EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Shaun Wilkinson	**v**	**DBD Distribution Limited**
Heard at: Watford		**On**: **8/9/10 May 2018**

Before: Employment Judge Skehan
Members: Mrs M Castro and Mrs C Brodie

Appearances

For the Claimant: In Person
For the Respondent: Mr M Green (Counsel)

JUDGMENT

1. The claimant's claims for: (1) unfair dismissal; (2) wrongful dismissal; and (3) discrimination on the grounds of religion or belief, are unsuccessful and dismissed.

REASONS

The issues

1. At the outset of the hearing it was agreed with the parties that the issues to be determined in this matter were those as set out by EJ Clarke on 3 October 2017. These were:
   1.1 Direct discrimination on the grounds of the claimant's religion or belief.

      1.1.1 Did the respondent subject the claimant to the following treatment:

         1.1.1.1 Putting him at risk of redundancy?

         1.1.1.2 Selecting him for a redundancy?

         1.1.1.3 Offering him a lower redundancy payment than others in a similar position?

1.1.1.4 Stating that the restrictive covenant in his contract of employment would be operated against him?

The claimant withdrew the allegation of 'dismissing the claimant' at the commencement of the hearing and confirmed that he did not allege his dismissal to be tainted by discrimination on the grounds of his religion or belief.

1.1.2 Has the respondent treated the claimant as alleged less favourably than they treated or would have treated the comparators which has identified? The claimant relies upon the following comparators:-

1.1.2.1 Mr Tony O'Mahony, a Key Account Director, who the claimant alleges undertook work similar to the claimant's and who was not put at risk of redundancy;

1.1.2.2 Secondly, Mr Adrian Shepherd, Mr Peter Atkins, Miss Jeannette Pierce, Miss Elaine Banks and Miss Danielle O'Mahoney who were all offered significantly higher redundancy payments than the claimant was indicated would be offered to him and who were told that they had no need to abide by certain restrictive covenants in their contracts of employment post redundancy when the opposite was indicated to the claimant; or

1.1.2.3 a hypothetical comparator, being someone in the claimant's position who was a Jehovah's Witness.

1.1.3 If so, are there amongst the primary facts found by the tribunal ones which could properly and fairly enable it to conclude that the difference in treatment was because of the characteristic, in this case, being that the claimant was not a Jehovah's Witness and the comparators were. If so, has the respondent provided an explanation which demonstrates the non- discriminatory reason for that proven treatment being a reason of reasons which show that the treatment was not materially linked to any significant extent to the protected characteristic.

1.2 Unfair Dismissal

1.2.1 What was the reason for dismissal? The respondent asserts that it was a reason related to the claimant's conduct being potentially a fair reason under Section 98 of the Employment Rights Act 1997. The claimant asserts that this was not the true reason but that this was a contrived reason intended to enable the respondent to have the best chance of enforcing restrictive covenants against the claimant. It was noted that the claimant accepts one of the factual allegations made against him, namely that he deleted quotations from the respondent's system. This is correct in the sense that the claimant admits that he deleted some three of four live quotations

while deleting a significant number of historic quotations but he asserts that he did this accidentally.

1.2.2 Was a fair procedure adopted by the respondent, namely one that a reasonable employer could adopt?

1.2.3 Was the decision to dismiss a fair decision being one which a reasonable employer could have made in response to the facts as found. If the dismissal was unfair, did the claimant contribute to his dismissal by his own culpable conduct?

1.2.4 In the event that the claimant would otherwise be found to have been unfairly dismissed, can the respondent prove that if had it adopted a fair procedure, the claimant would have been fairly dismissed in any event at some point in time.

1.3 Wrongful Dismissal

1.3.1 It is admitted that the claimant was summarily dismissed. If the tribunal is satisfied that the claimant was in breach of contract, was he dismissed consequent upon that breach and if so, was the breach sufficiently serious to entitle the respondent to bring the contract to an end in response to it?

The Law

2. Section 13 of the Equality Act 2010 provides the definition of direct discrimination being that, a person A discriminates against another B if because of the protected characteristic A treats B less favourably than A treats or would treat others, the protected characteristic in this case is religion or belief and in particular, the fact that this claimant was not a Jehovah's Witness. Section 136 of the Equality Act 2010 sets out burden of proof in discrimination matters being: if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred; this does not apply if A shows that A did not contravene the provision.

3. In a claim for unfair dismissal, it is for the respondent to show a genuinely held reason for dismissal and that was a reason which is characterised by Section 98 Employment Rights Act 996. In this case, the reason relied upon is the claimant's conduct. If the respondent shows such a reason, the next question where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as sufficient reason for dismissing the claimant. The question having been resolved in accordance with the equity and substantive merits of the case. It's not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal.

4. In a case where the respondent shows that the reason for dismissal was relating to conduct, it is appropriate to have regard to the criteria described

in the well known case of *Burchell-v-British Home Stores (BHS)* UKEAT/108/78. The factors to be taken into account are firstly whether the respondent has reasonable grounds for finding that the claimant was guilty of the alleged conduct, whether the respondent carried out such investigation as was reasonable in the circumstances, whether the respondent adopted a fair procedure in respect of the dismissal and whether the sanction of dismissal was a sanction which was appropriate, proportionate, and in a word, fair. In relation to each of these factors, it's important to remember at all times that the test to be applied is the test of reasonable response. We also note that a claim for unfair dismissal is a claim to which section 207A applies and the relevant code of practice is the ACAS Code of Practice on Disciplinary and Grievance Procedures.

5. To succeed within the wrongful dismissal claim, the claimant must show that his conduct was not sufficiently serious to constitute a breach of his contract of employment entitling the respondent to bring the contract of employment to an immediate end in response to it.

The Facts

6. We heard evidence from Mr Firth-Bernard, Mr Appleyard, Mr Harvey and Ms Crouch on behalf of the respondent and from the claimant on his own behalf. All witnesses gave evidence under oath or affirmation. Their statements were adopted and accepted as evidence in chief and all witnesses were cross examined. As is not unusual in these circumstances, the parties have referred to in their evidence a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party or deal with it in the detail in which we heard, it is not an oversight or an admission but reflects the extent to which that point was off assistance to the tribunal. We only set out our principal findings of fact. We make findings of fact on the balance of probabilities taking into account all witness evidence and considering its consistency or otherwise, alongside the contemporaneous documents.

7. By claim form received on the Employment Tribunal on the 23 June 2017, the claimant claimed unlawful direct discrimination on the grounds of religion or belief, unfair dismissal and wrongful dismissal. The claims were defended by the respondent. The claimant was employed by the respondent since 1 June 2009 and his most recent role was National Account Director of HB Sales. The claimant's employment with the respondent terminated on the 31 May 2017.

8. In this case, the majority of the facts are agreed between the parties. Prior to the redundancy situation outlined below, the claimant had a positive relationship with the respondent. He was a senior, successful, well regarded member of the sales team. The respondent had previously demonstrated flexibility with the claimant when the claimant was experiencing difficulties in respect of childcare commitments although we acknowledge a minor dispute between the parties in respect of the extent of the allowances made. We note that the claimant's role was changed in August 2016 when a decision was made by the respondent to remove the HB Team Line Management from his responsibilities. At this time, the

claimant said in an email that he was happy to accept the changes, he also said that he was sad following the decision to remove the line management responsibilities, but he remained committed to the company.

9. The respondent commenced a redundancy consultation on the 15 March 2017. Within this initial notification of potential redundancy to staff, the respondent told the claimant that it had concluded that it was no longer commercially viable to continue trading in Scotland, the North of England, North Midlands, North East Anglia and some parts of Devon and Cornwall given the ever increasing cost to serve, plus additional investment required to deliver a consistent, high level of service in relation to the anticipated sales revenue. On the 20 March 2018 the respondent released a similar but less comprehensive statement to the industry stating that it was not commercially viable for them to continue trading in Scotland and the north of England giving the ever increasing costs to serve plus additional investment required to deliver a consistent, high level of service in relation to the anticipated sales revenue and margins available.

10. The respondent identified the claimant's role as National Account Director of HB Sales as a standalone role at risk of redundancy. There was a dispute between the parties in respect of the claimant's role. The claimant appears to claim that his role was not a stand-alone role but was equivalent to that of his colleague, Mr Tony O'Mahony who was employed as Key Account Director. The implication being that there should have been a redundancy pool of two. In cross-examination the claimant said that he did not believe that he was placed at risk of redundancy because of his religion. When asked to clarify his claim he said that he believed Tony O'Mahony was not placed at risk of redundancy because of his religion, being a Jehovah's Witness.

11. Mr Firth-Bernard placed considered emphasis on the claimant's national business remit. The claimant told as that his national duties were minimal. The respondent placed emphasis upon the support that the claimant provided to the sales teams within their individual regions. The claimant, during cross-examination, said that he considered his role to be substantially similar to that of Mr O'Mahony's. We note, however, that within his witness Statement, the claimant places emphasis on his national role: "I was employed to manage a sales team and help develop and grow sales within the business during my time at DBD, we helped to grow and develop the business from circa. 16 million at my time of joining, to 32 million at my time of leaving." We note the claimant's job description places emphases on the national elements of the claimant's role. Mr Firth-Bernard also explained that Mr O'Mahony's accounts produce revenue in the region of eight million, however, the claimant's direct accounts produced revenue in the region of three million. The fact that the claimant was paid considerably more than Mr O'Malley was due to his national role. We note while there was some dispute in respect of the figures as the claimant believed his sales figure to be 4.2 million, the claimant accepted that his direct account figures were considerably less than those of Mr O'Mahony's. There was also considerable difference in respect of the pay and pay structure between the claimant and Mr O'Mahony. Mr O'Mahony had unusual circumstances in

that he had previously been a director and part owner of the respondent. For various reasons, his role changed since 2013 and his salary had reduced from a starting figure in the region of £100,000, to a current basic of £60,000 and an overall package of £70,000, according to the respondent. The claimant had believed that Mr O'Mahony's basic salary to be £70,000 in 2016 with an additional bonus entitlement of approximately £19,000 giving total earnings for Mr O'Mahony in 2016 of £89,000. In light of Mr O'Mahony's reducing entitlement, it is possible that both of these accounts may be correct. However, the total earnings of the claimant in that period amounted to a £103,000. We note that despite the claimant's accepted lower client revenue, the claimant's earnings, even on his own evidence, are substantially greater than that of Mr O'Mahony's.

12. In taking the evidence as a whole, we prefer the evidence of Mr Firth-Bernard on this point and we accept that the claimant's senior role placed him in an individual standalone role. We note that at no time during the month-long redundancy consultation period did the claimant raise any issue with the respondent relating to querying the appropriate redundancy pool. For the sake of completeness, we note that these matters were first raised by the claimant following the conclusion of the redundancy process on the 18 May 2017. We conclude that the respondent has shown business reasons as to why the claimant's role was properly identified as a standalone role.

13. The respondent commenced the consultation period on 16/03/2017. The claimant was invited to an individual consultation meeting on 21/03/2017. The claimant's employment was terminated by reason of redundancy by letter dated 18/04/2017. The claimant's position was not the only position to be made redundant by the respondent. Within a different geographical area the respondent identified a redundancy situation within the sales team. The respondent identified a pool of 2 employees in this particular area who were placed at risk of redundancy. These employees were: Adrian Shepherd, a Jehovah's Witness; and Mr Cooper, a non-Jehovah's Witness. Mr Shepherd's position was selected for redundancy over Mr Cooper's. Ms Lumsden, a non-Jehovah's Witness was also selected for redundancy, Mr Shepherd and Ms Lumsden were both offered enhanced settlement packages. During cross-examination Mr Firth-Bernard told us that even though the settlement agreements were agreed individually with the employees, he was conscious of fairness and parity between the employees when agreeing the amounts with both agreements providing similar payments. The claimant contended that the sums offered to the 2 employees were not equivalent when taking base salaries into account.

14. During the consultation process a meeting was held between the claimant and Mr Firth-Bernard on the 12 April. There is a dispute between the parties in respect of exactly what was said at this meeting. Mr Firth-Bernard said that the claimant asked to be paid off so he could start work elsewhere and indicated that the claimant may work for PJH, who were a main competitor of the respondent but that the claimant told Mr Firth-Bernard that he had various options. Its common ground between the parties that the

discussion moved to restrictive covenant as contained within the claimant's contract of employment. Mr Firth-Bernard says that the claimant told him that the restrictive covenants were "Not worth the paper that they are written on and let's let the lawyers fight it out." The claimant was unclear as to whether he accepts this wording was used by him, but he told us that he said that as his employment contract was terminated on the basis of redundancy, it would mean that his restrictive covenants would be null and void. In light of this conversation, Mr Firth-Bernard decided to place the claimant on gardening leave to give him some time away from the business and allow the business to protect itself from what Mr Firth-Bernard believed to be the strong possibility that the claimant would commence soliciting the respondent's business.

15. Mr Firth-Bernard believed that an amicable decision was reached to place the claimant on garden leave until the end of June and thereafter make a payment in lieu of the outstanding notice period due to the claimant allowing him to start any new position on the 1 July. The claimant confirmed in cross-examination that following this matter he imagined that Mr Firth-Bernard was worried about the claimant's potential future actions. We understood the claimant to the referring to his potential future actions that may be in contravention of his existing contractual restrictive covenants and in competition with the respondent. We conclude that the claimant was aware of the respondent's concerns in respect of his future employment. We note that up to the date of dismissal the claimant refused to share details of his future employment plans with the respondents. His response under cross-examination was that the information was 'private and confidential' to him.

16. It's common ground that there is no contractual entitlement for any employee of the respondent's to any enhanced redundancy payment on the termination of their employment, however, the company considers ex gratia payments in individual circumstances. We turn now to look at the circumstances of the individuals listed as comparators:

    16.1 Peter Atkins had been made redundant in a previous exercise. We heard no evidence to suggest that the respondent had any concerns in respect of restrictive covenants or post termination competition following the termination of his employment.

    16.2 Jeanette Pierce left the company but not in a compulsory redundancy situation. No issues were raised in respect of restrictive covenants or post termination competition following the termination of her employment.

    16.3 We heard that Elaine Banks was not part of the respondent's sales staff, she was part-time and the respondent had no concerns about restrictive covenants or post termination competition following the termination of her employment.

    16.4 We heard evidence in relation to Danielle O'Mahoney, also referred to as Danielle Mandell who left in circumstances relating to ill health.

During cross-examination the claimant told us that he played no part whatsoever in the negotiation of Danielle's settlement agreement. However, we were thereafter referred to an e-mail from the claimant to Danielle dated the 24 October 2012 where a settlement offer was put to Danielle by the claimant. It is obvious to us that the evidence given by the claimant in relation to Danielle has been inaccurate and the claimant played a role in negotiating a settlement agreement with Danielle on behalf of the respondent. The respondent had no concerns about restrictive covenants are post termination competition following the termination of her employment.

16.5 There was a considerable dispute between the parties in respect of the circumstances of Adrian Shepherd. The claimant claimed that Mr Shepherd was going to work for a competitor, namely Symphony. Mr Firth-Bernard did not believe that Symphony were a competitor. Mr Firth-Bernard told us that he had been informed by Mr Shepherd that he [Mr Shepherd] had turned down potential opportunities for PJH, a direct competitor of the respondent. Mr Firth-Bernard believed that Mr Shepherd had made considerable efforts to provide comfort to the respondent that he would seek to abide by his restrictive covenants. Mr Firth-Bernard did not consider Symphony to be a direct competitor as they supplied kitchens in a substantially different price bracket to that of the respondent. Mr Firth-Bernard also identified an opportunity for collaboration with Symphony in the future as potentially the respondent could supply appliances to them. Mr Firth-Bernard's evidence on this point is accepted. The claimant did not appear to question the genuineness of Mr Firth-Bernard's belief but told us that Mr Firth-Bernard's perception of Symphony was incorrect and he [Mr Firth-Bernard] should have considered Symphony to be a competitor. We consider this point, even if the claimant is correct, to be irrelevant.

16.6 In relation to Heather Lumsden, Mr Firth-Bernard believed that she was planning to work for a company in Blackpool that operates in the North of England and Scotland and again believed that her future employer may be a good contact for the respondent as they may well take over business from the respondent in areas where the respondent had withdrawn its presence. Mr Firth-Bernard's evidence in this point is accepted. The respondent was not concerned in respect of restrictive covenants or post termination competition following the termination of her employment.

17. The claimant told us during cross examination that the respondent's ability to enforce the restrictive covenants vary depending on the reason for the termination of employment and that they were unable to enforce restrictive covenants if his employment had been terminated by reason of redundancy and that the respondent would be better able to enforce the restrictive covenants should a misconduct dismissal occur. The claimant did not elaborate on his reasons for believing this other than referring to previous legal advice and we accept that he held this belief. Mr Firth-Bernard gave evidence that he considered the reason for termination i.e. whether it be

redundancy or conduct, to be irrelevant when considering the enforceability of restrictive covenants. We accept that he held this belief.

18. We now turn to the background in respect of the disciplinary allegations. The disciplinary allegations in respect of confidential and incorrect information as made against the claimant were as follows:
    18.1 That the claimant was passing confidential information to external parties; the claimant said that his email on 21/03/2017 was sent only to solicit future job recommendations. The respondent considered that the email contained company confidential Information. This email was brought to the attention of Mr Firth-Bernard on 21/03/2017 and the claimant apologised for sending it. However following this time the claimant sent a further email on 20/04/2017 talking about the respondent taking the decision to withdraw their services from 'most of the UK'.
    18.2 That the claimant was passing untrue information to external parties; the claimant admits having a telephone conversation with a Mr Alexander an external contact of Bloor homes on 28/03/2017. Following this conversation, Mr Alexander sent an internal email saying that the claimant had confirmed that the respondent was in the process of reducing the geographical cover in areas including East Anglia/part of the West/areas north of Leicester. This information was incorrect.

19. It was also alleged that the claimant had destructed the respondent's property by deleting quotes for the system. The claimant admits that he deleted a large number of quotes from the system, some of which were live quotes. The claimant accepts responsibility for deleting quotes and acknowledges that there is a standard process for amending live quotes on the respondent's system to record whether they were won or lost and to provide a reason for the lost quotes. The claimant claims that he was deleting quotes on the system to help a former colleague who would be inheriting his quotes following the claimant's departure. The respondent told us that this allegation was the trigger for the claimant's disciplinary process. On 20/04/2017 Mr Firth-Bernard sent an email to the claimant stating:

> "there is evidence to suggest that £3.5 million worth of quotation opportunities disappeared from your pipeline at as they have neither been won or lost… … So please could you explain the reason for all of this"

The claimant responds on the same day to say that,

> "I am shocked and disappointed to be the allegations made against me which I strongly refute. I have at no time deleted or amended any live quotes on the system under my accounts, I have no idea how this may have happened… Once again I would like to repeat that I am not responsible for any live quotes being removed from the system.

20. Following receipt of this e-mail, Mr Firth-Bernard commenced a formal investigation into the claimant's conduct by email instruction to Rebecca Greaves dated the 20 April 2017 at 20:59. On 02/05/2017 the claimant sent an email to Mr Firth-Bernard including the following information:

"…I would like to acknowledge after having taken the time to consider my [email of 20/04/2017 set out above] I advise that the information contained within my email is in fact in some parts untrue, this is an action that I deeply regret and apologise for.
I can advise that I did indeed during the consultation period whilst continuing my normal duties under employment amend and in some cases delete live opportunities within my account portfolio. I believe however that any quotes deleted will fall under the following categories… Under no circumstances were my actions deliberately meant to be malicious or harmful to the company. I carried out's actions in response to an email sent by [Mr Firth-Bernard] to all HB sales team during the consultation period whereupon he advised that all team members were required to carry out normal duties including the upkeep of goldmine… Once again I would like to apologise for both attempting to mislead you in any way and for the actions carried out

21. The claimant told us during cross examination that he had lied to the respondent when initially asked for an explanation relating to the quotes. The claimant accepted that his actions in deleting these quotes were not in line with the respondent's internal practice or policy. He told us that there was a 3 stage process involved in deleting any such quotes including the insertion of a password. However the claimant's evidence as to the reason for his actions was unclear during the hearing. Despite his acceptance set out above he made opaque contradictory references to 'company practice'. The claimant told us that he wanted to assist remaining colleagues. The claimant maintained that his actions in deleting the live quotes were a mistake on his part and he had no intention to delete live quotes alongside the lost ones.

22. The final disciplinary allegation against the claimant was in relation to the theft of confidential information from the respondent. This allegation refers to 4 emails sent by the claimant to his own personal Hotmail account on 18/04/2017 between 10:47am and 11:35am These emails contained attachments of the respondent's trading agreements with 4 different clients. The claimant told ours that he did send this information to himself however this information was needed by him for forthcoming planned business meetings with existing customers. He told us that the documents were emailed to his private Hotmail account for ease of printing. The claimant told us that he did not consider the documents to be capable of causing damage to the respondent as the particular clients had ongoing contractual relations with the respondent. The claimant appeared to accept that the majority of the documentation emailed to his private email was confidential to the respondent and there was a dispute between parties as to whether all of the documents emailed to the claimant's private address were confidential.. The respondent told us that there were no planed meetings between the claimant and the relevant clients. Further, we were referred to an email from the claimant to Andrew Page dated 18/04/2017 at 11:46 that stated :

Hi Andy

Hope you are well? Sorry I'm not! As you will be aware I am due to leave DBD very soon and have been put on gardening leave with effect from this week! I've no idea who will be covering my workload during this time. I'm sure we can meet again in due course and discuss further opportunities to work together

23. An investigation into the disciplinary allegations was carried out by Mr Harvey. There is very little factual dispute in respect of the disciplinary allegations. We consider investigation report contained within the bundle to be a comprehensive report by Mr Harvey and we are unable to identify anything further that could be usefully investigated by him. We note the claimant's response to the investigatory report. The disciplinary process was handled by Mr Appleyard. We refer to the disciplinary invite and evidence set out in the tribunal bundle together with the disciplinary hearing report. Mr Appleyard set out the disciplinary outcome in a letter dated 30/05/2017. He concludes that the allegations were found to be upheld. He says that taking into account the claimant's length of service and his explanation for his actions given the seriousness of the issues in the circumstances, it was his view that the dismissal was the only appropriate sanction. The claimant's employment was summarily terminated by reason of misconduct with immediate effect on 31/05/2017

24. The appeal process was handled by Ms Crouch, the respondent's financial controller. Ms Crouch was, at the time, a relatively new employee of the respondent and was within her probationary period. She is not a Jehovah's Witness. Ms Crouch considered the claimant's representations relating to his concerns on her appointment. Ms Crouch was confident that she could handle the appeal hearing fairly, without bias or undue influence of the new employer. Ms Crouch gave evidence in respect of her experience and ability to chair the appeal hearing saying it was within her capability. She considered the fact that she was a new employee within her probationary period to be irrelevant. Ms Crouch had no personal grievance with the claimant. They did not know each other well and only worked together on a few occasions. The appeal hearing was held in the bar area of a restaurant. The claimant alleges that he was close enough to other users of the area to be able to overhear their detailed conversations and believed that his conversation may also have been overheard. The claimant told us that he considered the venue to be inappropriate. There was a dispute between parties as to how busy the bar area was however it was accepted that the meeting was not held in a private room. The claimant told us that there was no issue that he was unable to raise during the appeal hearing because of the public nature of the venue.

25. The claimant refused to tell Ms Crouch during the appeal process whether or not he had a new job. Ms Crouch says that the fact that the claimant would not tell her it was working for a competitor did not allow her to trust that the claimant had taken the alleged actions in good faith. Ms Crouch did not accept the claimant explanations for his actions and referred in particular to the timings of the various emails. Ms Crouch sets out her findings in respect of the appeal with a letter dated 23/06/2017.

The claimant's appeal was unsuccessful. Ms Crouch's evidence was forthright, comprehensive and accepted by the employment tribunal.

26. We were referred to exchange of text messages between the claimant and a friend who was also a former employee of the respondent. This exchange related to enhanced termination packages paid to other staff. Within this exchange of messages the claimant writes:

> "Thanks, mate, like I said I don't need to know the details, however, given that you and many others had enhanced payments, can be argued in tribunal that these were paid on religious grounds 😊. I am the only non-witness who has had or will get a pay out and only payment proposal is at statutory level therefore, it's grounds for discrimination."

The response from the claimant's friend was:

> "Good line to use, however, wasn't Heather given a payoff …?

The claimant's response was:

> That's for Heather to argue and her package is a lot less than Adrian's."

27. The claimant was asked during cross examination why he used the 😊 symbol. He responded "because I was happy, the sun was shining". The claimant was asked during cross examination about missing messages from the exchanges disclosed by the claimant. The claimant confirmed that some messages had been omitted from his disclosure and, when produced it was noted that these messages referred to other former employees who received enhanced payments, some of whom were Jehovah's Witnesses and some were not.

Deliberations

28. We take this opportunity to comment on the evidence that we have heard in a general manner. We consider the respondent's witnesses to have been helpful witnesses who were open, clear, considered and comprehensive within their evidence. We appreciate that the claimant was acting in person, however, his evidence was at times difficult to follow and on occasion internally inconsistent and facetious. We refer to the cross-examination question relating to why the claimant used a 😊 in the text message referring to discrimination as set out above. The answer he gave was that "I was happy, the sun was shining" It was noted by the Employment Tribunal that the claimant omitted part of this message exchanged that referred to other former employees who received payoffs; some of whom were Jehovah's Witnesses and some were not. We note the inaccurate evidence that the claimant provided in respect of the part he played in negotiating Danielle O'Mahoney's severance payment. This is surprising considering that the claimant names Danielle as a comparator within his claim on the basis that he was treated less favourably than her due to his lack of

religious belief. We note that the claimant has ignored inconvenient facts such as Adrian Shepherd, a Jehovah's Witness being chosen for redundancy over Mr Cooper, a non-Jehovah's Witness and Heather Lumsden, a non-Jehovah's Witness being offered a settlement package. During cross-examination the claimant said that he did not try to explain these matters. The claimant's credibility was damaged by all of these matters.

29. We now turn to address the list of issues in turn. The first allegation of discrimination on grounds of religion or belief was the respondent putting the claimant at risk of redundancy. It's accepted that the claimant was placed at risk of redundancy, however, the claimant's claim was confused and difficult to decipher. In cross-examination the claimant said that he did not believe that he was placed at risk of redundancy because of his lack of religion. When asked to clarify his claim he said that he believed Tony O'Mahony was not placed at risk of redundancy because of his religion being a Jehovah's Witness. It is clear from the claimant's own evidence that he has not been put at risk of redundancy by reason of not being a Jehovah's Witness. As the claimant is a litigant in person, we have examined his allegations further to ensure that any allegation of religious discrimination is not inadvertently overlooked. The claimant told us that Mr O'Mahony may not have been placed at risk of redundancy because of his religion or his close friendship with Mr Firth-Bernard, or his former position as a director or owner of the company. There is no evidence to support any of these allegations. We do, however, have evidence from the respondent which was accepted that the respondent correctly identified the claimant's role as a standalone role and, therefore, he was placed in a redundancy pool of one. The respondent demonstrated credible business reasons that were accepted by the tribunal as to why Mr O'Mahony was not placed in a redundancy pool with the claimant or at all. For this reason we do not accept that Mr O'Mahony is a correct comparator as his role is materially different from that of the claimant's. The correct comparator this allegation is a hypothetical comparator being an employee in a standalone role was placed at risk of redundancy and who was also a Jehovah's Witness. The claimant produced no evidence to support his claim and we reiterate the facts set out above and conclude that it is clear to us that the fact that the claimant was not a Jehovah's Witness played no part whatsoever, either directly or indirectly, in the respondent placing the claimant at risk of redundancy.

30. The next issue was the allegation of discrimination on the grounds of religion or belief by the respondent in selecting the claimant for redundancy. It is clear from the evidence that we have had heard and the conclusions in respect of the facts as set out above, that the claimant was selected for redundancy by the respondent due to the respondent's decision to reduce its area coverage. This factual background was not challenged by the claimant. The respondent has shown that it had a reduced requirement for the claimant to undertake his role and this was reasonably determined by the respondent to be a standalone role. Again, the claimant appeared not to be claiming that he was selected for redundancy because of not being a

Jehovah's Witness but that Mr O'Mahony escaped selection because of his religion. For the same reasons as set out above, Mr O'Mahony is not the correct comparator and we refer to the same hypothetical comparator. The claimant produced no evidence to support his claim and we reiterate the facts set out above and conclude that it is clear to us that the fact that the claimant was not a Jehovah's Witness played no part whatsoever, either directly or indirectly, in his selection for redundancy.

31. The next allegation is that the claimant was treated less favourably by reason relating to his religion by being offered a lower redundancy payment than others in a similar position. We find that the claimant's claim is confused. Within this element of his claim the claimant has failed to address the fact the respondent has offered enhanced redundancy payments to both Jehovah's Witnesses and non-Jehovah's Witnesses. The claimant ignores the fact that Heather Lumsden, a non-Jehovah's Witnesses, was given an enhanced redundancy package. When asked to address this, the claimant surmised that Heather Lumsden's package was substantially less than Adrian Shepherd's. This in turn, led to disclosure of both individual packages and confirmation by the respondent, supported by documentation, that both employees were offered a similar package. Indeed, Mr Firth-Bernard confirmed in his evidence that he was conscious when agreeing the amounts individually with each employee, that there was to be a level of fairness between the employees and he considered the settlement of each with each individual to be fair. This evidence was accepted by the employment tribunal. To consider this allegation properly we are obliged to identify a suitable comparator. As explained to the claimant at the outset of the hearing, a comparator must be in materially the same circumstances as the claimant, save for the protective characteristic. We accepted Mr Firth-Bernard's evidence that he was concerned that the claimant had claimed his restrictive covenants were unenforceable and may cause damage to the respondent's business in the future. It is for this reason that the claimant was placed on garden leave and was not offered an enhanced redundancy payment. In our opinion this is perfectly understandable concern on the part of Mr Firth-Bernard. The claimant accepted during cross examination that Mr Firth-Bernard was likely to be worried about post termination competition on the part of the claimant. Therefore, the correct comparator in our view, is an employee who was a Jehovah's Witness who also informed the respondent that he considered the restrictive covenants as contained within his contract of employment to be unenforceable and gave rise to a legitimate concern on the part of the respondent that he may cause damage to the respondent's business in the future and was placed on garden leave. None of the potential comparators listed by the claimant fall within this category.

32. We accept that Mr Firth-Bernard's evidence that he did not have concerns in respects of Mr Shepherd's chosen employer. As stated above, it is irrelevant whether or not Mr Firth-Bernard should have had concerns in respect of Mr Shepherd or whether he incorrectly believed that Symphony was not a direct competitor with the respondent. Therefore, we are left with a hypothetical comparator who was also a Jehovah's Witness who informed

the respondent that he considered the restrictive covenants to be unenforceable and gave rise to concerns in respect of post termination competition with the respondent and was placed on garden leave. In these circumstances, as we are fully aware and accept the reasoning behind Mr Firth-Bernard's actions in relation to the claimant, we conclude that a hypothetical comparator would be treated in a similar manner to the claimant. We conclude that the claimant was not offered a lower redundancy payment than others in a similar position.

33. The next issue raised by the claimant is an allegation of less favourable treatment on the grounds of the claimant's lack of religion by the respondent stating that the restrictive covenants would be operated against the claimant. The claimant claims that both Miss Lumsden and Mr Shepherd were told that the restrictive covenants would not be enforced against them. Mr Shepherd is a Jehovah's Witness, Miss Lumsden is not. The respondent has given evidence that has been accepted by the tribunal in respect of its attitude towards Mr Shepherd and Miss Lumsden. Neither of those employees were considered a post termination risk by the respondent. It was clear to the employment tribunal from the evidence produced by the respondent that religion or belief played no part in their treatment of the claimant during the redundancy process. The respondent utilised the availability of garden leave to attempt to mitigate the risk posed by the claimant. The respondent did not identify any risk posed by the other affected employees. For the reasons set out above, the individuals listed are not considered to be correct comparators as their circumstances are not materially the same as the complainants. When looking at the hypothetical comparator who is in materially the same circumstances as the claimant as set out above, we see no evidence whatsoever to suggest that the hypothetical comparator would be treated any differently to the claimant. We note that it was common ground between the parties that no enforcement action in respect of any post termination restrictive covenants was taken by the respondent against the claimant.

34. In light of the above, when reviewing the evidence as a whole we conclude that the claimant's claim for discrimination on the grounds of his religion or belief, being an absence of his belief, must fail.

35. The first aspect that we look at in respect of the unfair dismissal is the reason for the dismissal. The claimant believes that the respondent's ability to enforce the restrictive covenants can vary depending on the reason for the termination of employment. The claimant's claim was set out on the basis that having identified a redundancy situation, the respondent would be better able to enforce restrictive covenants should a subsequent misconduct dismissal occur. The claimant did not elaborate on his reasons for believing this, however, we accept that he held this belief. Mr Firth-Bernard gave evidence that he considered the reason for termination i.e. whether it be redundancy or conduct, to be irrelevant when considering the enforceability of restrictive covenants. We accept that he held this belief and under the circumstances this seems a logical and reasonable belief for him to hold. We note in these particular circumstances, the misconduct allegations do

not negate the validity of the redundancy situation but bring the claimant's employment to an end summarily by reason of misconduct prior to the expiry of his notice period. We accept the respondent's evidence that the respondent considered enforcement of restrictive covenants to be irrelevant to the disciplinary concerns raised in respect of the claimant, the disciplinary process and outcome.

36. There is an abundance of evidence within the investigation and disciplinary documentation summarised above to conclude that the reason for dismissal was related to the claimant's conduct. We find, in reviewing the entirety of the evidence provided by the parties that the reason for dismissal was related to the claimant's conduct and wholly unrelated to any issue of enforcement of restrictive covenants. As an aside, we note that had the respondent been unduly concerned with the enforcement of restrictive covenants, it is likely that the respondent would have taken some post termination action to enforce those covenants.

37. The next issue we look to is whether or not a fair procedure was followed. We note that the respondents followed an investigation, disciplinary and appeal procedure. We were unable to identify any procedural or substantial flaw within the respondent's process. In relation to the procedural aspects, the only allegation of procedural irregularity raised by the claimant related to the appeal process. The claimant objected to the appointment of Ms Crouch. We heard from Ms Crouch in relation to the appeal process and we heard her evidence that she acted professionally and independently. We note that she is a senior and experienced professional and we consider that she did a thorough job and produced a comprehensive report that was contained within the employment tribunal bundle. Ms Crouch provided a rational and considered conclusion. We note the claimant's concerns in respect of her short length of service and the fact that she may well have been within he probationary period when she carried out her duties, the implication being that she would be either unwilling or unable to uphold any appeal. However, we consider that Ms Crouch has properly and comprehensively addressed the claimant's concerns through her witness evidence. There is, in general terms, no ACAS or statutory prohibition on a new employee carrying out any step in the disciplinary process and we find her participation within the process and actions to be appropriate.

38. We also note the claimant's concerns in respect of the venue in that the appeal meeting was held in an open bar/restaurant area. We conclude that these were not ideal circumstances, however, we also note that the claimant confirmed there was no issue that he was unable to raise because of the venue. We, therefore, conclude that although not ideal, this potential flaw does not constitute a procedural defect sufficient to render the dismissal unfair.

39. We now turn to look at the decision to dismiss and the substantive content of the disciplinary. We note the notification from Mr Firth-Bernard to staff asking staff not to comment externally beyond that information that the respondent had released in the market and the claimant's subsequent communications to external contacts. The claimant had a conversation with

Justin Alexander and we refer to the e-mail of the 28 March reflecting Mr Alexander's understanding of the conversation. The claimant claims that his conversation went no further than the company information as provided to the market and also claims that Mr Alexander's reported comments are inaccurate. The respondent's conclusion is that Mr Alexander's internal report following his conversation with the claimant is likely to contain a reasonably accurate summary of that conversation. The allegations in respect of untrue comments, and in particular, the e-mail of the 20 of April 2017, containing a reference by the claimant to the respondent's purported decision to withdraw their service 'from most the UK'. We note the information in respect of the deletion of quotes. The claimant admits that he deleted live opportunity quotes within the respondent's system. The claimant accepts that this is not in line with the respondent's internal policy and that there was a multi stage process involved in deleting any such quotes. The claimant accepts that he lied to the respondent when initially asked for an explanation relating to these quotes. The claimant's evidence as to the reason for his actions was unclear during the hearing. He accepted that he acted in contravention on the company policy and practice yet he made opaque contradictory references to 'company practice'. The claimant told us that he wanted to assist remaining colleagues, yet he had at the same time, informed a customer that he was unaware of any colleague taking over his work. The claimant maintained that his actions in deleting the live quotes were a mistake on his part and he had no intention to delete live quotes alongside the lost ones. However, the claimant's evidence in respect of mistake was difficult to understand viewed alongside the multi stage deletion process involving the insertion of a password on each occasion and the timing of his actions. The claimant agrees that he sent three high level commercial trading agreements to himself at his private e-mail address. The claimant told us that he needed the information for client meetings and he could not print the documents from the system so he sent to his private e-mail address to assist with printing. We heard from the respondent that these documents did not correspond with any planned meetings on the part of the claimant. We note that the documents were sent at approximately the same time as the claimant's e-mail as sent out above, confirming that he was on garden leave. The respondent evidence was accepted and there is no evidence to support the claimant's explanation that the emails and attachments were sent to his private email address for any reason connected to his work for the respondent.

40. We have carefully examined the submissions and explanations given by the claimant at every stage of the process and during the hearing. It is clear to us from examining the documentation and listening to the evidence presented during the hearing that the respondent considered the claimant's responses to these disciplinary allegations. The claimant's submissions made during the disciplinary process were not accepted by the respondent. We can identify the logic behind the respondent's considerations and its conclusions. Taking the evidence as a whole, we consider the respondent's decision to dismiss the claimant based on the disciplinary allegations they set out, to fall squarely within the band of reasonable responses open to a reasonable employer.

41. Turning to the issue of wrongful dismissal. We note that the claimant is an experienced salesman. The claimant was well aware of the potential risk to the respondent following the termination of his employment, notwithstanding the redundancy situation identified by the respondent. Taking all the evidence into account, including the claimant's submissions and his stated reasons for his actions and reiterating all the matters we've referred to above, we believe that it is more likely than not that the claimant, by his conduct, as specified above and in particular his actions in deleting live quotes from the respondent's system, lying about his actions together with emailing the respondent's confidential Information to his private email address is guilty of serious or gross misconduct entitling the respondent to lawfully terminate his employment summarily.

42. In light of the above findings, the claimant's claims for discrimination on the grounds of his religion or belief, unfair dismissal and wrongful dismissal fail and are dismissed.

43. It is noted that following the employment tribunal giving these reasons orally, counsel for the respondent confirmed that it was not the respondent's intention to pursue any claim for costs against the claimant and requested a copy of these reasons in writing.

_____
Employment Judge

Date: 27 / 6 / 2018

Sent to the parties on: .....

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For the Tribunal Office