EMPLOYMENT TRIBUNALS

Claimant: **Mr Asim Rahat**

Respondent: **Active Remedial Solutions Limited**

Heard at: **Leicester**

On: **Hearing 8 and 9 January 2019**
(Reserved on 15 January 2019)

Before: **Employment Judge Ahmed (sitting alone)**

Representation
Claimant: **In person**
Respondent: **Mr Mugni Islam-Choudhury of Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. The Claimant was unfairly dismissed. The issue of remedy is adjourned.

2. It is not appropriate to make any deduction from the basic and compensatory awards.

3. The Respondent is ordered to pay to the Claimant £515.00 (net) in respect of an unlawful deduction of wages.

4. The Respondent is ordered to pay to the Claimant £1,127.54 (net) for breach of contract in respect of unpaid expenses.

5. The Claimant was dismissed in breach of contract. The Respondent is ordered to pay damages of £1,277.76 (net) for failure to give proper notice of termination.

REASONS

1. In these proceedings Mr Asim Rahat brings complaints of unfair dismissal, an unlawful deduction of wages and breach of contract in respect of both non-payment of expenses and notice pay.

2. Mr Rahat was employed by the Respondent as a Footwear Design Manager from 1 September 2014 to 3 May 2018. He was summarily dismissed by letter of 3 May 2018. He presented his Claim to the Tribunal on 6 September 2018. He has complied with the ACAS Early Conciliation procedure.

3. The Respondent conceded at the hearing that the complaint in respect of an unlawful deduction of wages, a sum retained for what was alleged to be damage to the company car being a sum of £515.00 was well-founded. Judgment can therefore be entered for that sum as it is no longer disputed.

4. The expenses claim is almost agreed and can be dealt with fairly shortly. The amount claimed on the Claimant's schedule is £1,225.79. All of the expenses are now conceded with the exception of £31.25 in respect of a train ticket for the Claimant's daughter and £67.00 in respect of subsistence which the Respondent disputes on the basis that the Claimant was not at work on the day the alleged expense was incurred. I accept that the Claimant did not need to have his daughter, who is a minor, at work with him on the day in question despite any child care or other responsibilities he may have had for his daughter on that day. The Respondent is not contractually obliged to pay, nor has it ever agreed to pay, travelling expenses for anyone other than their employees. Accordingly that part of the claim must be dismissed. I also accept that the Respondent has no record of the Claimant undertaking work on 23 February 2018 and as the Claimant is unable to prove otherwise that claim must also be rejected. The remaining expenses are conceded and come to a total of £1,127.54. The Respondent will be ordered to pay this sum as damages for breach of contract.

5. Following the receipt of the ET1 Claim Form on 6 September 2018, a notice of a hearing with case management orders was sent by the Tribunal to the parties on 24 September 2018 together with notice of the hearing on 8 January 2019. An additional day was later added to ensure the case completed in the time allotted. The case management orders required mutual disclosure of relevant documents by 5 November 2018, a bundle of document for the hearing to be agreed and prepared by 19 November and mutual exchange of witness statements by 3 December.

6. Unfortunately, there was considerable slippage in compliance of case management orders. The trial bundle does not appear to have been finalised until 4 January 2019. There seems to have been an agreement (although I have not seen any written evidence of it and there is some dispute that there was ever an agreement) that witness statements would be mutually exchanged a day before the hearing rather than 3 December 2018. The Respondent was willing and able to exchange statements the day before the hearing but the Claimant did not signify his readiness nor serve his statement. The Respondent's solicitors made an application for the claim to be struck out. At the start of this hearing, the Respondents confirmed that they did not wish to proceed with that application. The Claimant produced his witness statement on the morning of the hearing. The Respondent sought time to read it which was granted. Despite the rather unsatisfactory state of affairs both parties confirmed that they were content and willing to proceed.

7. The Claimant, in addition to submitting his witness statement late, also brought with him to the hearing a small quantity of documents which he wished to include in the bundle. After having the opportunity to consider, Mr Islam-Choudhury on behalf of the Respondent confirmed he had no objection to them being included in the agreed bundle. They are certainly relevant. Mr Rahat then

sought disclosure from the Respondents for a large quantity of internal company documents which he believed would be necessary to advance his case. The application was objected to. There had been no prior application for disclosure and the documents requested sought ran into many pages. The relevance was not entirely clear. To order disclosure would almost certainly lead to an adjournment of the hearing. The failure to request them earlier was entirely the fault of the Claimant. There was no reason why the Respondent should be penalised for the delay in making the application. The application was therefore refused.

8. The Claimant represented himself at this hearing and was the only one to give evidence on his own behalf. The Respondents called Mr Derek Moore (Managing Director), Ms Ana-Maria Moore (Sales Office Manager and daughter of Mr Moore) and Mr Abhishek Dwivedi (the Respondent's Operations Manager based in India). The Respondents also entered into evidence a witness statement by Ms Samantha Caroline Purvis, Managing Director of The Compass Partnership ("Compass"), an HR Consultancy and Management service. Mr Islam-Choudhury indicated that it was not the Respondent's intention to call Ms Purvis. On the second day the Respondent had changed its position but Ms Purvis was not in Tribunal and we would have to wait for her to arrive. Given that the hearing was already under severe time pressures (it was ultimately necessary to reserve the decision) the application to adjourn until she arrived was declined. No oral evidence was therefore taken from Ms Purvis.

9. In coming to my decision in this case I have taken into consideration the oral evidence of the witnesses, the contents of their witness statements, the documents in the bundle and oral submissions. References to page numbers in this decision are to the agreed bundle.

THE FACTS

10. The Respondent is a family company founded in 1998. The Managing Director and founder is Mr Derek Moore. Mr Moore's wife owns 50% of the shares but is not directly involved in the management of the company save in respect of one matter which occurred during the events of this case and is dealt with below. Ms Ana-Maria Moore and Ms Jemma Moore, both daughters, are employed as a Sales Office Manager and Director respectively.

11. The Respondent has an associated company, London Brogues Limited ("London Brogues") which also operates from the same premises and is also controlled by Mr Moore and his family. Mr Moore makes all the key decisions in respect of both businesses. The business of both companies is the import of shoes and remedial work to shoes which UK retailers have purchased. Where shoes following import to the UK are found to have defects and are capable of rectification the Respondent or London Brogues will undertake the necessary work to bring them up to merchantable standards.

12. Mr Rahat was at all material times an Indian national. He was already resident and working in the shoe industry in a different capacity and for a different employer when he came across Mr Moore's business. In early 2014 there were discussions between Mr Moore and Mr Rahat as to the Claimant joining the Respondent with a view to sourcing shoes from India. At the time Mr Rahat required a sponsor in the UK for continued residence and to work in this country. He had a certificate of sponsorship prior to his connection with the Respondent. This sponsorship was renewed by the Respondent on 1 January 2017 for 3 years. There is no jurisdictional issue raised for the

purposes of these proceedings in relation to Mr Rahat's status. Equally there is no issue that he was at all material times an "employee". There is a contract of employment dated 1 September 2014 in the bundle which the Respondent relies on though Mr Rahat does not accept that this was ever given to him. The Respondent does not take any issue in relation to time limits in bringing these proceedings. The claim is ACAS early conciliation compliant.

13. It is agreed by both Mr Rahat and Mr Moore that the working relationship between the relatively young Mr Rahat, who was then in his late twenties and Mr Moore who was in his early sixties, was a close one. Mr Moore accepts that not only did he hold Mr Rahat in high regard and trusted him implicitly but also regarded him "almost like a son". For his part Mr Rahat believed that he was a natural successor when Mr Moore retired from the businesses. Mr Rahat harboured the belief that at some point in the near future Mr Moore would sell him his shares in London Brogues which had become very successful over recent years. It is agreed that Mr Moore did tell the Claimant he would consider transferring shares to him at some point but no date was ever agreed and Mr Moore's evidence was that he certainly would not do so whilst he had outstanding personal guarantees to the Bank.

14. On 5 January 2018 the Claimant was made a Director of London Brogues (though not of the Respondent) but Mr Moore's evidence was that this was purely to provide some authority for him in his dealings with overseas suppliers and customers. He denies that it was not a forerunner to any transfer of shares. No shares were ever in fact ever transferred to the Claimant.

15. The Claimant had well established contacts with suppliers in India. There is some dispute as to who was mainly responsible for them, a point not necessary for me to decide, but there is no doubt that the Claimant made regular business trips to India and was instrumental in dealings with shoe manufacturers and suppliers in India along with Mr Dwivedi as the company's local representative.

16. The Claimant's contract of employment was with Active Remedial Solutions Ltd only and makes no reference to London Brogues. I accept though that part of the Claimant's duties involved working with and for London Brogues even though that is not spelt out and there is no written job description. As a result I take into account the Claimant's conduct whilst undertaking work for London Brogues even though they were not his employer. The contract of employment stipulated that the Claimant would be paid a salary of £28,000 per annum. He also had his rent for accommodation paid, was provided with a lease Mercedes car and was entitled to all reasonable expenses incurred in connection with his work.

17. On 28 and 29 March 2018 whilst the Claimant was on a short break Mr Moore telephoned to enquire as to the levels of stocks for London Brogues. Mr Moore wanted to know why there were unusually high levels of stock. The Claimant could order stock of his own accord although there is a dispute as to the extent Mr Moore would approve of what was ordered in advance and whether Mr Moore had knowledge of what was in the pipeline. Mr Rahat did not regard the stock level as alarming and said he would look into it when he returned to the office. Mr Rahat raised the question of his shares but Mr Moore batted off the discussion on the subject wanting instead to concentrate on the stock issue.

18. Shortly after the meeting Mr Moore took the unilateral decision, without consultation with Mr Rahat his then only other Director, to appoint his wife as an

additional Director. A Resolution passed was that stock could not be ordered by a single Director alone and that it would in the future require the approval of at least two Directors. Mr Rahat was only informed of this decision after it had been made. Mr Moore says that this was a shareholders meeting and not a Directors meeting so the Claimant was not entitled to be present or to be given notice of the meeting. Once the Resolution was 'passed' Mr Moore sent an e-mail to the Claimant to inform him.

19. The Claimant returned to work on 3 April 2018. According to Mr Moore, he was confrontational and aggressive. Whilst that is disputed and it forms no part of the alleged misconduct which ultimately resulted in dismissal, I am satisfied the Claimant was indeed emotional and considered that the act of appointing another Director without consultation or discussion was a breach of trust. He also felt that it was connected to his discussion about allocation of shares.

20. Mr Moore then handed the Claimant a pre-prepared letter dated 3 April suspending the Claimant from employment. The contents of the letter are of some significance and I therefore consider it appropriate to set it out in full.

"Dear Asim,

As you are aware I have been very concerned with the high levels of London Brogues stock which has been ordered by you, since the middle of last year I have been clear that we should be ordering based on our sales activity and the quantities based on requirement and not the amount to fill a container, however it seems that nearly every new style introduced into our range has been ordered without the expected market tests. You were trusted to do this as you have continually assured me that T.K. Maxx would buy any underperforming stock at a profit, which has not been the case.

Towards the end of last year, I brought to your attention that our stock levels were 11000 pairs when we agreed 5000 pairs, you said you would reduce this.

However, you ordered further stocks assuring me that at least 75% were sold, in fact your words were 'don't worry it's nearly all sold', and the balance would be required for repeat business from these sales. On arrival of these goods I noticed that a lot of this stock remained in the warehouse and on investigation found out that less than 35% of the first container of over 4000 pairs and less than 17% of the second container, nearly 2000 pairs, had been sold. When I put this to you, you said that the sales agents had let you down and we had some cancellations, I cannot find any cancellations to support your claim, our policy is to base orders on sales, but it is evident that this has not been the case. There was no justification for the quantities ordered.

Towards the end of last year, you were advised by Jemma that we were running low on some Gatsby styles and could you order stock. You failed to do this causing us loss of sales. You have now ordered this stock but not the quantities you were asked to order, which were based on previous sales, you have even added on styles for which there is no demand, because it seems you think it will sell.

On the 28/3 I was working on our cashflow forecast for the bank and emailed you to provide copies of any orders placed, as they were not in DropBox as they should have been, you emailed me an order placed with Bharat Expo which is when I found out you had overordered as previously mentioned. This order was placed over 1 month ago.

You had previously mentioned a style called Austin which you had ordered from Weston Footwear, but you hadn't sent me this order and it wasn't on Dropbox, you subsequently forwarded me this order and another order which I knew nothing about. The order for Austin also included a style called Freddie, a style which people had looked at on our Micam stand but to my knowledge had not placed any significant orders and even, so you have changed the style from that shown at the show as you thought it wasn't right. You advised me by mail that the order had no prices and was not confirmed.

On Thursday 29/3 I emailed you to advise that no further orders were to be placed without the

authority of at least 2 Directors, you were upset and came to the office where you then explained that Weston were making the orders early as they had other commitments later in April. You said that we could delay the collection of the orders and put off the payments. So, these unconfirmed orders with no prices on, issued over 1 month before 23/2, are being made. What is going on? Our stock levels are now approximately 16000 pairs and you have ordered another 4800 pairs with an approximate value of £72000.

Your actions are irresponsible reckless and an abuse of trust, they are not authorised or sanctioned and damaging to the future trading of the company.

I have no option than to suspend you from all duties whilst further investigations are made. You will be paid as usual and may use the company car, insured by you and at your risk, until advised otherwise. You are not to contact suppliers, customers or employee's/agents of the company concerning the company's business without the prior authorisation of the company. You are not to attend the company premises without invitation.

You have opened accounts in the name of London Brogues Ltd with Orderhive, Shopify, Rackspace, GS1 and Zoho, you have to now failed to supply the company with the administrator login details, usernames, passwords and security details used on its behalf. This is company property and I require this information by return. You will be held responsible for any losses we may suffer due to your retention.

I will write to you advising the company's position in due course when you will of course have the opportunity to respond."

21. In the above letter Mr Moore refers to two emails sent to the Claimant on 28 March 2018. In the first of those emails Mr Moore asked the Claimant to provide copies of any orders that had been placed but not yet shipped as he could not see them in Dropbox. That e-mail was sent at 11:00 am. On the same day at 13:08 Mr Moore sent a further e-mail to the Claimant to ask: "are there any Weston orders other than Austin and Freddie". On both occasions Mr Rahat supplied the information requested promptly. The documentation supplied shows that on the first occasion the orders were for 720 and 1710 shoes. The orders disclosed following the second e-mail were for 2400 and 2250 shoes. The latter would be the equivalent amount to fill an entire container.

22. Later on the same day at 11:14 Mr Moore sent an e-mail to one of his suppliers, Bharat Enterprises, as follows:

"It is with regret that I have to inform you that Asim Rahat is no longer with the company. This is due to differences between ourselves and how the company should be run."

23. At 11:20 he sent an e-mail to another supplier as follows:

"I understand from Asim that you have an appointment with him on Thursday, unfortunately he is no longer with the company."

24. At 11:26 in an e-mail to Bharat Expo he wrote:

"It is with regret that I have to inform you that Asim Rahat is no longer with the company".

25. At 11:32 there is an e-mail to another supplier as follows:

"Asim has left the company so all e-mails etc to myself or Jemma."

26. At 14.30 Mr Moore sent an email to an established supplier, Weston Footwear, to say:

"It is with regret that I have to inform you that Asim Rahat is no longer with the company."

27. At 15.49 Mr Moore sent an email to another supplier, Oxford Tanners,

which said inter alia,

"I have to inform you that Asim Rahat is no longer with the company."

28. It is agreed that after the suspension Mr Rahat was told not to contact suppliers or customers but it is not agreed that he was asked to hand over all the office and other keys other than his car keys. On this point I prefer the evidence of the Claimant that the return of the keys was at the Respondent's request and not a voluntary act on his part. Mr Rahat was unlikely to have returned the keys unless they were required of him. That is consistent with an instruction to the Claimant not to attend company premises. It would not make sense to tell Mr Rahat not to attend company premises yet still allow him access to the premises particularly as there was considerable suspicion on the part of Mr Moore and he believed that Mr Rahat was withholding passwords to email accounts and log-in details.

29. Mr Moore says that after the suspension he rang Mr Dwivedi and had a Facetime conversation with him. He asked Mr Dwivedi if there was anything else that he should know about other than high stock levels and Mr Dwivedi simply looked at him blankly which caused Mr Moore to have further suspicions about the Claimant's conduct. On the same day Mr Moore says that he discovered that two of his employees at London Brogues were asked by the Claimant to go and work with him as he was in the process of setting up a new company. Upon hearing this Mr Moore immediately took steps to remove the Claimant as a Director.

30. On 13 April 2018 the Claimant was told that the investigation conducted by Mr Moore and Ms Jemma Moore had concluded. Mr Rahat was required to attend a formal disciplinary hearing on 19 April. There were 3 allegations against him and they were as follows: -

Allegation 1

Mr Derek Moore, Director of Active Remedial Solutions Ltd and London Brogues Ltd, directed that you should only order stock on behalf of those companies in direct relationship to sales activity and quantities required by customers.

Between 22 February 2018 and 3 April 2018 in direct contravention of the above, you continued to place orders for stock in excess of sales activity and quantity based requirements, giving rise to a position as of 29 March 2018 whereby excess stock received in respect of orders place to the approximate value of £72,000 exist.

Allegation 2

That on or about Tuesday 3rd April 2018 when you, having been advised by Mr Derek Moore in writing by letter of that date, of his concerns regarding the level of unauthorised stock, you deleted data belonging to Active Remedial Solutions Ltd and/or London Brogues Ltd from your computer, with the intention of preventing or impeding the investigation in respect of the excess stock.

Allegation 3

Between 7th March 2015 and 3rd April 2018 without lawful or other authority and with the intention of defrauding Active Remedial Solutions Ltd and/or London Brogues Ltd, you entered into a contract or series of contracts with Oxford Tanners, Bharat Expo and Weston Footwear to pay you secret commission on orders placed by you on behalf of your employer during the course of your normal duties as an employee.

31. The disciplinary hearing on 19 April 2018 was purportedly chaired by Ms Ana-Maria Moore in conjunction with Ms Purvis with Ms Kate Clark, an employee

of Compass, taking notes. There are manuscript notes of the disciplinary hearing in the bundle. There is a passage of discussion as to the Claimant deleting e-mails and contains the following narrative:

"SP - Allegation 2 went home, plus deleted e-mails. What had to do to get access to account was because needed to know if being contacted. Contacted Rackspace. All e-mails deleted.

AR - Yes all deleted 21,400 from day one.

SP - said panicked.

SAR - because I was threatened.

SP - Felt could be something incriminating.

32. The above discussion relates to second of the three allegations, in particular that he deleted approximately 21,000 e-mails. The allegation so far as these present proceedings is concerned is that this was to cover up alleged cash transactions from manufacturers in India because the Claimant was making a secret profit in respect of each pair of shoes and was thus defrauding London Brogues of profit. It is agreed that it was the Claimant who had undertaken the necessary IT work to set up the passwords for e-mails and that the Respondent was unable to log in until it contacted the IT supplier, Rackspace, so that the account could be restored. It is the Respondent's case that Rackspace were able to restore all the passwords and the 21,000 deleted e-mails shortly after they were deleted, which on the Respondent's account was 3 April 2018.

33. Following the disciplinary hearing on 19 April, Ms Moore wrote to the Claimant to confirm that the decision was to dismiss the Claimant having found that all three allegations were substantiated. In particular, and relevantly, the conclusions were as follows: -

Allegation 1: You did, in direct contravention of a directive from Derek Moore, Director, continue to place orders for stock in excess of sales activity and quantity based requirements, giving rise to a position as of 29th March 2018 whereby excess stock received or to be received in respect of orders placed to the approximate value of £72,000 exist.

Allegation 2: You did delete data belonging to Active Remedial Solutions Ltd and/or London Brogues Ltd from your computer, with the intention of preventing or impeding the investigation in respect of the excess stock.

Allegation 3: You did enter into a contract or series of contracts with Oxford Tanners, Bharat Expo & Weston Footwear to pay you secret commission on orders placed by you on behalf of your employer during the course of your normal duties as an employee without lawful or other authority and with the intention of defrauding Active Remedial Solutions Ltd and/or London Brogues Ltd.

34. Following the Claimant's suspension Mr Moore decided to undertake further enquiries and investigations. On the basis of those investigations it is alleged that the Claimant had been defrauding London Brogues of funds by making secret profits. In support of this Mr Moore relies on an e-mail from the Claimant dated 8 September 2016 to Mr KK Sharma of Bharat Enterprises a shoe manufacturer in India, in which the Claimant writes to Mr Sharma to say:

"Can you please ask Rajan [of Bharat Expo] to be more careful and not put attachments with commission details."

35. Further, in an e-mail from Mr Bhatnager, of Bharat Expo, to the Claimant of 23 February 2018, there is the extract:

"Target price advised RS 1050/plus commission?"

36. Prior to dismissal and a week after the Claimant's suspension, Mr Moore met Mr Bhatnager in his UK office. Mr Moore's oral evidence as confirmed in his witness statement is that Mr Bhatnager confirmed that his company had paid commission to the Claimant in respect of orders placed by London Brogues. Mr Bhatnager however refused to provide written confirmation, being fearful of repercussions. There is no written note of the meeting and it was not held in the presence of any professional adviser despite the fact that the Respondent by now appears to have engaged the services of Compass.

37. On 1 May 2018 Mr Moore travelled to India and met Mr PP Singh of Bharat Expo, who is described as the practical owner of the Company. Mr Singh handed Mr Moore an envelope containing £1,960 in cash. Mr Moore asked what it was for and he was told that it was payment due to the Claimant on the last shipment. Mr Moore would not accept the payment but as Mr Singh would not issue a credit note, the payment was deposited in the company's bank account and marked as payment received from Bharat Expo as a discount on previous orders. Mr Singh also agreed to reduce the costs of further orders by 80 Rupees. None of this is confirmed in writing by either party.

38. Mr Moore goes on to say that whilst in India he went to visit Weston Footwear and met the owner and his son. Mr Moore says that both confirmed to him that they had paid commission to the Claimant but maintained that these payments were for "expenses in India" as well as payment of shoe moulds and courier charges.

39. Mr Moore in his evidence explained that since he had been involved in the suspension and investigation he believed it was not appropriate to conduct the disciplinary process and thus he engaged the services of Compass partnership. He acknowledges that elements of the investigation he undertook after the Claimant was dismissed could have been done prior to dismissal.

40. The way in which the fraud is said to have taken place is described in Mr Moore's witness statement. It is alleged that Mr Rahat artificially inflated the prices of each pair of shoes by "broadly" £1 sterling (but in Indian Rupees) which he then received as a cash payment. Mr Moore says that it is not possible for him to be precise as to the extent of the fraud but over a three-year period he believes it to be in the region of £180,000. This is based on the total number of shoes imported plus some shoe uppers. By adding a mark-up on each pair of shoes, which it is alleged went as commission to the Claimant, London Brogues were paying approximately £1 more per pair than should have been the case.

THE LAW

41. In relation to unfair dismissal the relevant provisions are at sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996"). They state:

"(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) [not relevant]

(b) relates to the conduct of the employee,

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is 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."

Section 123(1) and (6) ERA 1996 deals with compensation and contributory conduct and states:

"(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

42. The classic guidance as to the correct approach in applying section 98(4) ERA 1996 was confirmed in **HSBC Bank plc v Madden** [2000] ICR 1283 where the Court of Appeal approved the approach originally set out in **Iceland Frozen Foods v Jones** [1983] ICR 17). The guidance is as follows:

"(1) The starting point should always be the words of [section [98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute its decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment Tribunal as an industrial jury [then sitting as a panel but now as judge alone] 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 the band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

43. The Court of Appeal in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 reminded tribunals of the importance of not substituting their views for that of the employer. I have been conscious of the importance of not doing so.

44. It is now well-established that the range of reasonable responses test applies equally to the investigation as it does to the decision to dismiss (**Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23).

45. In **British Home Stores v Burchell** [1980] ICR 383, the Court of Appeal set out the criteria to be applied in cases of dismissal by reason of alleged misconduct. Firstly, the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the misconduct in question. Secondly, the tribunal must consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly, at the stage at which the employer formed its belief, whether it had carried out as much as investigation of the matter as was reasonable in all of the circumstances. Although **Burchell** was decided before changes were made to the burden of proof, the three-step process is still helpful in determining cases involving dismissal for misconduct.

46. In relation to complaints of breach of contract, a different test is applied than the test for unfair dismissal found in section 98(4) ERA 1996. For breach of contract (or wrongful dismissal) it is the common law test that is applicable. For dismissal to be justified in relation to a breach of contract claim, the employee must commit a repudiatory breach which is then accepted by the Respondent.

47. The classic test as to what constitutes conduct that would constitute a repudiatory breach was set out in **Laws v London Chronicle** [1959] 1 WLR 698. There it was held that the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract.

48. In considering fairness I am required to take into account the provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures. The relevant paragraphs of the ACAS Code are as follows:

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

22. A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.

26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

27. The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.

49. I have also been referred to the following cases in submissions:

W Devis & Sons Ltd v Atkins [1977] IRLR 314
Neary v Dean of Westminster [1999] IRLR 288
Steen v ASP Packaging Ltd [2014] ICR 56

THE ISSUES

50. The issues in this case are as follows: -

50.1 Was the Claimant unfairly dismissed (that is unfair in respect of matters other than the concession)?

50.2 Did the Claimant contribute to his dismissal and if so is it just and equitable to reduce his compensation and by what percentage?

50.3 Was the Claimant engaged in misconduct that was discovered after dismissal?

50.4 Did the Claimant engage in dishonesty making secret profits whilst working for the Respondent?

50.5 If the Claimant was unfairly dismissed, should there be an uplift in respect of breach of the ACAS code of practice?

CONCLUSIONS

51. I am satisfied that the Respondent has established that the reason for the dismissal was 'conduct' pursuant to section 98(2)(b) ERA 1996. The dismissal was therefore for a potentially fair reason.

52. Mr Islam-Chaudhury on behalf of the Respondent rightly conceded at the commencement of this hearing that the dismissal was procedurally unfair although I note that this concession was made very late in the day. The concession was made because it is accepted that on 3 April 2018 Mr Moore contacted suppliers to say that the Claimant had already left the Company and therefore the outcome as to dismissal was pre-determined and unlikely to change. The Respondent however argues that this was a procedural failing only and the Tribunal should not find 'substantive' unfairness or unfairness for any other reason. Moreover, it argues that information acquired after the decision to dismiss would have justified dismissal and on the principles set out in **W Devis & Sons Limited v Atkins** [1977] IRLR 314, compensation should be reduced to nil. I shall deal with that in more detail below.

53. The Respondent also concedes, quite properly, that the first allegation could not justify gross misconduct. It therefore relies on the second and third allegations in respect of defending both the complaint of wrongful dismissal and 'substantive' unfairness.

54. Notwithstanding the concession it is of course necessary for me to consider whether the dismissal was unfair in other respects because if the dismissal was procedurally unfair only, and only in respect of the concession, the question of a **Polkey** reduction (see **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 would also be highly relevant.

55. In coming to my decision I have taken into consideration the guidance in **Burchell v British Home Stores** and **HSBC v Foley**. I am conscious that it is not for the Tribunal to substitute its view for that of the Respondent and that the Tribunal must, amongst other considerations, determine whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer. The touchstone is of course always the test of reasonableness under

section 98(4) ERA 1996.

56. The Respondent rightly concedes unfairness though in my judgment, and for the reasons set out below, the unfairness extends beyond that conceded. The concession that the final decision was predetermined is made entirely properly because Mr Moore sent several e-mails to suppliers on 3 April (some of which are highly misleading and factually untrue) to the effect that Mr Rahat had resigned and was no longer with the company. The lateness of the concession is also relevant insofar it undermines the Respondent's credibility that it went through a fair disciplinary process and that Mr Moore was divorced from the decision to dismiss.

57. I have no doubt that the decision to dismiss the Claimant was made by Mr Moore on 3 April 2018. I arrive at the conclusion for several reasons. Firstly, the e-mails to the suppliers make it abundantly clear that the Claimant has no further association with the Respondent, not that he has only been suspended. There is an air of permanence as to the wording of the emails. Secondly, I am satisfied that Mr Moore had asked the Claimant for the keys to be returned which signified an end to the relationship. Thirdly, Mr Moore telephoned Mr Dwivedi immediately afterwards with the purpose of letting his 'local' man know what he had done. Fourthly, Mr Moore moved quickly to protect his business interests with suppliers and contacts to let them know that whilst Mr Rahat had gone it was business as usual.

58. In his evidence at this hearing Mr Moore described his e-mails to suppliers on 3 April as a 'panic reaction'. I do not accept that was the case. These emails were written over the course of a day, extending well into the afternoon. Furthermore, the content of the e-mails was not factually correct. Mr Rahat had not "left the company", a phrase which is commonly used on resignation – he had in reality been dismissed.

59. I now propose to go through the **Burchell** test in more detail.

<u>The investigation</u>

60. Mr Moore's was undertaken largely after dismissal. It concluded that Mr Rahat was engaged in serious wrongdoing of fraud and dishonesty. Mr Moore relies upon numerous references to paying 'commission' which is in his view is tantamount to the Claimant keeping a sum of money for oneself as the business did not pay commission as such.

61. Firstly, the word 'commission' has a potential to mislead. The Respondent accepts that on at least two occasions commission was paid to suppliers with the full knowledge of Mr Moore. The reason why it was done was because the suppliers wanted it to be termed commission on official documentation rather than it being called something else. Mr Moore concedes that on these occasions the Respondent (or London Brogues) knowingly labelled payments as commission when they were not commission at all. The purpose was to circumvent tax or other regulatory issues in India for the benefit of their suppliers. There was no benefit to London Brogues in doing so but it helped the suppliers and Mr Moore was willing to oblige.

62. I have also been taken to a very short sample of documentation in Mr Moore's evidence where commission is part of the overall calculation of the invoice. Mr Moore denies that he was aware that commission was being routinely added on these transactions and only discovered it around the time of

the suspension or shortly thereafter. The first factual issue for me to determine therefore is whether Mr Moore was aware to the existence of the payment of commission other than the two instances which are conceded.

63. As at January 2016, Mr Moore was certainly aware of an e-mail exchange between the Claimant and Mr KK Sharma of Bharat Expo International which states:

"Please send us a letter confirming an agreement between Bharat Expo International and London Brogues wherein BEI has agreed to pay 7% commission on all orders received WEF1/4/15til31/3/16.

This is required for our banking procedures. I am processing this commission of 19418 GBP by Monday."

64. Similarly, there is an e-mail of 8 January 2016, long before the dismissal, which is sent directly to Mr Moore from the Claimant in which the heading of the emails is "Commission for London Brogues".

65. In short, there are at least two instances where Mr Moore himself has either called something commission when it is not or at the very least he was aware that the term has been used without any improper connotation. There may be other instances. Logically, it would not make sense for the Respondent to only make use this arrangement only twice because if there were tax or other benefits to their Indian suppliers it is likely to have been an ongoing practice. If therefore there was commission paid in the past it must have occurred with the knowledge and approval of Mr Moore and done for the specific purpose of assisting his suppliers. It is those same suppliers that Mr Moore now seeks to rely upon as credible 'witnesses' to establish dishonest conduct against the Claimant. I find it inconceivable that in a small company where Mr Moore kept very close control of affairs that he would not see these written orders placed by Mr Rahat on behalf of the Company in which commission featured regularly and prominently in the paperwork.

66. I also note that there is an exchange of e-mails between Mr Moore and 'Barratt' from Weston Footwear where there is a reference to commission. This e-mail is dated 10 April 2018 well before the Claimant was formally dismissed. If the Claimant was therefore taking secret profits via commission Mr Moore was aware of this as at 10 April 2018 yet chose not to raise it as a misconduct issue.

67. Mr Moore conceded that information he obtained after the decision to dismiss was information he could have obtained prior to it. As a consequence the Claimant has been deprived of the opportunity to answer the allegations which are now relied on to extinguish any award of compensation. That in my view is a substantive failing not just a procedural one. An employee is entitled to know the evidence against him prior to dismissal particularly where that information could easily have been gained then.

68. I should also add, although a relatively minor point, that Ms Jemma appears to a material witness in the investigation producing a statement in respect of the second allegation (page 132) yet she is also one of the two investigation officers (page 84). I recognise there is a shortage of officers to undertake all the tasks but it is not clear why Ms Jemma Moore needs to be involved in the investigation at all.

The reasons for dismissal

69. It is now rightly conceded that the first allegation could not properly constitute an allegation of gross misconduct. The Claimant had no prior warnings of misconduct and if it was not a gross misconduct issue, it would at most have been a first or final warning issue rather than dismissal. It is nevertheless worth considering the first allegation because there is not only an unfair dismissal claim in these proceedings but also a contested breach of contract claim.

70. It is accepted that there could not be a repudiatory breach because of stock irregularities alone. If I have misunderstood the Respondent's concession in this respect I would in any event have found that stock issues of the type alleged in this case could not reasonably amount to a repudiatory breach or conduct justifying gross misconduct for the following reasons. Firstly, there is no evidence as to what 'normal' stock levels were. There is a dispute as to whether the stock that was actually ordered was at twice the normal levels. Mr Rahat's evidence was that what he ordered what not unusual and could be dealt with. It is therefore difficult to decide whether the Claimant's actions amounted to a serious deviation from normal patterns of stock ordering. Secondly, Mr Moore says he had discussions with his Accountant when he discovered that the stock levels were almost twice what they should be and his Accountant confirmed that he (Mr Moore) had good reason to be worried. There is no evidence from the Accountant as to why Mr Moore was right to be concerned or indeed if he was concerned. No note of any conversation or letter has been produced nor any e-mail exchange. In short there is nothing independent to verify that what the Claimant did in terms of stock levels placed Mr Moore's businesses at risk.

71. I am satisfied that Mr Moore also knew exactly what the position was in relation to the levels of stock even before he asked the Claimant and thus there is something of a contrived shock. The so-called stock issue which he apparently discovers by accident is really no accident at all. In relation to the two e-mails he sends to Mr Rahat on 28 March about orders which are not yet in Dropbox, Mr Moore is clearly aware of the position because he already knew about it. He therefore seeks to lay a potential trap for the Claimant. When he identifies an apparent omission in the reply he immediately fires another email as if to say I know you are not showing me the full picture. Mr Moore must have known the answer to the question before he asked as it did not take him long to contradict Mr Rahat.

72. I am satisfied that Mr Moore phrased his e-mails deliberately in the way that he did. It is highly unlikely given the history of the relationship that stock issues and an order for one container of shoes would have caused Mr Moore to suddenly decide to dispense with the services of his most senior employee in the business. His actions come at a time when the Claimant is putting pressure on Mr Moore for shares in the business. When Mr Rahat says to Ms Purvis at the disciplinary hearing that Mr Moore always knew of what was being ordered he is not contradicted by either Ms Purvis or (perhaps more importantly) by Ms Ana Moore. There is no attempt to revert to Mr Moore to check that whether what Mr Rahat was saying was true. The only possible inferences to draw from that are either Ms Purvis or Ms Moore knew that was true or they were not interested in finding out the truth.

73. The second and third allegations deal with deletion of data and allegations of dishonesty. I deal with these matters separately though in reverse order.

The allegation of dishonesty

74. My first observation is that the KK Sharma email is not the damning evidence that it purports to be. Commission payments were, as we have seen, sometimes made by the Respondent at the Indian suppliers' request and it was as much in their interest as anyone else that no overt reference was made to commission.

75. Secondly, and directly relevant to the issue of unfairness, is that these emails which Mr Moore says he was able to restore were not fully put to the Claimant for an explanation at the disciplinary hearing. This is despite the fact that they are said to 'establish factually' the issue of dishonesty. Indeed, there is no evidence that copies of the emails mentioned are even supplied to the Claimant prior to the disciplinary hearing let alone discussed. The notice of the disciplinary hearing simply refers to supplying "the evidence upon which the case against you relies" without specifying what that evidence is or what the documents are. There is no list of what is sent to the Claimant and there is no specific reference at the disciplinary hearing as to the emails. Neither Ms Purvis nor Ms Moore say in their witness statement which documents were sent. In any event the discussions should have taken place was between the Claimant and Mr Moore who were the only ones to have a proper dialogue as to what the emails could have meant or inferred.

76. Ms Purvis is clearly an HR specialist running her own business providing employment law services. She would have appreciated the importance of ensuring that all relevant potentially incriminating information was sent to the Claimant in advance of a disciplinary meeting. If all of these emails had been sent I am satisfied that she would have ensured that reference was made to them in the notice of the disciplinary meeting sent on 13 April 2018. Given the absence of any reference to them in the notice and the absence of any specific reference in the Respondent's own notes (save for one or two potential areas where it is not clear which documents are under discussion) I am satisfied that not all of these emails were sent to the Claimant nor were they discussed in detail at the disciplinary hearing. If they were discussed but are not referred to in the notes that would lend weight to the Claimant's argument that the meeting notes are not an accurate record.

77. The amount of the alleged fraud undertaken by the Claimant is estimated by Mr Moore to be in the region of £180,000. However, there is no documentary evidence of this ever ending up in the Claimant's bank accounts or in accounts he may have controlled. During the disciplinary hearing the Claimant offered to produce copies of his bank accounts which was not taken up by the Respondent. I find it extraordinary that in the face of an offer to inspect the Claimant's bank statements, the Respondent chose not to do so if it genuinely believed in fraud. If the concern was that the Claimant may have placed funds in bank accounts he was not disclosing the matter could at least have been investigated further. It is common experience that entries in one account will often lead to the existence of other undisclosed accounts.

78. It is difficult to see how the Respondent could have an honest and genuine belief, let alone a belief based on reasonable grounds, when it failed to investigate how the Claimant appropriated funds or to take up an offer to inspect his bank statements. At the very least the refusal to take up the offer confirms a predetermined view that no matter what the Claimant was prepared to offer by way of exonerating evidence the disciplinary officer was not interested in

considering it. The Claimant was criticised during cross-examination by Mr Islam-Chaudhury for not saying he was innocent of any allegation of dishonesty. Mr Islam-Chaudhury makes the point that many claimants in unfair dismissal cases wrongly believe that unfair dismissal is about the fact of dishonesty rather than the **Burchell** test and so dwell on their innocence yet Mr Rahat does not plead innocence in his witness statement. That may be correct but it is clear from the notes of the disciplinary hearing that Mr Rahat does plead his innocence and denies any wrongdoing. He makes it clear at the disciplinary hearing that he did not give or take commission to benefit himself.

79. Mr Moore relies on evidence gathered from three suppliers as the case against Mr Rahat for dishonesty. These suppliers were: Oxford Tanners, Bharat Expo and Weston Footwear. All of them are based in India.

Oxford Tanners

80. In respect of Oxford Tanners if their 'evidence' is to be interpreted now as meaning that Mr Rahat was taking secret commission then they have at the very least contradicted themselves. In an email of 21 July 2018 (after the Claimant had been dismissed) they wrote to Mr Moore to say:

"Finally, note that we have not given any payment to Mr Asim [Mr Rahat], we had informed this several times and even when we met you we said that we have not made any payments to Mr Asim."

81. The alleged information from Oxford Tanners is rendered even more unreliable by reason of an email from Mr Moore of 17 July timed 16:25 to Mr Kamal Ahmed of Oxford Tanners. In those emails there appears to be a suggestion from Mr Moore that if Oxford Tanners provide incriminating information they might receive payment of some of the money they were owed on outstanding debts. Mr Moore writes:

"Please let's be straight as I do want this to work. I said that if you give us the details as requested so that we could give to our legal advisers, I would then ask them if we could as a gesture of goodwill release £35K as an advance. I have asked them and they have replied that no payments should be considered until we have your statement upon which they can only advise after its receipt."

82. Mr Kamal Ahmed replies to say, inter alia,

"What you are asking us we are not able to understand."

83. Mr Moore then writes back as follows:

"We require your statement of payments to Asim. The total amount is very important as it should tie up with the information we have here."

84. Mr Ahmed says in conclusion,

"Finally note that we have not given any payment to Mr Asim, we had informed this several times and even when we met you we said that we have not made any payments to Mr Asim."

85. These exchanges make it clear that even in the face of an incentive to make payment (or a threat not to make payment of outstanding sums due) Oxford Tanners would not change their position. It is possible that these passages may be taken out of context but the fact that commission is part of the discussions is

nevertheless tolerably clear. The emails conclude with a clear message from Mr Kamal Ahmed on 25 July 2018 to Mr Moore in which he says:

"In fact we I [sic] have not paid any commission to Asim neither I have shown anywhere that I have paid."

86. Therefore contrary to the Respondent's position Oxford Tanners say that no unlawful payments were made by them to the Claimant for any personal benefit. I should say that the fact that all these emails are headed 'without prejudice' is immaterial. Whilst there did seem to be some suggestion at the start of the hearing that there may be an objection to them being referred to because of that heading no objection was ultimately pursued. In any event by agreeing to include them in the bundle the Respondent has waived any privilege.

87. I also note within the bundle a series of order forms which includes a column (or box) for payment of 'commission'. For example, at page 173 of the bundle there is a reference to 80 (either Rupees or Pounds) charged as "commission/invoice charge". The commission/invoice charge is part of the pro-forma document thus suggesting that it was something that routinely needed to be completed. The existence of 'commission/invoice charges' as an apparently standard item on the order form suggests that it is not being done secretly or irregularly. If Mr Rahat wanted to make a secret profit through commission it is highly unlikely he would have added such sums to an order form where it could easily be seen.

88. That leaves the question of whether Mr Rahat was buying shoes at a price other than the one he disclosed and pocketed the difference. In respect of that allegation there is absolutely no evidence to support it despite Mr Moore travelling to India to obtain such evidence. At this hearing Mr Moore went through a document which purports to show the Claimant taking secret commission. It is an attachment to an email from Oxford Tanners of 1 March 2018 where Mr Moore says he is able to calculate the amount of secret profit.

89. I find there is nothing in the email or the relevant attachment as *evidence* of the Claimant pocketing money himself. Mr Moore would have seen this email at the time it was sent yet he neither said or did nothing about it then. If it was one of those emails which was only discovered as part of the 'recovered' emails, Mr Moore did not refer to it in the suspension letter which was on 3 April by which point it would have been highly material. It was not referred to in the allegations calling the Claimant to a disciplinary hearing, it was not discussed at the disciplinary hearing and it is not even specifically dealt with in Mr Moore's witness statement signed a few days before this hearing. This document does not demonstrate any impropriety on the part of the Claimant.

<u>Bharat Enterprises/Bharat Expo</u>

90. It is not clear whether this is one company or two separate entities. In any event by an email of 10 April 2018 Mr Moore writes to Mr Bhatnager to say:

"We are aware that you have included a commission for our employee Mr Asim Rahat……this is not and has never been agreed by us please reduce and re-invoice."

91. Mr Bhatnager then asks to discuss the matter with Mr Moore informally but he does not however reveal anything as to any discrepancy in prices which would have brought the Claimant's activities on making secret profits to light. There is no witness statement from Mr Bhatnager nor any written evidence to support

what Mr Moore says he was told. Mr Moore says that Mr Bhatnager was concerned as to any implications on him and his company and therefore has put nothing in writing. This suggestion is simply not plausible. Mr Bhatnager could not reasonably be concerned as to what the Claimant might do or could do. Mr Rahat had no power to damage Mr Bhatnager's businesses. There was no reason for Mr Bhatnager not to commit anything to writing. If Mr Rahat was taking a secret profit, Mr Bhatnager had nothing to lose in discussing the issue openly. I place very little weight on anything that Mr Bhatnager or Bharat Expo are alleged to have told Mr Moore.

Weston Footwear

92. Mr Moore personally went to India and met Mr Majahan, the effective owner of the company and his son on 2 May 2018. Mr Moore says he was told that commission was paid to Mr Rahat but that it was designated as "expenses in India".

93. Again, there is absolutely no cogent evidence to corroborate or confirm this. There is no email or any witness statement from Mr Majahan in support. Mr Moore went so far as to issue a debit note of £36,774.32 against Weston Footwear which he believes was the amount of commission Weston must have paid to the Claimant. How this sum is calculated is not clear. Mr Moore himself says that if payments were made for expenses and shoe moulds then Weston Footwear have contradicted themselves.

94. What is in fact telling is an email of 2 June 2018 Weston Footwear wrote to Mr Moore in which they say:

"Dear Mr Derek,

As I told you during the meeting that this amount [Rs 173,600] was paid to Asim Rahat who was a representative of London Brogues for us and it was explained to us that these are the brand's Indian expenses like courier and mould expenses etc. I explained to you clearly that I have not paid this amount to him for any reason but only this. Therefore, please trust us on this issue that we are will [sic] never go beyond our business ethics and kindly remit our balance amount."

95. What this email demonstrates if anything is that a sum of money was paid by Weston for work to the products transacted and that Weston did not pay anything secretly as they are keen to ensure that they always act ethically. There is no evidence of any funds going into the Claimant's own pocket from Weston.

Payments to the Claimant's father-in-law

96. There is a suggestion that payments were made to the Claimant's father in law which is indicative of wrongdoing as Mr Rahat's father-in-law had nothing to do with the business and no payments should ever have been made to him.

97. Within the short bundle of emails produced by the Claimant and agreed to be added to the bundle, is an email of 8 September 2016 which refers to two payments to Mr Rahat's father in law of around Rs 10,000 and Rs 2000 by Global Exports, a supplier based in India.

98. The reason for the payment is not entirely clear as Mr Rahat's father in law was never an employee or agent of the Respondent or London Brogues. However, the email was two years ago and Mr Moore was clearly aware of it at the time as he was a direct party to some of the emails in the chain. In fact it is

his email of 8 September 2016 which refers to the payment to Mr Rahat's father-in-law so clearly this could not have been news to him. If there was anything improper done by the Claimant in respect of this transaction I am satisfied Mr Moore knew about at the time and chose to do nothing about it.

99. Mr Dwivedi who gave evidence on behalf of the Respondent was specially flown in from India for the purposes of these proceedings. Mr Dwivedi clearly did not get along with the Claimant and some of his remarks about Mr Rahat are less than complimentary. However, when asked whether he had any proof of dishonesty Mr Dwivedi accepts that there is no evidence the Claimant has taken secret payments. Mr Dwivedi worked closely with the Claimant and suppliers. It is said that he was told on one occasion that he was not to be involved in discussions in relation to prices and that this was done so that Mr Rahat could keep it secret from Mr Dwivedi but I conclude that any such decision could only have been made by Mr Moore and not the Claimant. Mr Rahat would not have had the authority to tell Mr Dwivedi to stay away from price discussions and given the poor relationship between him and Mr Rahat I am confident that if this was said the matter would have got back to Mr Moore.

100. In conclusion I am satisfied that the Respondent has failed to establish that the Claimant took secret profits or was engaged in any fraud or dishonesty. I am satisfied that where commission was paid it was with the specific knowledge of Mr Moore. I am also satisfied that there is no cogent evidence of dishonesty against the Claimant. If anything it is the Respondent's business practices which appear questionable.

The deletion of emails

101. There was a substantial dispute as to whether the Claimant had deleted approximately 21,000 messages on the email account of London Brogues. The Claimant's position is that he could not have done so because when he got home after his suspension the passwords for the account had already been changed. His evidence is that when he got home he opened up his laptop and saw emails in the process of being deleted. He then disconnected his laptop from the WiFi to save emails for his own records and managed to save some of them. When he reconnected his laptop the password had changed. The Respondent's position is that the Claimant admitted to deleting e-mails at the disciplinary hearing and they rely on the notes of that meeting which are partly set out above. Mr Rahat does not accept that the notes are an accurate record and he refused to sign them at the time.

102. There has been no expert evidence from Rackspace who appear to have been the IT firm responsible for recovering emails and restoring passwords. There is no independent expert evidence as to what was deleted, when it was deleted or when the recovery of emails occurred. That makes it difficult to follow the timing of events and to decide the issue.

103. I shall deal firstly with the disciplinary hearing notes which contain an apparent admission from the Claimant that he was responsible for deleting them. In the absence of Ms Purvis or her notetaker there is no sworn evidence as to the accuracy of the notes, particularly as the notes are being taken by a business who is not entirely impartial in the process. There is no audio recording of the meeting.

104. As it is, it is unnecessary for me to decide the point – and if it was I would have found that there is no cogent evidence to support the Respondent's position

- because in my view the relevant question is why e-mails were deleted, if at all. E-mails are routinely deleted by employees and deletion of itself is not therefore an act of wrongdoing. It depends on the purpose for which they are deleted and possibly the quantity and timing. If they are deleted because of an attempt to hide wrongdoing then that is clearly a relevant consideration. If it was factually established that 21,000 emails were deleted at the same time that might be prima facie evidence of something to hide.

105. As it is there is no independent evidence in favour of the Respondent to support their contentions. The Respondent must have recognised that this was an important issue because they place great store on so many emails being deleted and deleted by the Claimant, both of which are separate factual issues. A letter or report from Rackspace would have been relevant supporting evidence. There is no explanation as to the absence of such evidence. There is no explanation either as to the timing issue that the Claimant relies on. The fact that he has some emails which he has brought to this hearing supports his contention that he was able to save some of them when he disconnected his laptop from the WiFi.

106. As it is there is no evidence of 21,000 e-mails or anything of that quantity being deleted. I am not prepared to make a finding of fact in favour of the Respondent merely because that is what they say in their witness statements particularly as I have serious misgivings as to the credibility of Mr Moore's evidence on the alleged dishonesty issue and Ms Ana Moore's credibility by her insistence, even after the concession, on the dismissal being her own independent decision, which it clearly was not.

107. In terms of the Claimant's motives as to why these were deleted, I consider it is relevant to examine the Respondent's own views as to why these emails were being deleted at the time rather than its case now. After the Respondent had been able to restore the e-mails, it sent the Claimant a letter inviting him to the disciplinary hearing. In the second allegation, the material part which for ease of reference is repeated here, the Respondent says:

"That on or about Tuesday 3rd April 2018 ……..you deleted data belonging to Active Remedial Solutions Ltd and/or London Brogues Ltd from your computer *with the intention of preventing or impeding the investigation in respect of the excess stock.*" (emphasis added)

108. The Respondent's view at that time was that the Claimant had deleted data (emails) with the intention of preventing an investigation into stock losses, not to hide anything dishonest. The Respondent had by that stage already formed a view or had a suspicion as to Mr Rahat making secret profits (as is clear from the next allegation) and therefore if it felt there was anything related to secret profits it would no doubt have linked the two.

109. I find no clear evidence that Mr Rahat deleted any emails and in the absence of such evidence, which the Respondent could easily have obtained and produced but have not done so, I make no finding of fact that the Claimant deleted approximately 21,000 emails, some of which he now seeks discovery of (but not provided) for his own cause.

<u>The disciplinary hearing</u>

110. Ms Moore accepts that she had not conducted a disciplinary hearing prior to this. In her witness statement she makes the following statements:

In making *my* decision that the Claimant had been guilty of gross misconduct and therefore

should be summarily dismissed *I* considered and took into account the matters set out in the paragraphs immediately following.

I could see no satisfactory explanation for there being no price agreed with the manufacturer for the supply of shoes to the Respondent. Equally *I* could find no plausible explanation for the quantity of stock being ordered in the absence of agreed sales.

The letter of dismissal dated 3 March confirmed the conclusions which *I* reached." (emphasis added throughout)

111. I find the suggestion that it was Ms Moore's independent decision to dismiss, regardless of her father's predetermined views, to be wholly implausible. Ms Moore is a junior employee. The Claimant was a Director. Quite apart from the difference in seniority it is inconceivable that after her father had sent out emails to suppliers telling them that the Claimant had left that Ms Moore was going to do anything other than to decide to dismiss. This was nothing more than a rubber stamping exercise.

112. Unfortunately, Ms Moore maintains the charade that it was her own independent decision to dismiss throughout her evidence and these proceedings. Ms Purvis in her witness statement says:

"Given that Ann-Maria (sic) was not familiar with the process of disciplinary hearings (as is the case with many small employers) the disciplinary meeting was conducted by both of us."

113. The reality is, judging from the notes, is that the meeting was in fact being conducted and chaired by Ms Purvis. Ms Moore plays little part and has little to say or to ask the Claimant throughout. In my view Ms Moore was unfortunately engaged in nothing other than a contrived disciplinary process designed to tick the relevant procedural boxes when the outcome was already a foregone conclusion.

114. I am satisfied that the disciplinary hearing was not a genuine fair-minded enquiry as it should have been. If it had a number of matters which would ordinarily would have been the subject of further investigation would have been pursued. Generally, if there is a gap in the facts following an investigation, the person conducting the hearing will adjourn to ascertain those facts. That does not happen here because there was no genuine desire to conduct an open disciplinary process. That can be the only possible explanation as to why:

114.1 When Mr Rahat says that orders would not be placed without Mr Moore's knowledge Ms Purvis does not adjourn to ask Mr Moore if that was indeed the case. Ms Purvis would not know the answer herself as she was not employed by the business and Ms Ana Moore, who does work for the Company did not intervene to provide an answer. As a consequence, a crucial factual dispute was never investigated;

114.2 When Mr Rahat says that on the day he was suspended he was told by Mr Moore that there were two options - the 'easy way' ("one month's notice pay and 2 months stay re visa") or 'the hard way' (which is not specified), Ms Purvis does not seek Mr Moore's comments as what he meant by these options as they would clearly be relevant as to whether the Claimant had been threatened with dismissal if he did not agree to Mr Moore's suggestions;

114.3 When Mr Rahat said that Mr Moore had seen the costings, and therefore might have been aware of commission payments, Ms Purvis did not adjourn to enquire whether that was the case. Again, that was a crucial issue because if commission payments were being made with Mr Moore's consent or knowledge

the Claimant was not doing anything inappropriate.

115. I am satisfied that the Respondent had not undertaken a reasonable investigation prior to the decision to dismiss when it could easily have done so. I am satisfied that the investigation prior to dismissal was inadequate and fell outside the band of reasonable responses. I am satisfied that Ms Ana-Maria Moore did not have an honest and genuine belief in the misconduct alleged. Ms Moore was simply rubber stamping a decision her father had already made. I am satisfied that the belief in misconduct was not based on reasonable grounds. The Respondent concedes that stock deficiencies would not have justified summary dismissal for gross misconduct. For the reasons set out above the Respondent could not have held a reasonable belief of misconduct on the other allegations.

116. I am required by section 98(4) ERA 1996 to take into account the size and administrative resources of the Respondent. I note that it is a relatively small company but it has been trading for 20 years and has a reasonable sized turnover in conjunction with its sister company, London Brogues. I am satisfied it has reasonably good administrative resources.

117. I am satisfied that the decision to dismiss fell outside the range of reasonable responses open to a reasonable employer. The dismissal was substantively and procedurally unfair both for the reasons conceded as well as for the reasons set out herein.

Section 123(6) ERA 1996

118. Mr Islam-Choudhury argues that the acts of dishonesty and deleting e-mails by the Claimant are sufficient to render a nil compensation award under section 123 ERA 1996 regardless of any other act or acts. In support he relies upon the principles set out in **Devis v Atkins** and in particular to the alleged misconduct discovered after dismissal. He goes on to argue that this misconduct was sufficient to destroy trust and confidence based on dicta in **Neary v Dean of Westminster**. In particular he cites Lord Gauncey's remarks where it was said that to constitute gross misconduct the conduct in question "must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer required to retain the servant in his employment". He also refers me to **Steen v ASP Packaging** which contains guidance from the EAT on reductions of the compensatory award under section 123(6) ERA 1996.

119. The point being made as to **Neary** is that all the Respondent needs to show is that conduct amounts to gross misconduct if it undermines trust and confidence even if fraud is not proved. There are several observations in relation to that. The first is that the submission appears to amount to a tacit acknowledgment that the Respondent has or will have some difficulty in establishing fraud or dishonesty. Secondly, loss of trust and confidence is not unusual in all dismissals. Indeed it is a rare to find trust and confidence intact whenever there is a dismissal and so it is not a separate consideration as such. Thirdly, the dismissal letter makes no reference to loss of trust and confidence as the reason for dismissal nor is there any evidence as to when trust was lost. If it was lost at the time of the suspension letter then it was clearly premature because on the Respondent's pleaded case it had not even held a disciplinary hearing at that stage. I find no substance in the submission based on **Neary** and certainly no basis to extinguish or reduce any financial award.

120. Mr Islam-Chaudhury goes on to suggest that the Claimant behaved the

way he did at the suspension meeting because Mr Moore's actions were going to put a stop to the commission payments. That explains not only his aggression but also supports the allegation of taking secret profits because there no other reason for him to be angry. This argument is fundamentally flawed. Even if the Claimant was not unilaterally able to order higher levels of stock unilaterally he could still continue making a secret profit on 'ordinary' levels of stock if that is what he was doing. In other words the introduction of another Director to sign off orders would not affect his ability to earn secret commission. The level of any such secret profit might be lower but it would not be an end to it. The Claimant did not earn secret profits on high levels of stock only. In my view the Claimant was angry because he felt Mr Moore was now seemingly reneging on promises to sell or transfer his shares and the appointment of Mrs Moore was contrary to his aims and ambitions.

121. I am also satisfied that this is not a case of misconduct discovered after dismissal as such and the **Devis v Atkins** principle has no application to this case. It is more accurate to say that the Respondent chose not to investigate the facts at a time when it could have done which is an entirely different matter. The **Devis v Atkins** principle is designed to ensure that employees should not be awarded compensation inequitably when they have suffered no injustice by being dismissed. Here the Claimant would suffer injustice as no dishonesty has been established and any timely investigation could have meant the Claimant had an opportunity to challenge the allegations before dismissal.

122. I am satisfied that for the reasons given above it is not just and equitable to reduce the Claimant's basic or compensatory awards.

The ACAS Code

123. In the light of the findings above I am satisfied that the dismissal has been in breach of the ACAS Code. In particular I am satisfied that the Respondent has failed to comply with paragraphs 5, 6, 9 and 22 of the Code.

124. Paragraphs 26 and 27 of the Code relates to appeals. The Claimant did not appeal (contrary to paragraph 26) but any appeal would have been to Mr Moore which would have been in breach of paragraph 27.

125. I regard the appeal issue as neutral and not appropriate to make an uplift or a reduction. However there are several breaches of the ACAS Code and it is appropriate to consider making an uplift of the compensatory award which will need to be considered in more detail after submissions.

The breach of contract complaint

126. The respondent has failed to prove on a balance of probabilities that the Claimant committed a repudiatory breach. The Claimant was therefore dismissed in breach of contract and is entitled to damages which would be equivalent to the notice he was entitled to receive.

127. The notice provision under the contract of employment was one week's notice for every year employed. As the Claimant was employed for three full years he is entitled to 3 weeks' pay.

128. The Claimant was summarily dismissed without any notice at all. It is agreed his net weekly pay was £425.92. He is therefore entitled to damages for breach of contract of £1,277.76.

Remedy

129. Whilst some evidence was given on remedy, I consider that it would be appropriate to have a remedies hearing to determine and assess compensation as well as any issues as to mitigation. It will also deal with the question of the ACAS uplift. I am aware that the Claimant started his own business after dismissal. There is a possibility of pending litigation in relation to copyright issues between his new company and London Brogues which as far as I can see does not impinge upon the issues in this case or on remedy. A remedies hearing will therefore be listed in due course with a time estimate of one day unless the parties indicate it is likely to take longer. Any such indication should be given within 7 days of this decision being sent after which it will be listed at the first available opportunity.

130. In addition it will be useful to have a telephone Preliminary Hearing to give directions and make appropriate case management orders in respect of the remedies hearing. The parties should provide their availability for this as soon as possible upon receipt of this decision.

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Employment Judge Ahmed

Date: 8 February 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE