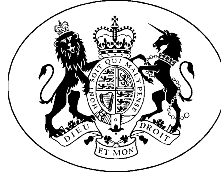

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E Boxshall	**v**	**SCB and Associates Limited**

Heard at: London Central
On: 10 – 12 October 2018

Before: Employment Judge Hodgson

Representation

For the Claimant: Mr G Anderson, counsel

For the Respondents: Mr T Cordrey, counsel

JUDGMENT

1. **The claim of unfair dismissal fails and is dismissed.**
2. **The claim of breach of contract fails and is dismissed.**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 8 November 2017, the claimant brought claims of unfair dismissal and breach of contract.

The Issues

2.1 The claimant alleges ordinary unfair dismissal and wrongful dismissal.

2.2 The respondent relies on conduct as a potentially fair reason for dismissal.

2.3 The claimant alleges that he may refer to pre-termination negotiations because the exception pursuant to section 111A(4) Employment Rights Act 1996 is engaged. The respondent disputes this.

Evidence

3.1 The claimant gave evidence.

3.2 For the respondent we heard from Ms Ruth Stone and Mr Joachim Emanuelsson.

3.3 We received a bundle, a chronology, an opening note from the claimant, and written submissions from both parties.

Concessions

4.1 At the commencement of the hearing I noted that the claimant's claim form referred to pre-termination negotiations. The parties had not sought a preliminary hearing. Both parties stated that it would be appropriate for me to hear all evidence relating to pre-termination negotiations and then determine whether that evidence must be excluded. I initially expressed concern as to whether it would be feasible or appropriate for me to do that. Both parties confirmed that it was possible, and that it was appropriate approach.

4.2 Both parties stated that whilst the evidence of pre-termination negotiations may be excluded for the purpose of unfair dismissal, it may be necessary to consider it for the purpose of wrongful dismissal. The principles relevant were consider at the beginning of the hearing and during submissions.

4.3 Both parties accept that section 111A Employment Rights Act 1996 applies only to unfair dismissal and it prevents pre-termination negotiations from being admissible in evidence, and that extends to both the content of, and the fact of, the discussions.[1] Both parties accept that evidence of the pre-termination negotiations may be admitted if, pursuant to subsection 4, the negotiations were in the tribunal's opinion improper or connected with improper behaviour. Both parties accept that if the subsection 4 exception does not apply, the evidence of the pre-termination negotiations may still be admissible in relation to the wrongful dismissal claim.

4.4 During submissions, I raised the potential operation of the common law principles of admissibility in the context without prejudice negotiations. Both parties accepted that evidence of the pre-termination negotiations should be admitted when deciding the wrongful dismissal claim. Neither wished to rely on the common law principles.

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[1] This view is supported by *Faithorn Farrell Tim's LLP v Bailey* 2016 ICR 1054.

The Facts

5.1 The respondent is a company which provides physical and future brokerage services in biofuels, energy, and agricultural markets. At the material time, it had 16 employees. From 1 December 2011 to 12 July 2017, the claimant worked as a broker in the respondent's energy commodity division. He was the most senior person on his desk.

5.2 There were issues with the claimant's performance which emerged in the second half of 2016 and continued during the remainder of his employment. The respondent was dissatisfied with the claimant's productivity. On 8 December 2016, the claimant was told by his manager, Mr Joachim Emanuelsson, that income of £15,000 per month was unsustainable. In a further email of 13 January 2017, he was told "You need to pull out all the tricks here, your revenue is falling and its [sic] now in negative contribution territory for the third month in a row."

5.3 It is the claimant's case that it was the market conditions, and not his performance which depressed his productivity. The cause is not relevant to my decision. Both parties knew at the material time that the claimant's performance was under scrutiny, and it was considered unsatisfactory. I accept Mr Emanuelsson's evidence that he believed the claimant could perform better. He states that the claimant's performance during 2016 became volatile and started to display a downward trend.

5.4 Mr Emanuelsson, at first, sought to engage with the claimant in an informal manner. He offered the claimant help with individual customers who had gone cold and generally sought to engage him. By May 2017, Mr Emanuelsson formed the view that it would be necessary to put a formal performance plan in place. He addressed this in his email of 15 May 2017. He told the claimant that he wished to see improvements in his performance. Specific sales targets were set.

5.5 In his statement, the claimant suggests that the targets were unreasonable. I have preferred Mr Emanuelsson's evidence that they were not unreasonable. Had they been unreasonable, on the balance of probability, there would have been appropriate contemporaneous evidence demonstrating the claimant's reasoning. The targets were just sufficient to put the claimant into positive contribution. He was targeted an annual sum of $160,000; the average revenue for a broker in the London office was US$420,000. The target was not unreasonable.

5.6 It is apparent that the claimant's performance did not significantly improve. The claimant recognised the difficulties. On 28 June 2017 at 10:49, the claimant sent a WhatsApp message to Mr Emanuelsson . He indicated he had been doing his best to meet targets and stated the market was "dreadful." He stated "I am asking you first as a friend if you could let me know the terms you are looking to dismiss me under. [If] you are looking to lighten the desk and want me out then I would like to think we could sit down and discuss this." Later in the message he continued "I would like to

think my exit from SCB which is imminent due to your email targets you sent me, could be done in a friendly manner after being a good and loyal servant through the last 5 years."

5.7 Mr Emanuelsson confirmed he was in London and would meet with the claimant. A meeting took place that day. The claimant stated it was impossible for him to meet his targets. It is accepted the parties discussed termination in the following three ways: dismissal, resignation, or some financial arrangement. The claimant states it was an ultimatum from Mr Emanuelsson. I have preferred Mr Emanuelsson's evidence: it was the claimant who identified the three possibilities. He did so because he had reached the conclusion that his employment must come to an end. I have reached my decision on the balance of possibility. I have not needed to rely on the claimant's credibility in preferring Mr Emanuelsson's evidence. There is no contemporaneous written evidence which would adequately support the claimant's contention that Mr Emanuelsson gave some form of ultimatum and the remainder of the evidence shows the claimant actively pursuing a settlement and engaging with the settlement agreement process. The claimant's evidence on this point is superficial and sketchy. Further, in his statement the claimant failed to set out, with any clarity, the events of 28 June 2017. He fails to mention his own WhatsApp message of 28 June 2017, which called for a meeting to discuss his options and acknowledged the likely termination. His oral evidence was unconvincing. Mr Emanuelsson's evidence, as supported by Ms Ruth Stone is clear, detailed, and cogent. The contemporaneous evidence points to the fact that the claimant had reached the conclusion that his employment would come to an end and actively initiated negotiations.

5.8 There was a discussion on 28 June 2017 as a result of the claimant's WhatsApp message; the claimant suggested a settlement figure in the region of £40,000. Mr Joachim Emanuelsson suggested £27,000 was more realistic, ultimately this was rounded up to £30,000. It is common ground that Mr Emanuelsson spoke with Ms Ruth Stone, general counsel for the respondent. She had duties in relation to regulation and compliance generally. She viewed the conversation as a "protected conversation." On 29 June 2017 she produced a settlement agreement and gave it to the claimant. It is the claimant's case that he was told he must sign it and return it the following day. His statement puts it the following way:

> **28. On 29 June 2017, Ruth Stone, the Respondent's in-house counsel, provided me with a copy of a settlement agreement which was marked "without prejudice & subject to contract" and which set out a termination payment of £30,000. I was told that the agreement needed to be signed and returned by the following day, Friday 30 June 2017.**

5.9 There is no contemporaneous documentation which would support the assertion that the claimant was given any deadline. The claimant had already instructed a solicitor. He intended to meet the solicitor. Ms Stone was told this. I accept her evidence that she encouraged him to take advice and she explained to him the nature of without prejudice discussions. Had he been given a specific deadline, on the balance of

probability, he would have referred to it in his WhatsApp messages, but he says nothing about a deadline.

5.10 It is clear that there were further discussions and negotiations. The claimant's WhatsApp messages reveal that he was largely concerned about the tax-free status of the £30,000 offer. His concern led him not to accept the offer. He was dismissed for alleged misconduct.

5.11 It is apparent that the offer remained open until the time when the claimant was dismissed. His evidence is as follows:

> **42. The meeting[2] finished at 12.46pm and I was told that the outcome meeting would take place the following day at 4pm. Ms Stone told me that this was the final opportunity to sign the settlement agreement, with the offer of £30,000 remaining open for me to accept until 4pm that day. David Haigh, who accompanied me to the hearing on both days, asked Ms Stone after the conclusion of the meeting for clarification on the offer. David asked Ms Stone to confirm that if I accepted the settlement offer by the 4pm deadline on 12 July 2017, then all charges against me and the disciplinary action against me would be dropped. Ms Stone confirmed that this was the case and said that if I didn't accept the offer, then the outcome of the disciplinary hearing would be given at the scheduled hearing at 4pm on 12 July.**

5.12 It is not disputed that the offer remained open. There is a dispute as to whether the claimant was told that no disciplinary action would be pursued against him. I accept, on the balance of probabilities, that there would have been some discussion about the continuation of disciplinary proceedings and the reason for termination. I accept the claimant believed that if he accepted the offer, disciplinary proceedings would be dropped. He did not accept the offer. He was dismissed. I need to consider the circumstances leading to the dismissal.

5.13 The claimant's role had a number of strands which include the following: market information would be obtained (some of which was purchased from specialist providers and was confidential) and communicated to prospective clients; he would effect trades for clients; and he would deal with sensitive and confidential information relevant to the respondent's business, and business plan.

5.14 The claimant's contract of employment contains a confidentiality clause at 6.1 which included the following wording:

> **…All such confidential information shall be and remain the property of the company. Broker agrees that, during and after the term of brokers employment with the company, broker shall not… disclose to any individual or entity, for any reason or purpose whatsoever, any confidential information.**

5.15 There was a restrictive covenant at paragraph 6.2 restricting his activity in the brokerage business for a period of three months. There was a non-solicitation clause at 6.3. Clause 6.5 of the contract dealt with "unique

[2] The reconvened dismissal hearing of 12 July 2018.

services." The broker was deemed to accept that breach or threatened breach of the provisions including confidentiality, and non-solicitation would be deemed irreparable harm.

5.16 The claimant was subject to FCA regulations. He was aware of the need to maintain confidentiality in relation to clients.

5.17 The respondent had an IT policy. Section 3 contains a confidentiality policy which included the following words:

> **Never use your own personal email for the purposes of SCB business. Only use the email account provided by SCB."**

5.18 Under section 9, there was a following prohibition:

> **Never forward or send or cause to be forwarded or sent any client or other company confidential information to any personal email account.**

5.19 Underpinning all of this is the general FCA requirement, which has not been disputed by the claimant, that the respondent should be able to monitor client communications for the purposes of compliance.

5.20 The claimant's evidence is that he did not know of the existence of the IT policy. I do not need to resolve whether that is true. The claimant stated that he never even thought to question whether there was an IT policy. In the context of a financial organisation, where it is necessary to comply with FCA principles and/or regulations, it is extraordinary that a broker would not seek to familiarise his or herself with relevant regulations, and relevant IT practices. Moreover, a number of emails reiterated the prohibition. For example, the monthly report of 8 September 2016 specifically states, "This is a confidential report for circulation within SCB entities only." There can be no doubt that the claimant should have fully understood that there were limitations on his use of information, the handling of information, and the devices which could be used. He was supplied with computer access, both at work and remotely, and a work's telephone. He had remote access to sensitive and confidential information.

5.21 It ise clear that the claimant breached his contract in a number of ways. He sent confidential and sensitive information to his own personal email. He used his own personal WhatsApp account for client communications. He downloaded company confidential information to his own personal email.

5.22 It is the claimant's case it was common practice for brokers to use their own WhatsApp messaging service to disseminate commercially sensitive information obtained as part of the employee's duties. It may be that this was a common practice amongst brokers. However, the claimant's breaches went beyond simply sending market information to clients. The claimant's obligations relate to his work with clients, and his obligations to the company. Circulating commercially sensitive information using a private phone, via a private WhatsApp account, may be designed to

encourage trading, but it may be seen as poor practice. I do not have to determine how widespread this was. Downloading the company's confidential information onto a personal email account is a direct and specific breach of his contract of employment. It is clear the claimant indulged both types of behaviour.

5.23 On 30 June 2017, Ms Stone observed the claimant's behaviour was becoming strange. He was printing a lot of material, and appeared to be sending a lot of material electronically. The respondent has access to the claimant's work emails because of its duty to monitor. A search was conducted in accordance with the respondent surveillance policy. This revealed that between 11 January 2017 and 30 June 2017 the claimant had forwarded approximately 182 emails from his company email to his own personal iCloud. This led directly to the claimant being suspended on 3 July 2017.

5.24 Ms Stone informed the claimant of the suspension on 3 July 2017. The reason for the suspension was confirmed by letter of the same date. Ms Stone then conducted a further investigation; she reviewed all the relevant emails.

5.25 The respondent is a small company with a headcount of 16. The claimant was a senior broker. Mr Emanuelsson was on annual leave. Mr Kevin McGeeney, the chief executive officer, was the most senior individual and it was considered he would be necessary for any appeal. Given the limited resources, the claimant's seniority, and the need to keep Mr McGeeney in reserve for the appeal, it was concluded that Ms Stone should undertake both the investigation and the disciplinary.

5.26 On 5 July 2017, Ms Stone invited the claimant to a disciplinary hearing. The claimant was given access to each of the 182 emails. He was given an opportunity to comment on each and to give an explanation for why he had sent the email to his personal email account. The claimant gave various explanations in relation to each of the emails. His explanations included the following: so he could read the emails at home; so he could copy and paste the information into client messages; and because his work phone was not working and/or had been misplaced.

5.27 Ms Stone was concerned about the rate the claimant had forwarded confidential company emails on 30 June 2017. He had forwarded 43 confidential emails to his personal email account. It became apparent he had deleted 34 of those forwarded emails from his outlook sent items leaving only emails which Ms Stone considered innocuous.

5.28 The emails forwarded were not all of the same nature. One concerned a client golf day. Several contained contact details. One concerned passwords. A number concerned sensitive confidential information about strategy, which stated on their face that they should not be circulated outside the company.

5.29 It became apparent that the claimant owned a company, Black Gold, and this caused Ms Stone some concern because of the potential for competition. Ultimately, the existence of the company, and the claimant's relationship with it, was not relevant to her decision.

5.30 The disciplinary hearing took place over two days and lasted a total of five hours. Ms Stone concluded that the claimant had forwarded numerous emails to himself, the bulk of which contain confidential information. She considered that his conduct was an act of material dishonesty and was gross misconduct, constituting a breach of his obligations under the employment contract and company policy. She had in mind that the use of the personal email was strictly forbidden. She believed that the prohibition on the use of personal email had been communicated to all respondent employees. She was particularly concerned about the disclosure in the context of a highly sensitive and regulated environment. She dismissed the claimant. She confirmed her reasons in a letter of 12 July 2017.

5.31 The claimant appealed the decision. Part of the appeal was concerned with the specific FCA regulations he was said to have breached he also raised practices of other employees in relation to WhatsApp messages. The claimant withdrew his appeal. It is part of the respondent's case, which has not been disputed, that Mr McGeeney would have considered those allegations had the appeal proceeded.

The law

Unfair dismissal

6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.2 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell [1980] ICR 303**, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09**.

6.3 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones [1982] IRLR 439** and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.4 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

Privilege

6.5 Section 111A Employment Rights Act 1996 provides as follows:

> **(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 un-fairly 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) …**

6.6 I have regard to the case of **Faithorn Farrell Tim's LLP v Bailey 2016 ICR 1054**.

6.7 When considering the admissibility of termination negotiations, it may be necessary to consider both Section 111A and the common law privilege which attaches to without prejudice discussions. The common law position is not referred to in Section 111A.

6.8 Under the common law, the general principle is that where there is a dispute between the parties any written or oral communications between them amounting to a genuine effort to resolve the dispute will not, generally, be admitted in evidence. It is not enough for the parties to assert that negotiations are without prejudice. If there is no extant dispute, or genuine offer to resolve the dispute, the rule is not engaged. The effect of the rule is to render inadmissible evidence which may otherwise be probative. Under the common law, it may be possible to refer to the fact of the without prejudice discussions whilst the content may be privileged. Privilege can be waived, but that requires the agreement of both sides. Waiver should be unequivocal: mere mention of without prejudice discussions may not be sufficient to waive privilege. Whether a reference to without prejudice discussions in any pleading, correspondence, or statement waives privilege, will be a question of fact.

6.9 There may be exceptions to the common law position which include the following: where there is a requirement to show a concluded agreement; where it is required to show an agreement should be set aside for misrepresentation, fraud, or undue influence; and where the exclusion may act as a cloak for perjury, blackmail, or other unambiguous impropriety.

6.10 It is not necessary for me to consider the case law in detail. It is enough that I observe that section 111A does not purport to limit the common law position.

6.11 Any evidence which is not sufficiently relevant should not be admitted. Privilege, therefore, is only important when the evidence is sufficiently relevant.

6.12 It is clear that common law privilege only applies where there was a genuine attempt to settle any extant disputes. It is possible that the scope of section 111A is wider than common law privilege. It refers to pre-termination negotiations and they are defined by subsection 2 as any offer made or discussions held before the termination of employment in question with a view to it being terminated on terms. Undoubtedly, a genuine attempt to settle an extant disputes will be caught by the notion of pre-termination negotiations. It is possible that there may be no extant dispute or a genuine attempt to settle, but Section 111A may operate to exclude evidence which would not have been excluded by the common law privilege.

6.13 **Bailey** suggests that section 111A will apply not only to the content of the pre-termination negotiations, but also to the fact of those negotiations. That may extend as far as internal discussions within the employer organisation. It follows that section 111A may be wider than the common law privilege in relation to both the fact of negotiations, and the context of those negotiations when there is no genuine attempt to compromise and extant dispute.

6.14 What will constitute an extant dispute is something that I do not need to explore. It is, ultimately, fact dependent.

6.15 It follows, therefore, that section 111A is concerned with preventing evidence relating to pre-termination negotiations being admitted, in unfair dismissal claims, and its scope appears to be wider than the common law principle.

6.16 If the exception under subsection 3 applies, subsection 1 is disapplied. If the exception under subsection 4 applies subsection 1 *applies*, but only to the extent the tribunal considers it just. There is no specific guidance as to what is deemed improper behaviour and it should not be assumed that it is limited to unambiguous impropriety. There is no definition of what is just, and it cannot be assumed that it should be limited to those exceptions relevant to the common law position.

6.17 If the exception is made out, it is incorrect to say that it makes the evidence of both the fact of and the content of the pre-termination negotiations admissible. It simply leads to the disapplication of subsection 1 in cases of automatic unfair dismissal,[3] and the possible disapplication of subsection 1 in the case of improper behaviour.[4]

6.18 Further, the exceptions have no relevance when considering the common law. It follows, that evidence which may be excluded by section 111A for the purpose of unfair dismissal may be admissible for other purposes such as wrongful dismissal or discrimination. However, that remains subject to the general common law principles. If the evidence is excluded because of common law privilege arising out of without prejudice negotiations, the evidence is not admissible at all. It is not admissible, in any event, if it is insufficiently relevant.

6.19 It would follow that if pre-termination negotiations only take place when there was an extant dispute and there was a genuine attempt to settle, both section 111A and the common law principles will apply.

Breach of contract

6.20 If the employee is in repudiatory breach of contract, the employer may affirm the contract, or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory and it is accepted by the respondent, the employee will have no right to payment for his or her notice period.

6.21 In order to amount to a repudiatory breach, the employee’s behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1WLR 698, CA.**

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[3] Sec 111A(3) Employment Rights Act 1996
[4] Sec 111A(4) Employment Rights Act 1996

6.22 The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal to decide. In **Briscoe v Lubrizol Ltd 2002 IRLR 607** the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster 1999 IRLR 288, ECJ** where the special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." There are no hard and fast rules. Many factors may be relevant. It may be appropriate to consider the nature of employment and the employee's past conduct. It may be relevant to consider the terms of the employee's contract and whether certain matters are set out as justifying summary dismissal. General circumstances, including provocation, may be relevant. It may be appropriate to consider whether there has been a deliberate refusal to obey a lawful and reasonable instruction. Clearly, dishonesty, serious negligence, and wilful disobedience may justify summary dismissal, but these are examples of the potential circumstances, and each case must be considered on its facts.

<u>Conclusions</u>

7.1 It is important to me to bear in mind what evidence I have heard which is inadmissible for the purposes of both the unfair dismissal claim and the wrongful dismissal claim.

7.2 For the purposes of unfair dismissal, the settlement negotiations are inadmissible, unless an exception applies. The only exception relied on is section 111A(4) it being the claimant's case that the respondent's actions were improper or were connected with improper behaviour. The claimant's written submissions failed to address section 111(4) at all; they make no mention of it. During the hearing, it was said that the exception applies because the claimant was given an ultimatum, contrary to the ACAS Code of Practice for Settlement Agreements. Reliance is placed on paragraph 12, which confirms a party should be given a reasonable time to consider the settlement agreement and states, "As a general rule, a minimum period of 10 calendar day should be allowed…" The claimant also relies on an assertion that he was told that he would be dismissed if he did not sign the settlement agreement.

7.3 As to the first point, I do not accept the claimant was given an ultimatum on 29 June 2017, as he has alleged. On the contrary, he was given time to consider the settlement agreement and to take legal advice. He was encouraged to do so. He was never given an ultimatum.

7.4 After the initial offer was made, the claimant forwarded numerous emails to himself. This led to an investigation and ultimately the allegations of breach of confidentiality. A disciplinary procedure ensued. During that entire time it remained open to the claimant to accept the settlement agreement. Such a situation is not unusual. There must come a point,

following an investigation and a disciplinary hearing, when the respondent makes a decision whether to dismiss or not. The claimant was kept informed of the timescale and he knew when the decision would be made. The mere fact that it remained open to him to accept the settlement agreement before that final decision was taken cannot, in my view, be seen as any form of ultimatum. It is certainly not in any sense improper. The claimant had a choice. He was given no improper ultimatum. He was not subject to any undue, or improper, or inappropriate pressure.

7.5 I have taken into account the ACAS reference to a 10-day period. That is guidance only and it creates no binding rule. The reality is the claimant is a sophisticated individual who had access to, and took advantage of, independent legal advice. The issues between the parties were very narrow. His main concern was taxation of the settlement payment. He chose not to accept the offer. It was a genuine offer given by company in circumstances which initially set out as a potential capability dismissal and ultimately, entirely because of the claimant's actions, became a conduct dismissal. There is no improper conduct for the purposes of section 111A(4) Employment Rights Act 1996.

7.6 During oral submissions, I asked the parties to address me on whether the general common law relating to without prejudice would prevent the evidence of the settlement negotiations being presented, and if so, to address me on when the common law would have become applicable. Both parties took the view that the entirety of the settlement negotiations were admissible for the purposes of the wrongful dismissal claim. The basis for that concession was not made out and neither party specifically stated that there had been a waiver of any right. When considering my judgment, I was concerned that the parties may have proceeded on the basis of an erroneous assumption about the operation of section 111A(4). Both parties accepted that section 111A is only relevant to claims of ordinary unfair dismissal. It is not relevant to other claims such as breach of contract, discrimination, and is specifically excluded for automatic unfair dismissal. However, failure to establish the exception does not render evidence, which would otherwise be inadmissible for any other reason, admissible.

7.7 It is, in theory, possible for there to be settlement negotiations as envisioned by section 111A which are not covered by the common law principles dealing with without prejudice negotiations. However, in all negotiations there may come a point when a settlement negotiation reaches the point when litigation is contemplated by both parties. At that stage, the general common law would be engaged. In those circumstances even if, theoretically, the exception were made out under subsection 4, it may be necessary to consider the common law position. It may be theoretically possible to remove the prohibition under section 111A(1), but then to exclude the evidence because of operation of the common law position.

7.8 It follows that it cannot be assumed that when evidence is excluded by the operation of section 111A that the same evidence would be admissible for

the purposes of wrongful dismissal, or discrimination. The evidence may well be excluded because of common law principles.

7.9 I therefore sought further submissions from both parties on these matters. I received no submissions from the claimant. The respondent confirms that section 111A Employment Rights Act 1996 does not render admissible anything that would be inadmissible under the common law. It is the respondent's position that respondent's attempts to negotiate a settlement were without prejudice and subject to privilege.

7.10 I now turn to the substantive issues in this case. It is clear that I must ignore all pre-termination negotiations, and the fact of those negotiations, for the purposes of unfair dismissal. Effectively, this means that all of the evidence of the communications on 28 June 2017 concerning possible dismissal, the negotiations around the subsequent settlement agreements, and the fact that the settlement agreement remained open up to the date of dismissal must all be ignored.

7.11 With that in mind I go on to consider the claim of unfair dismissal.

7.12 The burden is on the respondent to show the reason for dismissal. A reason for the dismissal is a set of facts known to the employer, or it may be of beliefs held by the employer, which caused the dismissal. The honest belief establishes the reason.

7.13 In reaching her decision to dismiss, Ms Stone had the following facts in mind: the claimant had sent outside the company confidential and sensitive information relating to clients, business methods and transactions; the claimant had sent to his personal email account confidential information, including confidential SCB reports, which should not be circulated; the claimant had forwarded numerous emails to his personal account containing confidential conversations with customers; the claimant had sent information to third parties through his personal phone; the claimant had used his personal email to receive corporate login details and password; he has sent a very large number of emails on 30 June, and thereafter deleted a number of those from his inbox. I accept that she believed that these matters had occurred and that they were in breach of the company policy and FCA principles.

7.14 It is the claimant's case that the real reason for dismissal was the wish to save expense on the relevant brokerage desk. It is clear that the claimant was under pressure because of underperformance. He wished to say that it was down to the market. Mr Emanuelsson did not accept this. He believed that the claimant could perform better. The claimant understood that he needed to perform better. His performance did not improve. He was subject to a performance plan. He did not significantly improve. It is at least a possibility that the underperformance would have led to his

dismissal. I do not have to resolve, at this stage, the percentage chance.[5] However, the fact that he was subject to performance improving does not explain why he breached contract.

7.15 The claimant suggests there was a conspiracy and that there was a set intention to dismiss him. The claimant relies on various alleged facts and assertions. I should deal with the main matters he relies on.

7.16 The claimant refers to a discussion with his colleague Mr Rowntree, when Mr Rowntree suggested that he had the claimant's position covered. This conversation occurred after the claimant's own WhatsApp message in which he openly discussed the end of his own employment. It does not demonstrate any pre-existing intention. In any event, it is evidence that I must exclude because it indicates pre-termination negotiations and is not admissible.

7.17 It is right that Mr Emanuelsson refer to him as "toast," but this did not occur until it became clear that the claimant appeared to be breaching confidentiality. In a WhatsApp exchange with his chief executive, Mr McGeeney, Mr Emanuelsson said of the claimant "under the buss mate under the buss." This is a clear reference to the claimant's employment being terminated. This was a recognition of a likely outcome in the context of an individual who would stop performing, and who had started to breach confidentiality. It is not evidence of a pre-existing plan. I do not need to exclude this evidence, as it appears to be predominantly a reference to the claimant's conduct. It is possible I should exclude it altogether if it indicates pre-termination negotiations. It matters not; it is not probative.

7.18 There is no doubt that Mr Emanuelsson and others were concerned that the claimant may be seeking to solicit clients, and/or is set up in competition. These are the sort of concerns which are raised and thought about when it is clear a sales relationship may be coming to an end. Some of the expressions used may be robust. This is a robust environment. They do not prove some form of inappropriate conspiracy. They are a recognition of the difficulty faced by the claimant and a robust acknowledgment of that which seems very likely, namely an underperforming employee, who has started to breach contract, and whom may be setting up to compete, is likely to face dismissal.

7.19 There is reference to discussions about the respondent making a big mistake in letting the claimant go. This is neither probative of any pre-existing conspiracy, nor is it, in my view, admissible. It arises in the context of, and expands on, the pre-termination negotiations. It is therefore excluded as inadmissible.

7.20 There is reference to discussions between Mr Joachim Emanuelsson and Mr Kevin McGeeney where language such as "had to use the card so he

[5] We agreed at the start of the hearing that the case was limited to liability only. Issues of a 'Polkey' deduction or contributory fault would be a matter for any remedy hearing and I need not resolve them now.

could be fired for cause" is used. It is difficult to see how this evidence is admissible. The conversations occur in the context. That context includes the potential for settlement. This would indicate the fact of the negotiations. It is excluded. In any event, it does nothing to undermine either Ms Stone's belief in the misconduct, or his reason for treating it as sufficient to dismiss. The respondent did not concoct a conduct reason. The conduct reason arose directly out of the claimant's actions.

7.21 There is no evidence for the claimant's suggestion that he was given unfair targets, or that he should not be held responsible for his performance. The claimant seems to suggest that the respondent should not have given him targets when the market condition was poor. He goes on to suggest that it follows the targets were unreasonable. I find the targets were set at a level whereby the respondent would just break even on the claimant's salary. On any reasonable view, this is the minimum target which was appropriate. It may not be the claimant's fault the market condition was difficult. However, the fact that the market was difficult, does not prevent the respondent from setting targets. The claimant cannot ignore the fact that the whole purpose of his employment was to make money.

7.22 There is no credible evidence which could lead me to doubt Ms Stone's genuine belief in the factual matters relied on when dismissing. This establishes the reason.

7.23 I next need to consider the reasonableness of the dismissal. I must ask whether Ms Stone had grounds for her belief. The evidence before Ms Stone was overwhelming. The claimant's contract was clear. The IT policy was clear. There were numerous emails which also referred to confidentiality. In any event, she was entitled to assume that the claimant had a basic understanding of the principles of confidentiality the need for accountability to the FCA, such that he should not forward information to his own private email or deal with clients on his own private WhatsApp account.

7.24 There was overwhelming evidence that he had breached the policies by sending numerous emails. That breach had reached a crescendo on 30 June 2017 when he had sent some 43 emails. He then deleted 34 of them. He offered no explanation for deleting them. Before me, the claimant offered no explanation to the tribunal instead said that he could not even remember why he deleted them. Ms Stone took the view he was trying to cover his tracks. That could be the only explanation for deleting emails referring to confidential information from his work's Outlook 'sent items.' As to his reason, the claimant prevaricated before Ms Stone; he has prevaricated before the tribunal.

7.25 Ms Stone considered each email. She sought no explanation for a number of emails, because they did not contain confidential information; she could be criticised for that.

7.26 Overall, she found the claimant's answers unsatisfactory. He constantly referred to the need to "peruse" the emails. He offered no explanation as

to why he could not access them using the remote access provided, or on his company mobile. It became clear during the course of this hearing, that he had his company email account on his own iPhone. He did not offer that explanation to Ms Stone, but it makes it even more difficult to understand why he was suggesting there was an issue with the company phone. In any event when he suggested there was an issue with the company phone and it was not working, Ms Stone checked. She found it was working. At worst, he suggested that the may have been an intermittent problem.

7.27 There can be no doubt there were grounds for the belief.

7.28 As to the investigation, it is difficult to see what more could have been done. The specific emails were identified. Each one was given to the claimant. He was asked for an explanation for each. Had there been a simple explanation given by the claimant to the effect that he was simply doing exactly what everyone else did and believed it to be entirely legitimate, it may have been appropriate to interview each individual as to his or her practice. However, the allegations against the claimant went much further than disseminating market information by personal WhatsApp messages. The allegations are fundamental and concern what appears to be a systematic breach of his confidentiality obligations with the potential underlying intent to solicit clients or to compete. Given the totality of the allegations and the paucity of explanation, no further investigation, or consideration of the practice of colleagues, was necessary to establish the grounds to sustain the belief. The investigation was one open to a reasonable employer.

7.29 I should deal with a number of specific points raised by the claimant in support of his contention that the dismissal was unfair.

7.30 He suggests it should be concluded that he was not dishonest. This appears to be based on the assertion that he did not use any document sent to his iCloud inappropriately. This is not sustainable. The dishonesty occurred when he sent the documents. He breached the confidentiality clause (6.1), as he was using confidential information in a way which is not authorised by the company. He breached clause 6.5 because there is a threat of solicitation and competition.

7.31 The claimant suggested to me that he considered himself, and his private email, to be the same entity as the respondent organisation. That is self-evidently wrong. This is demonstrated by the fact that he offered the respondent the opportunity to check his laptop. This demonstrates that he viewed his own laptop, and his email account, as private. He is not part of the respondent's entity. Ms Stone could not have thought him part of the same entity.

7.32 The allegation that he was not dishonest is put in numerous ways. I do not need to consider each. It was reasonable to take the view he breached his contract and had acted dishonestly.

7.33 It is said that Ms Stone should not have investigated and then undertaken the disciplinary hearing. I accept that the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 envisages that there will be an investigation when the facts are established. Paragraph 6 states "In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing." However, this is guidance only. There are times when the nature of the disciplinary hearing and the investigation are so bound up together that it would be arbitrary and possibly dangerous to split the functions. It is difficult sometimes to define where an investigation stops and a disciplinary procedure begins. The bare facts in this case revolve around the claimant's potential breach of contract and FCA principles and/or regulations by sending numerous emails to his own email account. The fact that he sent the emails may be properly seen as the end of the investigation in the sense that he necessary investigations as envisaged by paragraph 5 of the code have been concluded. The next stage is to notify the employee of the alleged misconduct, giving him sufficient detail as envisaged by para 9 of the ACAS code. It may be that some employers would produce an investigation report which is then considered by another manager at the dismissal stage. However, it may be fairer to ask for the detailed explanation in the disciplinary. What matters is the overall fairness. It is important not to become distracted by irrelevant "investigation" or "disciplinary" labels. Ultimately, what is at issue is fairness. If the claimant is going to say that an individual should not have both investigated and undertaken the disciplinary, it is helpful if the claimant gives reasons. The mere possibility that it could have been approached in a different manner tells me nothing of why the claimant thinks that the approach adopted was unfair. There is no absolute rule that the process investigation and discipline must be separated. Here there were very good reasons for not splitting the two. The fact the emails were sent was not in dispute. What was needed was the claimant's explanation and the detail of that explanation was best given at the disciplinary stage. Any matter raised by the claimant could then be investigates as far as was necessary. I cannot accept that in this case it demonstrates any unfairness.

7.34 It is said Ms Stone did not explore with the claimant his awareness of the existence of the policy. It is possible that she could have been clearer about these points. However, the claimant was a broker in a regulated environment. When an individual is acting in a responsible professional capacity, it may be reasonable to assume that the individual understands his or her basis obligations such as to protect confidential and sensitive information. Ms Stone cannot be criticised for assuming the claimant had a basic understanding of his obligations. She was entitled to assume that he understood he should not be sending confidential and sensitive information to his own email account. He did not suggest to her that he believed his email account was part of the corporate entity (as he suggested before the tribunal). It is no defence to say he breached his clear contractual obligations, and the IT policy, because he had not familiarised himself with the content.

7.35 In the circumstances, I find that the respondent has established its reason and the grounds for that reason. The investigation and disciplinary procedure adopted was in the range of procedures open to a reasonable employer. The claimant's actions in forwarding confidential and sensitive information to his own account, and thereafter seeking to cover it up by deleting items from his sent box, and thereafter prevaricating and giving unsatisfactory explanations during the disciplinary investigation process lead me to conclude that the dismissal was within the band of reasonable responses open to an employer.

7.36 Finally, I need to consider the wrongful dismissal claim. It is not necessary for me to consider any of the evidence relevant to the settlement negotiations. The claimant's contract was clear in relation to confidentiality. Clause 6.5 made it clear that where information was used in a way that the could be a breach of confidentiality, non-solicitation, or restraint of trade, it will be deemed to cause irreparable harm.

7.37 I have to decide as a matter of fact whether the claimant breached contract. I accept that the claimant used his own WhatsApp account to disseminate market information to clients. This is an attempt to drum up business. That in itself, was technically in breach of his contract, it is not enough to demonstrate that he no longer intended to be bound by the terms of his contract. However, the claimant's actions went well beyond that. On 30 June 2017 he sent 43 emails to himself and then deleted all but nine. His explanation to me was that he could not remember why he had done it. That explanation is not believable. The claimant knew he was breaching his contractual obligations. He was breaching confidentiality. He also knew that it was likely he would be seen as obtaining information with a view to soliciting clients. Whatever the position he was forwarding to himself information which he had no right to; he knew it was contrary to policy. The only rational explanation for the deletion was he feared being caught; he deleted the relevant emails to cover his tracks. This is the clearest possible evidence of the most serious breach of contract. The respondent discovered the breach of contract. It accepted that breach by dismissing him. The wrongful dismissal claim fails.

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Employment Judge Hodgson

Dated: 21 December 2018

Sent to the parties on:

2 January 2019

For the Tribunal Office