reasonable basis on which they could come to that conclusion. Nevertheless, having taken advice from Mr Forrester, they made the Claimant a combined proposal to leave her employment by reason of redundancy and be paid in return the sum of £8,000, which would include her redundancy entitlements and a price for her shares. The proposal to make her redundant was made at a meeting between her and Mr Forrester and Mr Heaton on 29 March 2017. This came as a complete surprise to her and increased her feeling of vulnerability leading to her conduct on 3 April 2017. I have no doubt that the proposal to make her redundant was a device by the Respondent to turn up the pressure on the Claimant to leave and perhaps accept less than a fair value for her shares. However, before that process could be pursued any further, there was the supervening event on 3 April 2017, as a result of which, the Respondent was perfectly entitled to investigate and pursue its disciplinary procedure. The procedure focused entirely on the Claimant's conduct in printing and removing various documents furtively. The Claimant's conduct was clearly recorded at both the disciplinary hearing and the appeal hearing and confirmed as the reason for dismissal in the dismissal letter and the appeal outcome letter. I accept that the Respondent has shown the reason for dismissal related to the Claimant's conduct in attempting to take away a number of emails in a furtive manner leading to the Respondent no longer having trust and confidence in her.

91. The more substantive issue concerns the fairness or otherwise of the dismissal and the application of the *Burchell* guidance. Mr Feeny submitted there was inherent procedural unfairness in view of Mr Forrester chairing the disciplinary process. He submitted he had advised on the departure of Mr Seal and probably on the Claimant's exit. The Respondent was his "paymaster" and, in all the circumstances, it was submitted it was wrong for him to carry on and deal with the process, particularly when there were others in the Respondent firm who could have handled it. Even if not deliberate, he submitted there must have been a subconscious effect on Mr Forrester and his decision-making through knowing what his clients wanted. Further, he submitted that his clients were involved in the final decision. Mr Forrester admitted having a discussion with Ms. Jones at the end of the disciplinary hearing. Mr Feeny submitted he must have discussed the legalities of whether or not notice should be given and he submitted that Mr Forrester was performing an advisory role even while considering his decision to dismiss. He submitted it would not be too great a step to suggest that Ms. Jones influenced him in his decision-making. The Respondent's note made by Mr Styles recorded that the disciplinary hearing was paused for consultation with the senior management team. Afterwards, the Claimant's transcript of the disciplinary hearing records what, it is submitted, was a Freudian slip on the part of Mr Forrester when he said "we've reached the decision" before correcting himself to say that "I've reached the decision". Further he submitted that the dismissal letter written on the firm of solicitors' notepaper commence with the words: "We have been asked to communicate the decision to terminate your employment" which would be rather bizarre if Mr Forrester had made the decision solely.

92. Miss Ranales-Cotos submitted in terms that, if the Tribunal examines the notes of the disciplinary hearing and the outcome letter, there can be no question that, notwithstanding Mr Feeny's submissions, Mr Forrester conducted a fair hearing and had reasonable grounds for his belief in the Claimant's misconduct. Further, she asked the Tribunal to accept his evidence as a solicitor (with what that status involves) that it was indeed his decision and his alone, to dismiss the Claimant for the stated reason.

93. It is unfortunate that Mr Forrester did agree to chair the disciplinary process and, had someone else been instructed to do so, these issues would have been avoided. There probably was a subconscious desire on his part to please his clients and that might explain why he first adjourned the hearing to discuss the matter with Ms. Jones, before announcing his decision. Nevertheless, I am satisfied with his evidence that Ms. Jones was leaving the decision itself to him as she felt too personally conflicted. He is an experienced employment solicitor and I accept he was giving honest evidence on this to the Tribunal. The question whether or not the Claimant should be paid in lieu of notice did not go to the fairness of the dismissal. Ms. Jones accepted Mr Forrester's decision that the Claimant should be dismissed. I am not in the position of having to decide what might have happened if she had told him not to dismiss. I am satisfied that Mr Forrester's miscommunication to the Claimant at the end of the disciplinary hearing was a slip of the tongue. Solicitors often use the first person plural rather than singular in communications and he was in an unfamiliar situation outside his office. Whilst he was probably wrong and careless to communicate the decision to dismiss on his firm of solicitors' notepaper, I believe this also caused him to slip into the same terminology he would use when writing on behalf of a client, and there was nothing sinister or suspicious about it. The Respondent's note regarding the adjournment did not appear in the Claimant's own transcript and was simply a poor way of expressing the fact that Mr Forrester adjourned to speak with Ms Jones.

94. Since I reject the submission that the whole process was inherently unfair, I move to the next question, namely whether there had been enough investigation to enable Mr Forrester to have reasonable grounds for his belief in the Claimant's misconduct. Clearly, Mr Forrester believed the Claimant was guilty of misconduct, but did he have reasonable grounds for his belief. As far as Mr Forrester was concerned, the Claimant had admitted, and it was clear from the CCTV evidence, that she had printed some emails on the Respondent's printer and taken them to her car with the intention of keeping them for herself. I do not think it matters particularly that Mr Forrester kept on referring to her having "stolen, or "attempted to steal". What had taken place was perfectly clear. It was also reasonable for Mr Forrester to take the view that the Claimant had taken these steps furtively and without permission. The next question surrounding the conduct is whether Mr Forrester relied on the emails containing confidential information in coming to his decision. Certainly, the initial charge against the Claimant was that she had "stolen, or attempted to steal confidential company information". However, by the end of the disciplinary hearings, it is clear that his emphasis had moved away from this area. In announcing his decision to the Claimant, his first

conclusion was that the trust and confidence that the Respondent could have in the Claimant had broken down. He then conceded that the majority of the emails taken did not have any confidential information in them. When the Claimant challenged that any of them had any confidential information, he responded by referring just to the email containing "passwords and user names for a product the company has bought" and his belief that that amounted to confidential information. He went on to add that it didn't matter in his view whether the information was confidential or not and that what really mattered was the Claimant's attempt to steal.

95. The email to which Mr Forrester was referring as containing confidential information had only one user name and password, which a reasonable employer might have investigated further or concluded was likely to have been changed in the period of time between the date of the email (24 August 2015) and the date on which it was taken (3 April 2017). I find he accepted, as was reasonable in the circumstances, that there was hardly any confidential information involved in the documents and that it was innocuous.

96. The next question is whether Mr Forrester had reasonable grounds for believing the Respondent could no longer have trust and confidence in the Claimant. The argument went that the Claimant held a position with access to confidential information and that, as she had been seen furtively taking away documents, the Respondent could no longer trust her not to take away such confidential information in the future. A reasonable employer would have examined what she took on this occasion and her explanation for it. Mr Forrester started off questioning the Claimant about why she had taken some of the documents, but he did not really seem to take any notice of her explanation or, if he did, he failed to understand it and question her further. She made it clear in answer to these questions that she was taking the documents to help her deal in the future with any allegations against her for incompetence and, if necessary, use them in connection with any unfair dismissal claim. Mr Forrester simply could not see or understand her motive in taking the documents, and yet there was no other explanation for it. No positive case was put by him to her that the documents were taken for any other purpose. It was never suggested that the information contained in the documents could be used for purposes harmful to the Respondent and no reasonable employer could have believed that. Mr Forrester did not complete the exercise of taking the Claimant through each and every document. That was done at the appeal hearing by Mr King, and the Claimant repeated the same explanation. Somewhat surprisingly, Mr Forrester attached guilt to the Claimant's conduct in changing her mind between the first and second disciplinary hearing as to the incident in November 2016. He could not, or refused, to see that she had been taken by surprise at the first hearing and that, after she had had an opportunity to consider the documents and her own records, she accepted that she had gone into the Respondent's office and printed the particular document on the Sunday in question. That was a clear example of how his mind was closed as far as the Claimant having a reasonable explanation for her conduct was concerned.

97. As far as the Claimant's motive was concerned, the Claimant had given her history as to how she perceived she had been treated in the weeks leading up to 3 April 2017. Mr Forrester himself knew that the suggestion of redundancy at his meeting with the Claimant on 28 March 2017 had come as a considerable shock to the Claimant. Had he had an open mind, that might have leant some credence to her explanation. It would have done so to a reasonable employer.

98. A reasonable employer would probably have concluded that, whilst the Claimant might have been misguided, her state of mind and motivation explained her conduct and no malice was involved or future threat to the Respondent's business.

99. Consequently, I find there were no reasonable grounds for Mr Forrester's belief that the Claimant's conduct was serious enough to have caused a breakdown in trust and confidence.

100. Further, and in any event, I find that, based on the misconduct in question, the sanction of dismissal fell outside the band of responses of a reasonable employer and was therefore unfair. The initial allegation of stealing confidential information had effectively fallen away. There was no basis for a reasonable employer to come to the view that any serious misconduct had been committed and/or that trust and confidence had broken down. A reasonable employer would have taken into account the mitigating factors, namely as to the Claimant's state of mind and motivation and the fact that the documents taken were harmless. A reasonable employer would also take the view that, save in the case of gross misconduct, there would normally be no dismissal for a first breach of discipline in accordance with the ACAS guidance.

101. Having found the dismissal was unfair in all the circumstances, the next issue is whether there might have been a chance of the Claimant being dismissed fairly as some stage in the future. This is to apply the *Polkey* principles. Miss Ranales-Cotos submitted there were four possible bases for applying *Polkey*. Firstly the subsequent discovery that the Claimant had forwarded emails to herself at home; secondly, the likelihood of redundancy, since (according to her) the Claimant has not been replaced; thirdly, for reasons related to capability based on the losses suffered by the Respondent for the inaccurate holiday records, but it was accepted that there had been no capability process followed; and fourthly due to the Claimant's own lack of trust and confidence in the Respondent.

102. Mr Feeny submitted there was some chance of a fair dismissal sometime in the future, but only a very small possibility. He submitted that a 25% reduction might be appropriate. Miss Ranales-Cotos submitted that a fair dismissal was highly likely within a short fixed period of time and that I should approach it on that basis.

103. I do not accept the discovery of the further emails would have made any difference. Those were historical and therefore would not have followed on from any warning that might have been issued in relation to the events of 3 April 2017.

104. As for the likelihood of redundancy, that was only raised when the Claimant sought to sell her shares and was more likely to have been a negotiation ploy. I heard little as to how the Respondent's human resources functions are being managed without her. It would appear that some functions have been outsourced to Mr Forrester's firm, namely dealing with contentious employee issues. However, nothing was said regarding the regular day to day activities of human resources, such as recruitment, sickness and absence monitoring, holiday requests and records and payroll. It may well be that those various tasks have been spread around the directors and other employees and some have been outsourced, but I do not know. It is a possibility that the Respondent might have decided to take those steps in any event and make the Claimant redundant and it is possible it could have led to a fair dismissal by reason of redundancy. The negotiations might have led to the claimant accepting an increased financial package to include a redundancy payment and an acceptable price for her shares.

105. On the evidence, I cannot see any basis for a fair capability dismissal without any process having been started or without any evidence to support that the Claimant was incompetent.

106. I accept the Claimant stated on more than one occasion that she could not trust the Respondent but, nevertheless, she said she had no intention of leaving the Respondent's employment. If matters had been dealt with properly following the events of 3 April 2017, relations between the parties might well have improved, but there remained a possibility that irreparable damage had been done by then and that, at some stage, the Claimant would have left and claimed unfair constructive dismissal. The Respondent might have been in a position to successively defend such a claim.

107. Taking all the above into account, I am much more inclined to the percentage approach and find there was a 25% possibility of a fair dismissal (or a resignation without any claim) taking place in the future.

108. The final issue is whether it would be just and equitable to reduce the Claimant's basic and/or compensatory award for blameworthy or culpable conduct. There can be no doubt that the Claimant brought matters on her own head by furtively printing off and taking the documents in question. She knew what she was doing was wrong, but she felt justified. She was misguided. However, she did not intend to put the documents to improper use. I find it just and equitable that both her basic and compensatory award should be reduced by 35%.

109. The parties will now be given 28 days in which to try and negotiate a settlement. If the Tribunal receives no notification within 28 days of any such settlement, a date will be fixed for the Remedy Hearing.

Employment Judge **Battisby**
Date: 3 April 2018