EMPLOYMENT TRIBUNALS

FINAL HEARING

Claimant **Ms H Nicholson**

Respondent **Delilah Cosmetics Limited**

Heard: Remotely by video **On:** 9 and 10 September 2021

Before: Employment Judge Stephen Shore

REPRESENTATION:

Claimant: In Person
Respondent: Mr S Sanders, Counsel

RESERVED JUDGMENT AND REASONS ON LIABILITY

The judgment of the Tribunal is that:

1. The respondent did not unfairly dismiss the claimant. The claimant's claim of unfair dismissal fails.

2. The correct name of the respondent is Delilah Cosmetics Limited and the Tribunal records shall be amended accordingly.

REASONS

Brief Background and History of this hearing

1. The respondent, Delilah Cosmetics Limited is a retailer of cosmetics. It was founded in 2104 by the claimant, Hannah Nicholson, Rupert Kingston and Juliet White. Mr Kingston and Ms White are married to one another.

2. The claimant was employed as the Managing Director of the respondent from [2014] to 16 April 2020, which was the effective date of termination of her employment.

3. The claimant brings a claim of unfair dismissal.

4. The claimant began early conciliation with ACAS on 23 April 2020 and obtained a conciliation certificate on 24 April 2020. Her claim form (ET1) was presented on 16 July 2020.

5. There were no preliminary hearings in this case, which is unfortunate, as a preliminary hearing could have dealt with some of the questions in the case at an early opportunity, rather than them having to be dealt with at the final hearing. No fault lies with either of the parties or their representatives for not dealing with matters such as a list of issues before the hearing.

Housekeeping

8. The hearing was conducted remotely by video link. Neither party objected to this method of hearing.

9. I had not received all the papers in the case when I started the hearing at 10:00am on the first morning. I therefore spoke to the parties and advised them of the position. I noted that the claimant was representing herself. I advised her that the Tribunal operates on a set of Rules. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. Rule 2 says:

> *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

10. I also advised both parties that I would initially deal with liability in the case (whether or not the claimant had been unfairly dismissed and whether any deduction to compensation should be made because of her conductor because the dismissal had been procedurally unfair, but may have been fair if a fair procedure had been

followed). Because of my decision on liability, there is no requirement for me to consider remedy.

11. The parties had agreed and prepared a bundle of 380 pages in 8 PDF files. I had only received 3 of the PDFs on the morning before the hearing, but was sent the remainder. Mr Sanders advised that three further documents had been sent to the claimant in the week before the hearing:

    11.1. A service agreement, which was a template with no name and job title;

    11.2. A clearer version of page 364; and

    11.3. A one-page letter from Thames Valley Police to Mr Kingston regarding a complaint filed by the respondent against the claimant.

    If I refer to any document in the original 380-page bundle, I will put the page numbers in square brackets (e.g. [34-35]). If I refer to any document in the supplementary bundle, I will put the page number sin square brackets with the prefix "PB" (e.g. [PB23-24]).

12. Ms Nicholson confirmed that she had received the documents and did not object to their production. The claimant herself had sent 5 documents to the respondent on the morning of the hearing. Four were contained in a supplemental bundle of 22 pages together with the 3 documents that Mr Sanders had referred to. The fifth was a Scott Schedule from a civil litigation case in which the claimant was challenging the valuation of her shares after her dismissal. The document was over 100 pages long and I advised that I would read it in the break and decide on its eligibility.

13. A timetable for the hearing was agreed.

14. The claimant confirmed that her only claim was one of unfair dismissal. Specifically, there was no claim of detriment or dismissal for making a protected disclosure (whistleblowing).

15. No list of issue had been agreed, so I went through the issues (questions that had to be answered) and sent an agreed list to the parties (see below).

16. I then took a break to read the remaining documents.

17. On the resumption, I advised the parties that I would not allow the claimant's Scott Schedule to be admitted because it was not relevant to the issues I had to determine.

18. I also made an order changing the name of the respondent to Delilah Cosmetics Limited ("Delilah").

19. I heard evidence via video link from (in the order that they gave evidence):

    19.1. Rupert Kingston, Director of the respondent, who was the dismissing officer. His witness statement dated 20 August 2021 consisted of 45 paragraphs.

19.2. Frauke Hamer, Director of the respondent, who heard the claimant's appeal against dismissal. Her witness statement dated 23 August 2021 consisted of 16 paragraphs.

19.3. Juliet White, Operations Director of the respondent, who investigated the disciplinary allegations against the claimant. Her witness statement, dated 23 August 2021 consisted of 64 paragraphs.

19.4. Janet Fricker, Financial Director of the respondent. Her witness statement dated 24 August 2021 consisted of 34 paragraphs.

19.5. Hannah Nicholson, the claimant, whose witness statement dated 28 July 2021 consisted of 22 pages.

19.6. Stuart Large, who is the claimant's father and was the chairman of the respondent for a period. His witness statement dated 28 July 2021 consisted of 2 pages.

20. The claimant also produced witness statements from her 15-year-old daughter and her mother, but decided not to call them. She also tendered statements for Euan Williams, Pauline Mitford, Judy Mahoney and Natalie Harkins, but none of them attended. I can give their statements limited weight.

21. All witnesses gave evidence on affirmation. Both parties were given the opportunity to cross-examine witnesses. The respondent's representative was given the opportunity to re-examine their witnesses. The claimant was given the opportunity to amplify or clarify any of the answers she had given to cross-examination questions at the end of her evidence, as she did not have a representative who could have asked re-examination questions. The claimant was invited to re-examine Mr Large.

22. At the end of the evidence I read and heard closing submissions from both parties. At the end of closing submissions, I indicated that I would reserve my decision.

23. I offer my sincere apologies to the parties for the delay in producing this Judgment and Reasons. I had nearly completed them when a catastrophic IT failure deleted the document. I then contracted Covid and was unable to work for some time. On my return to work I had a number of matters to catch up on, including this one.

Issues

24. The following issues were agreed by the parties:

1. Unfair dismissal

1.1 Was the claimant dismissed?

1.2 What was the reason or principal reason for dismissal? The respondent says the reason was conduct or some other substantial reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.3.1 there were reasonable grounds for that belief;

1.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

1.3.3 the respondent otherwise acted in a procedurally fair manner;

1.3.4 dismissal was within the range of reasonable responses.

1.4 What was the reason or principal reason for dismissal?

1.5 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

1.6 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

1.7 If so, should the claimant's compensation be reduced? By how much?

1.8 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

1.9 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

1.10 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

2. Remedy for unfair dismissal

2.1 Does the claimant wish to be reinstated to their previous employment?

2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.6.1 What financial losses has the dismissal caused the claimant?

2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.6.3 If not, for what period of loss should the claimant be compensated?

2.6.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.6.5 Did the respondent or the claimant unreasonably fail to comply with it by?

2.6.6 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.6.7 Does the statutory cap of fifty-two weeks' pay apply?

2.7 What basic award is payable to the claimant, if any?

25. Because I found that the claimant was not unfairly dismissed, I did not consider any issues from paragraphs 1.6 to 2.7 above.

Relevant Law

26. In unfair dismissal claims, the relevant sections of the Employment Rights Act 1996 are ss.95(1) and 98.

"Section 95: Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

27. I was referred to a number of precedent cases by counsel, which I considered and have quoted in this decision where appropriate:

    9.1. **British Home Stores Ltd v Burchell** [1980] ICR 303;

    9.2. **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220**;**

    9.3. **Sainsbury's Supermarkets Ltd v Hitt** [2002] EWCA Civ 1588;

9.4. **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 428**;**

9.5. **Polkey v AE Dayton Services Ltd** [1988] ICR 142; and

9.6. **Moore v Phoenix Product Development Limited** UKEAT/0070/20.

Findings of Fact

28. All my findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over another. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. As I remarked at the hearing, much of the claimant's evidence was not relevant to the decision I had to make. I would also make the point here that the claimant tended to take a holistic view of the entirety of the way that she says she was treated by the respondent as being part of her unfair dismissal claim. It was not, which is why it is always essential to determine what issues (questions) that a Tribunal will have to set its mind to as early in the proceedings as possible.

29. Some of the facts in this case were never disputed. Indeed, much of the factual evidence of matters such as dates and events seemed to be agreed by all the witnesses who could give evidence on a particular point. The key disputes of evidence in this case were around the interpretation of events as they affected the claimant's position.

Agreed Facts

30. I find that the following facts were either agreed or never disputed:

30.1. The claimant has a long history in cosmetics, as has Mr Kingston. They have known each other for more than 20 years and were good friends before the events that led to the claimant's dismissal. Both Mr Kingston and the claimant have many contacts in the cosmetics industry.

30.2. The claimant and Mr Kingston worked together at another cosmetics company for some years before they formed Delilah. Whilst working for this company, the claimant and Mr Kingston came up with an idea for their own business in cosmetics. Their employer dismissed both of them for working on the project.

30.3. Delilah is a retailer of cosmetics. It was founded in 2104 by the claimant, Hannah Nicholson, with Rupert Kingston and Juliet White. Mr Kingston and Ms White are married to one another.

30.4. The three founders of the company held one third of the shares each. As Mr Kingston and Ms White are married, the shareholders agreement between the three included a clause that effectively

protected the claimant from being outvoted by the other two shareholders.

30.5. The claimant was employed, latterly as the Managing Director of the respondent from 1 January 2014 to 16 April 2020, which was the effective date of termination of her employment. It was accepted by the respondent that the claimant was dismissed.

30.6. The claimant began early conciliation with ACAS on 23 April 2020 and obtained a conciliation certificate on 24 April 2020. Her claim form (ET1) was presented on 16 July 2020.

30.7. The claimant was given a Service Contract and Employee Handbook [263-277]. The claimant agreed that she was subject to its conditions, which included provisions that required her to work in the best interest of the respondent at all times and not to act in conflict with the best interests of the respondent. She was also required to keep commercially sensitive material confidential. I have not set the provisions out in great detail, as the claimant accepted that she was bound by them.

30.8. The three founders had agreed that if one or more of them left, they must offer their shares to the remaining shareholders at a price to be agreed. There was a mechanism for calculating the value of the shares. The claimant expressed her dissatisfaction at the valuation of her shares on numerous occasions and cites this as the real reason that the respondent dismissed her.

30.9. During the whole of the claimant's employment, the respondent struggled to make profit and generate cashflow. Those circumstances resulted in a pay freeze for the directors in January 2019 and led the claimant to seek alternative income streams outside the respondent's business. There is a dispute of evidence between the parties as to whether she informed the respondent of her intentions. I find that the dispute is irrelevant, as the claimant remained under the contractual and fiduciary duties that she breached.

30.10. It was agreed that the claimant indicated an intention to resign and sell her shares on 8 May 2019. She indicated that she would not leave until she had sold her shares.

30.11. The claimant filed a grievance on 16 July 2019. There then followed an unsuccessful period of negotiation.

30.12. On 16 August 2019, the respondent suspended the clamant by letter pending an investigation into her alleged misconduct [44-46]. The allegations were:

30.12.1. Contact with Katie and Crispian from a beauty company called Beauty and the Boutique (“BATB") regarding building a makeup line for them; and

30.12.2. Contact with Delilah’s suppliers to arrange for samples of their product to be sent to the claimant’s home.

30.13. The claimant responded to the suspension letter on 16 August 2019 by email [47].

30.14. The respondent wrote to the claimant on 16 August 2019 [48] to ask for further details of her grievance.

30.15. Ms White began her investigation into the claimant’s conduct on 19 August 2019 and produced an Investigation Report dated 11 September 2019 [49-56]. That report and supporting documents were sent to the claimant with a letter dated 12 September 2019 [57-58] inviting the claimant to a disciplinary hearing.

30.16. The invitation made 7 allegations of misconduct against the claimant:

30.16.1. She had misused property belonging to Delilah and misused the company’s name;

30.16.2. She had used and disclosed confidential information without authorisation;

30.16.3. She had acted dishonestly;

30.16.4. She had diverted a business opportunity away from Delilah;

30.16.5. She had breached the implied duty of trust and confidence that she owed Delilah;

30.16.6. She had breached the following fiduciary duties:

30.16.6.1. Not to place herself in a position where her own interests conflict with those of Delilah or where there is a real possibility that this will happen;

30.16.6.2. Not to profit from her position at the expense of Delilah; and

30.16.6.3. Not to place herself in a position where her duty to another customer conflicted with her duty to Delilah.

The letter went on to give more details of the allegations.

30.17. There was then a period of approximately six months when the claimant was unfit to attend the disciplinary hearing.

30.18. On 15 December 2019, Mr Kingston retrieved photographs, videos and documents from the claimant's work computer. As a result, the respondent's lawyers to wrote to the claimant's lawyers on 18 December 2019 [111-114]. Further correspondence ensued. The respondent submitted written questions to the claimant on 9 January 2020 [123-127]. The claimant responded on 24 January 2020 [128-138].

30.19. During this period, the process of valuing the claimant's shares in the respondent continued without agreement until the claimant's solicitors wrote to the respondent's solicitors on 2 April 2019 [162-163] to complain (amongst other things) that it was unfair that the claimant had not yet received the outcome of the disciplinary allegations.

30.20. On 17 April 2020, the respondent's solicitors wrote to the claimant's solicitors [164-167] to advise that Mr Kingston had decided to dismiss the claimant for gross misconduct.

30.21. By a letter dated 24 April 2020 [168-170], the clamant submitted an appeal. It was heard by Frauke Hamer on written submissions. She upheld the claimant's dismissal by letter dated 17 July 2020 [191-196].

Disputed Facts

31. I preface my findings on the disputed facts with a few comments about the case and evidence in general:

    31.1. I empathise with the claimant's financial position in 2018 and beyond. However, the law on unfair dismissal makes little allowance for those circumstances when applying the provisions of section 98(4) of the Employment Rights Act 1996, other than when determining whether the decision to dismiss came within the band of reasonable responses;

    31.2. Despite my attempts to encourage the claimant to cross-examine the respondent's witnesses, she asked few questions of Ms Frauke, Ms White and Ms Fricker;

    31.3. The claimant found it difficult to focus on the issues in this case and differentiate them from her grievances about the way she felt she had been treated by the respondent in general terms across the full period of her employment.

32. I find that the claimant was bound by the terms of her contract of employment and the associated Handbook. She was also bound by the terms of her shareholders agreement with Mr Kingston and Ms White. She was therefore required, as a matter

of binding contract not to act in conflict with the respondent's best interests and not to disclose commercially sensitive confidential information to third parties.

The Allegations

33. The allegations against the claimant fall into two broad categories: her alleged actions in speaking to BATB and the respondent's suppliers as set out in the letter dated 12 September 2019 [57-58]; and her actions whilst absent through ill health as set out in the letter dated 18 December 2019 [111-114].

34. I find that the claimant initiated an email conversation with BATB on 4 March 2019 [59A] in which she stated:

> "I have been thinking ever since I met with you about something you mentioned re having your own line and I have a billion and one ideas I would love to discuss and maybe even a proposal…"

35. The above email was from the claimant's business email account at Delilah. I find that the claimant accepted in evidence that she had not told anyone at Delilah about the opportunity she had spotted. I find that failure of itself to be a breach of the claimant's contract of employment and her fiduciary duty as a director of the respondent. I find that the claimant's answers in cross-examination on the conversations with BATB to have been evasive, vague, elliptical and based on the erroneous foundation that she was entitled to do what she did because she was struggling financially and that the respondent was unable to meet her financial requirements and expectations.

36. I find that the claimant must have considered whether Delilah could fulfil to opportunity and must have dismissed that idea. I make that finding because I find the claimant's evidence that she was talking to BATB about product that Delilah could not supply not to have been credible. I preferred the evidence of the respondent, which said that it could have fulfilled BATB's requirements.

37. I find that the secrecy with which the claimant conducted her discussions with BATB is indicative of the fact that she must have known that she was doing something that she should not have done. I find that the claimant's failure to mention the purpose of the meeting with BATB on 14 March 2019 to have been a further breach and a further indication that she must have known that she was doing something that she should not have done.

38. I find that in her email of 26 March 2019 to BATB [59J-59L], the claimant sets out with crystal clarity that her input into BATB's new product would be a personal appointment that was outside Delilah. She talks of a consultancy fee and commission. I also find that the claimant offered to put BATB in contact with manufacturers/suppliers that Delilah used. I find that to be a breach of her contract of employment with the respondent.

39. It is relevant to my decision that the claimant's actions set out above occurred before she indicated that she wished to leave the respondent and sell her shares on 8 May 2019.

40. This is an unusual case in that once the claimant had indicated an intention to leave and to sell her shares, there appears to have been a period of intense negotiation about the terms upon which she would leave. I have no doubt that the contents of those discussions are protected by professional and/or litigation privilege and I do not need to know what was said or done in order to address the issues in this case. I would note, however, that the negotiations set the context of the investigation and decision to dismiss. I find that from 8 May 2019, the claimant had made up her mind to leave the respondent and the respondent had accepted her decision.

41. It is clear that negotiations were difficult and emotive. In such circumstances, I do not find it unusual or unlawful for the respondent to have looked at the claimant's email inbox and discovered the email trail between her and BATB referenced above. I mentioned to the parties the case of **Farnan v Sunderland Association Football Club Ltd** [2015] EWHC 3759 (QB), which is one of a long line of authorities that supports the proposition that an employer can monitor the email traffic of its employees.

42. I therefore do not find it unreasonable or unlawful for the respondent to have commenced a disciplinary investigation into the claimant's actions. Its decision falls within the band of reasonable responses.

43. The second set of allegations also arise from Mr Kingston inspecting the claimant's work laptop. On 15 December 2019, he discovered photographs [115-118] of the claimant attending a trade show on 18 September 2019, at a time when she was suspended from work and absent due to ill health.

44. I make the same findings on this matter as I do on the first set of allegations. I do not find it unreasonable or unlawful for Mr Kingston to have searched through the claimant's work computer and I do not find it unreasonable or unlawful for the respondent to have commenced a disciplinary investigation into the claimant's actions. Its decision falls within the band of reasonable responses.

45. The claimant's case is founded on an assertion that the respondent sought to dismiss her for misconduct issues so as to set her up to receive a low valuation of her shares. I find that she has put the proverbial cart before the horse. I found no evidence that suggests that the respondent was minded to dismiss or remove the claimant prior to 8 May 2019, when she indicated an intention to leave and sell her shares. I find that she committed serious breaches of her contract of employment and fiduciary duties as director in March 2019, well before she decided to leave. I reject the claimant's allegation that the respondent 'manufactured' her dismissal.

The investigation

46. I reminded myself that **Sainsbury's Supermarkets v Hitt** hold the respondent to a standard of investigation that falls within the reasonable band of responses. That is to say that the respondent would only err in law if it did something that no reasonable employer would do.

47. The test in **Sainsbury's Supermarkets v Hitt** has to be viewed through the lens of section 98(4) of the Employment Rights Act 1996, which requires me to take into

account the size and administrative responses of the respondent. In this case, it was never disputed that the respondent is a small employer with limited resources, although it did employ an HR adviser.

48. I make the following findings in respect of the respondent's investigation into the claimant's alleged misconduct:

    48.1. I find that the use of Ms White, Mr Kingston and Ms Hamer in investigating the allegations and hearing the disciplinary and appeal was within the band of reasonable responses. There is no requirement in the case law to suggest the only step a reasonable employer would take would be to employ outside consultants to undertake the task. I am mindful of the agreed evidence that the respondent was in dire financial straits at the time.

    48.2. Ms Hamer had taken no part in the investigation or dismissal, so it was within the band of reasonable responses to utilise her as the appeal officer. Her evidence was that had she not been confident in her ability to take an independent decision then she would not have agreed to conduct the appeal. I find that evidence to be credible.

    48.3. Ms White gathered all the relevant emails and documents and disclosed them to the claimant at an early stage in the process, and sought her comments on them in the letter dated 12 September 2019 [57-58];

    48.4. The claimant was advised of the right to be accompanied at the first proposed disciplinary meeting [57-59];

    48.5. The respondent obtained an Occupational Health report to satisfy itself of any adjustments that should be made to the process to allow the claimant to best put forward her case and response;

    48.6. The respondent agreed to a written disciplinary process, as requested by C's solicitors [109] (albeit while maintaining that the process was a sham and should not proceed);

    48.7. Mr Kingston raised supplemental questions where he needed to explore matters further on 9 January 2020 [123-127];

    48.8. Ms Hamer asked further questions of both Mr Kingston and the claimant during the appeal process; and

    48.9. While individuals at BATB were not interviewed as part of the investigation, I find that decision fell within the band of reasonable responses given the sensitivity of discussing this with a customer. I find the rationale in the investigation report [50] to be within the band of reasonable responses and note that the claimant did not challenge that decision.

Procedure

49. The claimant was not critical of the procedure used by the respondent in her closing submissions. I find that the respondent did not make a procedural error in the way that it conducted the investigations, disciplinary and appeal into the claimant's alleged misconduct.

Dismissal

50. Section 98(4)(a) of the Employment Rights Act 1996 requires me to consider whether the respondent's decision to dismiss the claimant was reasonable or unreasonable in treating the claimant's misconduct as sufficient reason for dismissing.

51. Section 98(4)(b) then adds that I should determine the question in accordance with equity and the substantial merits of the case. I also have to consider the case law in **Burchell** and **Iceland Frozen Foods**.

52. I have already set out above my findings that the claimant's assertions that she acted out of financial desperation will not come to her aid in this case. The effect of my findings above also negate her assertion that she did nothing wrong. In making my decision on the reasonableness of the decision to dismiss, I agree with the submissions made by Mr Sanders:

    52.1. I find that Mr Kingston gave a clear account of why he regarded the discussions between the clamant and BATB as advanced and damaging to Delilah, and why they could not be characterised as "nothing";

    52.2. I find that the claimant was indeed pursuing a business opportunity which could have been damaging to Delilah in multiple ways;

    52.3. I find that the commission that claimant was proposing to earn could have been paid to the respondent, rather than to the claimant herself directly, thus diverting possible revenue away from the respondent at a time of financial crisis;

    52.4. I find that by assisting and encouraging BATB to develop their own products, this could have made BATB less focused on and/or inclined to purchase Delilah products;

    52.5. I find that the respondent has shown on the balance of probabilities that the claimant shared confidential information, and product samples from Delilah suppliers;

    52.6. I find that the spreadsheet [SB17], which the claimant disclosed to BATAB contained information which could lead BATB to deducing Delilah's margins;

    52.7. The claimant was Managing Director of the respondent and was subject to contractual, statutory, and fiduciary duties which

prevented her from working otherwise than for Delilah, still less for a potential competitor and acting in a way which could harm Delilah;

52.8. If the claimant was going to pursue any personal opportunity with a potential customer which the respondent was actively pursuing, then there was a duty on her to seek fully informed consent from R, providing details of her intentions and interactions. I find that this was not done;

52.9. I find that the claimant had sought to conceal her actions, as set out above;

52.10. I find that the claimant gave inconsistent and unsatisfactory answers during the disciplinary process.

53. This is an unusual dismissal in that there was no hearing in person, but I find that the claimant consented to this and the failure to hold a dismissal meeting in the claimant's presence does not make the dismissal unfair. I make the same finding in respect of the appeal hearing. The claimant had every opportunity to participate.

54. I find that the claimant was not unfairly dismissed.

55. In the alternative, if there was a procedural flaw in the respondent's case, I would find that the claimant's compensation should be reduced by a factor of at least 90% because of her conduct and at least 90% on the basis of the case of **Polkey**.

Employment Judge S A Shore

Date 21 December 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

6 January 2022

FOR THE TRIBUNAL OFFICE