IN THE INDUSTRIAL TRIBUNAL **CASE NO. 26/2012**

Between:

CYNTHIA DAVIS

Complainant

v

GLOBAL PARTNERS LIMITED

Respondent

RULING

Christopher Pitto Esq. for the Complainant

Thomas Hillman Esq. for the Respondent

1. The Complainant was employed as the Accounts Manager of the Respondent from 1 September 2011 until her dismissal on 30 October 2012. By an originating application dated 16 January 2013 the Complainant complained that her dismissal was unfair on the basis that:

   "No notice period and no notice remuneration; No verbal or written warning; Finance Director Responsible as Accounts [four eyes]."

2. In her IT1 Form the Complainant states that the reason given to her for the dismissal was that she produced the wrong figures for the month of October 2012 and therefore the Company was close to insolvency.

3. The Respondent defended the complainant and in its IT3 Form dated 29 January 2015 stated that the reason for the dismissal was:

   "serious neglect and breach of duty (gross misconduct), failure to notify our director, report of financial flags as per previous direction, capability to carry out duties correctly and the reporting of inaccuracies to the director, report and other company directors, the company is now finding itself in a precarious financial position due to the above capabilities issue."

Background

4. The Respondent is (and I understand continues to be although has subsequently changed its name to Tourbillon Limited) a limited company offering financial advisory services in Gibraltar. The Complainant is not a fully qualified accountant but she does hold AAT accounting qualifications.

5. The Complainant's terms of employment are contained in an Offer of Employment dated 1 September 2011 (although the Complainant started working for the Respondent two months earlier on a self-employed basis prior to the signing of the Offer of Employment). The Complainant was contracted to work three days a week at the Respondent, Tuesday to Thursday.

6. The Complainant was originally employed as the Accounts and HR Manager of the Respondent. By March 2012 the Respondent removed her responsibilities as HR Manager as it required a full time HR Manager. Therefore, as from March 2012 only those duties and responsibilities in the Offer of Employment that related to her role as Accounts Manager were applicable to the Complainant.

7. The Offer of Employment sets out a number of express terms. Relevant express terms of the Complainant's employment contract are as follows:

   (i) to competently and professionally perform such duties as are customarily the responsibility of the Accounts Manager and as more particularly set out in the job description attached to the offer of employment;

   (ii) to remain in the office to complete urgent tasks should the occasion arise;

   (iii) to continuously keep and maintain and report daily reporting including but not limited to Capital Adequacy Ratio ("CAR"), pay invoices in a prompt manner, pay advisors commissions due to them within a month of being received, asset and liability return, profit and loss return;

8. It was critical for the Respondent to be aware of its financial position at any given time so as to ensure that its cash reserves never dropped below CAR. CAR is set by the Gibraltar Financial Services Commission ("GFSC") as a requirement of the Respondent's licence to operate its financial services business and is the level of excess funds that the Respondent is required to maintain in relation to its expenditure. The Respondent's CAR is set by the GFSC at €15,000 plus four months expenditure which equals approximately

£40,000 to £45,000. CAR would fluctuate on a month-by-month basis given that monthly expenditure would naturally fluctuate.

9. In order to ensure that the Respondent's cash reserves remained above CAR the Respondent set financial trigger points (sometimes referred to in the evidence as financial flags). The Complainant was to immediately inform the directors of the Respondent if the Respondent's cash reserves ever dropped below the financial trigger points which were set by the Respondent at £60,000 and £50,000 respectively.

10. There was a very good reason for the Respondent to have these financial flags in place. If the Respondent's cash reserves dropped below CAR the Respondent would need to immediately notify the GFSC. According to the Respondent, a failure to stay above CAR could greatly impact on the ability of the Respondent to conduct its business and potential actions by the GFSC in such a scenario could involve a suspension or even a revocation of the Respondent's licence. The Complainant's reporting of the cash reserves, and the position of the Accounts Manager, are therefore critical to the Respondent. I note however that I was not shown any evidence of the potential repercussions and/or steps by the GFSC should the Respondent's balance fall below CAR. The Complainant was aware of these issues and therefore the importance of her role.

The Evidence

11. The Complainant relies on her own evidence. The Respondent relies on the evidence of Mr Morley, the former Managing Director of the Respondent, Mr Bosbury, another former director of the Respondent and Mr John Britton a fellow of the Institute of Chartered Accountants in England & Wales.

12. The Tribunal was told that Mr Bosbury was unable to attend the hearing and no application was made for Mr Bosbury to be summoned. Mr Bosbury's evidence in the form of his witness statement was already before this Tribunal before my involvement in this case as a result of a consent order. Mr Bosbury's witness statement therefore stands as evidence but Counsel for both parties have submitted, and I agree, given that Mr Bosbury's evidence has not been subjected to cross-examination, I must take this into consideration when I consider the weight to be attached to that evidence.

13. In respect of Mr Morley, I found his evidence to be very clear, consistent and he proved to be a helpful witness who was prepared to answer questions truthfully. Mr Britton, who can essentially be viewed as being independent to the issues in the case, also provided very clear and genuine answers. I have no reason to doubt the veracity of their evidence.

14. I was not as impressed with the Complainant's evidence. At times, the Complainant failed to answer some very straightforward questions where perhaps she felt the answers would not assist her case. The Complainant did not have a clear recollection of the events leading up to her dismissal and often tendered evidence to fill in those gaps in her memory. Inevitably this led to inconsistencies in her evidence. As such, I do not feel she is as reliable a witness as Mr Morley and Mr Britton. It may also be worth noting that I have taken into account the fact that there has been a substantial passage of time between the events in issue and the hearing of this action.

Chronology of Events leading to the dismissal

15. This whole case arises from the production of a Bank Balance sheet by the Complainant on Thursday 11 October 2012. As part the Complainant's duty to report the financial state of the Respondent to the directors of the Respondent, the Complainant would produce financial reports headed "Bank Balances" on a bi-weekly basis. I refer to this document as a bank balance throughout this Ruling.

16. A bank balance produced by the Complainant was a very brief, one paged summary of the Respondent's financial position as of the date of the particular document. Each bank balance set out the sums held in each of the various bank accounts of the Respondent, the expenses due that month and it set out a final bank balance (i.e. the cash reserve of the Respondent). It was explained to the Tribunal that the expenses of the Respondent were fairly consistent: they comprised of wages, rent, electricity, etc. The greatest variable in relation to expenses is the commission payable to Authorised Representatives ("AR") of the Respondent as the amount payable to ARs would depend on the size of the commission received by the Respondent. The AR's are paid a percentage of the commission received by the Respondent.

17. The Complainant struggled to recall the events of Thursday 11 October 2012 with any degree of certainty. Surprisingly, the Complainant does not provide any evidence of the events of that day in her witness statement despite knowing, as stated in her IT1 form, that the reason for the dismissal was a failure to produce accurate accounts for October. All the evidence she provided in respect of the events of Thursday 11 October 2012 was produced during oral examination.

18. The Complainant explained in her oral evidence that she had been asked by Mr Morley on Thursday 11 October 2012 to provide him with a trial balance and profit and loss sheet and not a bank balance. The Complainant acknowledged that on that particular day the directors were anxious to

understand the Respondent's financial position as there were concerns that they were close to CAR. The Complainant maintains that the Bank Balance and the figures produced by her on that day were correct. She asserted that if the figures were wrong that could only be because Mr Morley had not provided her with all the necessary information required to produce accurate accounts. The Complainant also submitted that she exercised her role and responsibilities under a "four eyes" policy, which required the directors to also review the accounts. Therefore, she submits, if she was at fault so were the directors.

19. It is the Respondent's case that what was asked for from the Complainant was a breakdown of a figure that she had provided at a team meeting which had been held the previous day. It is common ground that a team meeting had been held the previous day. Mr Morley's evidence was that the Complainant had confirmed at that meeting that the Respondent's bank balance was in the region of £90,000, well above CAR. The Complainant accepted that a meeting took place but denies having made that declaration regarding the financial position of the Respondent.

20. Mr Morley confirmed that the Respondent had recently released 12 ARs and two support staff operating under the Respondent's licence in Sweden ("the Swedish Venture") and that the purpose of the meeting was to keep employees informed of those developments. The Swedish Venture is important as the Complainant alleges that the real reason for her dismissal was that the Respondent was in financial difficulties and as part of her case relies on what she describes as a failed Swedish Venture. I will deal with this point in more detail later in this Ruling.

21. Mr Morley explained that the figure of £90,000 "did not seem quite right with him" and so he asked for a breakdown of that figure. I believe Mr Morley when he states that he had requested a breakdown of the £90,000 and not a trial balance and profit and loss sheet as stated by the Complainant. The Complainant herself stated that Mr Morley did not understand trial balance sheets and profit and loss sheets and therefore, in my opinion, it would be illogical for him to request such a document. Furthermore, before this Tribunal is a Bank Balance dated 12/10. This supports Mr Morley's contention that he did not request a trial and balance sheet. No such document was before the Tribunal and it is clear from the evidence that the document being worked on that day was a bank balance.

22. There was also some initial disagreement between the parties concerning the number of drafts that had been produced by the Complainant on 11 October 2012. The Complainant was initially adamant and very clear in her evidence that she had only produced two drafts and that she could not recall the details

of the conversation between her and Mr Morley that led to her having to amend the original draft that she had produced. The Respondent maintained throughout that the Complainant had been sent back to review the draft on two occasions and had produced a total of three drafts.

23. When pressed in her cross-examination by counsel for the Respondent, Ms Davis recalled that she had in fact produced a total of three drafts and despite having earlier difficulties in recalling the reason for the various drafts she explained that Mr Morley had provided her with information regarding further payments which the Respondent expected to receive (forecasts) and that was the reason why she needed to amend the original draft.

24. I have difficultly in accepting this explanation as, by the Complainant's own evidence, forecasts would only be recorded in the bank balance and would not form part of the calculation to determine the bank balance. In other words, the bank balance figure would be the same irrelevant of forecasts. Given that they are only forecasts, it makes absolute sense for those figures not to be included in the final bank balance.

25. As stated above before the Tribunal was a Bank Balance sheet marked 20/09/2012 which had various handwritten markings over it including the date "12/10". The document refers to "Commission rec'd in up until 11/10/12". From the evidence of the Complainant and Mr Morley it would appear that some of the handwriting on that document belonged to the Complainant and also that of Mr Morley and Mr Bosbury. The document is quite clearly a "work in progress" and I have no difficultly in finding that this was the document that was being worked on during the course of that day.

26. The Complainant confirmed in her oral evidence that when producing new Bank Balances she would use previous documents as templates. That is perfectly logical and I have no doubt that this is what was being done on Thursday 11 October. The document before the Tribunal is said by Mr Morley to have been the final draft produced that day. No final Bank Balance sheet for the 11 October 2012 was before the Tribunal and it is the Respondent's position that one doesn't exist, as it was never finalised. Mr Morley told the Tribunal the earlier drafts would have been sent away with the Complainant for her to amend and therefore copies of those particular drafts were not kept. This in my view is totally understandable.

27. Mr Morley described the first version produced by the Respondent on that day as being predicated on her declaration the day before but was "wildly out". Mr Morley confirmed that he was aware of certain commissions that had been paid and of certain agents' fees that needed to be paid and which were not reflected in the figures being provided by the Complainant. This is why he

initially treated the figures with circumspect and sent the Complainant back to review the figures.

28. I do not accept the evidence of the Complainant that the figures were not correct because of the information provided by Mr Morley and/or Mr Bosbury after the production of the first draft. It was not Mr Morley's and/or Mr Bosbury's role in the Respondent to advise the Complainant of the funds coming in and out of the Respondent.

29. Indeed, Mr Morley was not responsible for the underwriting of new business and would therefore not necessarily be aware of all funds coming into and out of the Respondent's bank accounts. The Complainant was the employee within the Respondent who had complete unrestricted access to the Respondent's bank accounts and would see all funds coming in and out of the Respondent. Whilst I accept that there was a "four eyes" policy that does not absolve the Complainant of her own responsibilities. In my view, it is because of the "four eye" policy that errors were picked up upon. This is what I would assume the policy was designed for. Ultimate responsibility for producing accurate accounts however rested with the Complainant.

30. The Complainant should have been aware of all income (including commissions) as all money would have been received into or paid out from the Respondent's bank accounts. From these figures the Complainant would have been able to calculate the amount payable to the AR's from commissions received. All the information that the Complainant would have required in order to produce a Bank Balance would have been available from the statements of the various bank accounts. The Complainant confirmed she would obtain all necessary information from those sources from which she would in turn update the internal accounting system (SAGE) based on information obtainable from the bank accounts.

31. The Complainant also explained during cross-examination that "[Mr Bosbury and Mr Morley] wanted to see a figure that was impossible to see. They wanted to see a different figure there. If they do something to alter those figures. They didn't realise how much that they had spent." This explanation again does not seem consistent with the rest of the evidence. The Respondent was concerned that the figure produced by the Complainant was in fact too good a position to be in and that the actual position was worse than was being reported by the Complainant.

32. As to the second version produced that day, Mr Morley again explained that he once again "found glaring errors and omissions" and therefore sent the Complainant away to review her figures for a third time. Although the Complainant had originally denied being sent away for a third time she later

recalled that she had in fact produced a third document. This also raises doubts as to the veracity of the Complainant's evidence that it was Mr Morley's initial failure to provide her with information that caused the accounts to be wrong. If the Complainant's position were correct the input of the new information in producing the second draft would have meant that the second version was correct. Accordingly to Mr Morley they were not correct.

33. According to Mr Morley, he also found errors straight away in the third draft that was brought up to him around 4:50pm. Given that, in his view, the draft Bank Balance was still wrong Mr Morley stated in his oral evidence that he had explained to the Complainant that it was really important and urgent for the Respondent to know its correct financial position and their CAR levels and he asked her to work overtime. According to Mr Morley the Respondent replied stating that was employed to work 5pm and that she was going home. At 5pm she left the office of the Respondent.

34. The Complainant was again unclear in her evidence on this issue. She originally vehemently denied being asked to work overtime but then later change her evidence and stated that she remembered having an appointment that day at 6pm and stayed for an "extra thirty to forty minutes". I have no reason to doubt the accuracy and reliability of Mr Morley's evidence and therefore I conclude that the Complainant left at 5pm that day.

35. Following the Complainant's departure on Thursday 11 October Mr Morley explained that he and Mr Bosbury worked on the accounts well into Thursday evening and continued on Friday (which happened to be the Complainants day off). According to Mr Morley they found lots of different things wrong with the accounts and felt we were only scratching the surface. Mr Morley told the Tribunal he went in to the office on Saturday 13 October 2012 to continue with his own review of the accounts and in turn "calculated that the CAR was approximately £2,000 above the absolute minimum of £40,000. The exercise revealed a number of other serious related accounting matters…" The Complainant has not challenged this evidence and again I have no reason to doubt the accuracy or reliability of this evidence.

36. Mr Morley confirms in his witness statement that "following a thorough and systematic investigation we were left in no doubt that not only had [the Complainant] failed to notify us appropriately or at all that the CAR had fallen below the first and second trigger points but that as a result of her actions and/or omissions GPL had been placed in a very difficult position. Mr Pitto, counsel for the Complainant, also admits that "the fact remains that there were issues with the CAR" albeit he submits these were as a result of bad business decisions. In the circumstances, I can only conclude that the Complainant as a result of the Complainant's failure to produce accurate

accounts she then in turn failed to notify the directors of the Respondent of both financial trigger points.

37. Turning to the evidence of Mr Britton, he confirms that he was called on the 23 October 2012 to examine and investigate the accounts and the accounting system of the Respondent. Mr Britton is a fellow of the Institute of Chartered Accountants in England & Wales. Mr Britton's evidence in relation to his investigation can be summarised as follows:

    (i) the company was using an integrated and industry acknowledged accounting system called "Sage" which was perfectly adequate to prepare financial reports monthly and on an annual basis for audit;

    (ii) the Complainant had not prepared proper cash books in written or spread sheet formats and he was puzzled as to how she prepared the monthly financial statements;

    (iii) Upon investigation and after conducting a "mini audit" to verify the accuracy of the accounts he concluded that the Complainant had used the office accounts bank statements in various currencies and posted the transactions directly to the nominal ledge thus enabling her to produce a monthly set of financial statements. Mr Britton describes this as a "short-cut" method which made the audit trail and understanding of how the figures were made up not easy to follow and certainly not conventional to recognised accounting good practice;

    (iv) Mr Britton immediately advised the Defendant that they should use cash books produced via Excel Spread sheets and print them off monthly with bank reconciliations and currency conversion as required to pounds sterling. This in his view should have already been implemented by the Complainant as this was fundamentally what she was employed to do;

    (v) The cashbooks could be used as a medium of posting to the nominal ledge and the bank balances in Sage could then be checked back to the individual reconciled account balances. This normal accounting good practice has since been introduced. This is something an employer would reasonably expect their accounts manager to do;

    (vi) The main element of income was received via the Respondent's bank accounts and the commissions should then have been posted to the income accounts within Sage. Mr Britton's investigations revealed that the Complainant had failed to carry out these very elementary steps

which any employer would reasonably expect their accounts manager to do;

(vii) The expenses of the business should have all where possible been documents by purchase invoices which were posted to the purchase ledger in Sage and payments to suppliers posted from the cash books mentioned previously. One could reasonably expect the Complainant to have carried out this elementary book-keeping task and as accounts manager should have been at all times on top of this reporting. This would have given a listing of liabilities but as a result of the Complainant's omissions and/or failure to carry out her duties as accounts manager no coherent file of invoices was found and no purchase ledger existed;

(viii) There was no reconciliation of salaries paid or a wages book which is normal for any business, there were only computer printouts from the salaries system which was not satisfactory;

(ix) Because of the criticality of the CAR, the accounts should have been adjusted by the Complainant every month to reflect the liability to agents in respect of commissions received for the business that had been written in the Respondent's name. No such accrual was properly calculated and this, if anything, is the most valuable piece of information that directly affects the accounts and CAR. It follows that as a result of the Complaint's failure to carry out her duties the Respondent was left in a potentially very serious situation;

(x) His professional opinion was that the audited statements at 31 March 2012 were incorrect;

(xi) Mr Britton confirmed there was no written report for 11 October 2012.

The Law

38. The Complainant has brought her action for unfair dismissal under section 59 of the Employment Act and therefore this Tribunal has to determine the following issues:-

(a) what the principal reason or reasons for the dismissal were and thereafter whether that/those reasons are permitted reasons for the purposes of the Employment Act, and if so, whether in the all the circumstances of the case the Respondent acted reasonably in treating it/them as sufficient reasons to dismiss; and

(b) whether the procedure used for the dismissal was fair and reasonable.

39. The burden of establishing the principal reason for the dismissal falls on the Respondent. Similarly, if there is a dispute as to the real reason for the dismissal the burden of proving which one of the competing reasons is the principal reasons remains on the Respondent.

The Principal Reasons for the Dismissal

40. I must admit that the principal reason for the dismissal is not entirely clear from the pleadings and/or submissions made on behalf of the Respondent. In the IT3 form the Respondent states that the reason for the dismissal was "serious neglect and breach of duty (gross misconduct), failure to notify our directors or report of financial flags as per previous direction, capability to carry out duties correctly and the reporting of inaccuracies to the direct report and other company directors, the company is now finding itself in a precarious financial position due to the above capabilities issue".

41. The IT3 seems to suggest that the principal reason for the dismissal is gross misconduct arising out of the failure to notify the two financial flags and the failure to report accurate statements but a secondary reason for the dismissal was the Complainant's capabilities to perform her role. The further and better particulars filed dated 18th October 2013 by the Respondent seem to support this position given that paragraphs 7.4 to 7.20 (which sets out the facts giving rise to the dismissal) is headed *gross misconduct*. However the paragraph 7.17 states, "the purpose of the disciplinary hearing was to ascertain the events that had given rise to the Respondent's suspicions as to the Complainant's serious incompetence". At paragraph 7.19 the Respondent submits, "the offences in question were offences each capable of constituting gross misconduct".

42. However in Mr Hillman's skeleton argument the paragraphs that deal with the principal reason for the dismissal is headed "The First Limb – Capability – The Principle Reason for the dismissal". Indeed, Mr Hillman confirms that the Respondent's "biggest concern is that they had lost confidence in her aptitude and capabilities of performing the job she was employed to do." This was a reference to Mr Morley's statement to the Complainant in the disciplinary hearing that the directors had "lost confidence in her capabilities".

43. Of course, capability and conduct are two distinct legal reasons for dismissal as per section 65(2) of the Employment Act. The term "capability" is defined in section 65(7) of the Employment Act as "capability means capability assessed by reference to skill aptitude, health or any other physical or mental

quality". Pursuant to section 6.38 of the Respondent's Handbook gross misconduct may include any act or conduct which in the opinion of the Managing Director is likely to bring the company into disrepute or which is otherwise inconsistent with the standard of behaviour expected of employees. Gross misconduct can also include a serious breach of confidence.

44. I remind myself of the passage by Cairns LJ in *Abernathy v Mott Hay and Anderson* [1974] ICR 323 approved by Viscount Dilhorne in the case of *W.Devis & Sons Limited v Atkins* [1997] ICR 662 at page 330:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness.."

45. I have already found as a matter of fact that the Complainant failed to notify the director that the bank balance had dropped past both financial trigger points. In my view these failures amount to gross misconduct. I appreciate that it is relatively rare for a single act of misconduct to justify a dismissal but these failures could have had a huge impact on the business of the Respondent. I have no doubt this is conduct that falls within the meaning of gross misconduct at paragraph 6.38 of the Handbook. Furthermore, with the very strong weight of evidence by Mr Britton against the Respondent regarding her capabilities I also determine that a lesser reason was the Respondent's capabilities to perform the role of Accounts Manager within the Respondent.

Reasonableness of the Decision to Dismiss

46. Having determined the reason for the dismissal I must now consider whether it was reasonable for the Respondent to dismiss the Complainant. As Lord Denning MR stated in *British Leyland UK Limited v Swift* [1981] IRLR 91

"If no reasonable employer would have dismissed her, then the dismissal was unfair. But if a reasonable employer might reasonable have dismissed her, then the dismissal was fair. In all cases there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably a different view. One would quite reasonably dismiss the man. The other would reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld to be fair: even though some other employer may not have dismissed him."

47. As regards the corrected test for determining reasonableness in *Iceland Frozen Foods v Jones* [1982] IRLR 439 –

"(1) the starting point should always be the words of section 64(4) themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an Industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a "band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the industrial tribunal, as an industrial jury, 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."

48. Bearing all of the above in mind, I do not consider this to be a case where, in the circumstances of this case, it can be properly said that no reasonable employer would have taken the decision to dismiss the employee. I am of the view that the Respondent acted reasonably in treating that reason as a sufficient reason to dismiss and that it was a reasonable response and/or within the range of reasonable responses of an employer.

The Complainant's alleged Real Reason for the dismissal

49. It is the Complainant's contention that the real and only reason for her dismissal was that the Respondent was in severe financial difficulties as a result of office expansions and the failed Swedish Venture.

50. The Complainant states in her witness statement that in March 2012 everything was going fine and the company had started to do well but subsequent investments changed that position. The Complainant points to the fact that a number of people were employed between March and June 2012 namely; (i) a Swedish Office administrator had been employed for £18,000 per annum; (ii) a salary increase of £3,000 for an employee of the Respondent; (iii) the employment of another office administrator for £15,000

per annum; and (iv) a Compliance Officer for £26,000 per annum. In order to meet these additional costs the Complainant informed the Tribunal that Mr Morley had made two separate investments of £15,000 and £20,000 from his own money to help with the increase expenditure. The Complainant avers that it was as a result of the Respondent's poor financial position that she was dismissed.

51. It was the Respondent's position that whilst the company had decided to terminate its relationship with the 12 AR's and two support staff there had been very little financial loss to the Company. Mr Morley pointed out that the AR's would work on a commission based contract and therefore there was no cost to the Respondent unless it itself received commissions (which covered the AR's costs).

52. Even if the Respondent was in a dire financial position as stated by the Complainant it does not appear logical to me to dismiss your accounts manager whose position was so fundamental to the company. There is no evidence whatsoever before this Tribunal that shows, either directly or indirectly, that the decision to dismiss was taken as a result of any alleged financial difficulties. I therefore have no doubts that these factors played no role whatsoever in the Respondent's reason to dismiss the Complainant.

53. Having determined the principal reason for the dismissal and having found that said reason was a permitted reason for the purposes of the Act thereby enabling the Respondent to act reasonably in dismissing the Complainant, insofar that particular ground is concerned I now turn to the issue of whether the procedure used for the dismissal was fair and reasonable.

The Disciplinary Process

54. The Respondent submitted that the disciplinary process that led to the Complainant's dismissal was procedurally and substantively fair.

55. The Complainant submitted that the "disciplinary procedure applied to her in her dismissal was unfair". The reasons why it was unfair was because she was not allowed to attend the disciplinary hearing with a representative, legal or otherwise and the Complainant's investigations were not disclosed to her.

56. I now turn to consider the disciplinary process followed by the Respondent.

57. Despite normally being a day in which the Complainant was not required to work, on Monday 15th October 2012 the Complainant went into work after having been asked to do so by Mr Bosbury over the weekend. The Complainant confirmed that she was asked to do all her end of month tasks

including payroll, pay invoices and getting the commissions up to date. This she found "very odd". Mr Morley confirmed that all commissions were usually paid on the 15 October 2015 and therefore it was vital for Ms Davis to come in and pay all commissions that had been received to agents as Ms Davis was the only one in the office with access to the bank accounts.

58. After the Complainant had finished her work she was called into a meeting to which she had no prior notice with Mr Morley and Mr Bosbury. At the meeting on 15th October 2012, Mr Morley explained that he informed the Complainant that:

    (1) She had failed to notify the Directors of the £60,000 CAR trigger point;

    (2) She had failed to notify the Directors of the £50,000 CAR trigger point;

    (3) Preliminary investigations revealed serious doubts as to her capability and understanding as to the importance of carrying out her duties generally with specific reference to her seriously inaccurate reporting of cash flows and net balances; and that

    (4) She was suspended on full pay until the 18 October 2012 when she should attend to meet with Mr Morley, at a time to be confirmed, during normal working hours and as part of the internal disciplinary procedure.

59. It would appear that the Complainant had already formed the view by this stage that she was being dismissed. In oral evidence she said "In that meeting I was told you're suspended and as far as I was concerned that was it – the decision to dismiss me had been taken well before that meeting." In her witness statement she states "Mr Morley had taken the decision to dismiss me". Of course, at this point she had not been dismissed, the Respondent had merely suspended her pending an investigation. No submissions were made to this Tribunal regarding the appropriateness of suspension in these circumstances.

60. The Complainant confirmed in her oral evidence (again after an initial denial) that it had been explained to her during the meeting that Mr Morley had explained (i) his serious concerns about her accounting methods; (ii) their concerns about whether they were compliant with their CAR limits; and (iii) that as a result she had failed to notify of the financial flags. Indeed this must have been the case as the Complainant sent an email dated 15 October 2012 to the Mr Morley and Mr Bosbury expressing her "disappointment and concerns

at being suspended until further notice". According to the Respondent "all options as to the Complainant's future employment with the Respondent remained open". Mr Morley confirmed this in his evidence and I do not doubt this.

61. It is unfortunate that in her email of 15th October 2016 the Complainant chose to accuse Mr Morley and Mr Bosbury for "lacking professionalism", making "bad decisions" and stating that she is the "scapegoat [they] are seeking for [their] errors in putting the company in the financial situation it is in now". Perhaps it may have all been brought about by a lack of understanding of the process but it certainly did not assist the situation generally. The Complainant showed little remorse for making those statements in her cross examination adding it was "stupidity and [she] still stand by that, the way the company was being run and the way the company was spending was ridiculous. Scapegoat, for the poor financial position of the company". This in my view is clear evidence of the breakdown in the relationship between the Complainant and the Respondent.

62. It might be useful to add at this stage that these comments (and the further comments which I set out below in paragraph 69 and 70) in themselves may have amounted to a reason to dismiss the Complainant but I have not taken into account when forming a view on whether their was a legal reason to dismiss the Complainant given that they were not relied upon by the Complainant in their reasons to dismiss as set out in the IT3 Form, Perfected Grounds of the Respondent and in the Respondent's Skeleton Argument.

63. By email dated 17th October 2012 the Respondent requested that the Complainant attend a disciplinary meeting the following day. The email also informed the Complainant "that the meeting is of a serious nature; potentially leading to disciplinary action being taken. This meeting and the outcome is based on several key issues that relate to [the Complainant's] capability in [her] current role within the company".

64. By an email dated 17th October 2012 at (16:23) the Complainant wrote back to Mr Morley stating:

"My lawyer (which I have copied into this email) requires a copy of the company's procedure on disciplinary and also for you to list your reasons why you have come to the decision to suspend me.

Once I have received this information I will be in a better position to arrange a meeting with you.

Can you please copy in my lawyer in all correspondence from now on."

65. By separate emails the Respondent provided the Complainant with a copy of the Company's procedure on disciplinary and also re-iterated their reasons for the suspension. The Complainant responded by stating that given that the:

"delay in receiving the information requested you must appreciate that at this late hour it is impossible to meet with my lawyer now and prepare for this meeting tomorrow. I will speak to my lawyer tomorrow and will consult with him when we will be ready to confirm a time and day suitable to both parties".

66. I do not accept that there was any great delay in providing the information sought (just over an hour) but note that the response was sent outside of normal business hours (19:44) and so I do accept that the notice provided was unreasonable. The meeting was re-arranged for the 24th October 2012.

67. An issue then arose between the Complainant and the Respondent regarding the Complainant's rights to attend the disciplinary meeting with a lawyer. By a letter dated 24 October 2012 the Respondent wrote to the Complainant and stated:

"It is with great concern that I once more write to you concerning your continued refusal to attend this very important meeting without a solicitor being in attendance. Following once again seeking confirmation of our understanding of Gibraltar Employment Law, I will reiterate once more that, as per the Company's internal grievance and disciplinary procedures, you are not permitted to bring a solicitor into a meeting to represent you during what is an internal employment matter. However, as a gesture of good will, allied to your current incapacitation, I am prepared to allow you time to prepare and to find either of the following people to accompany you: 1. A fellow colleague of Global Partners Limited (2) A registered trade union official. I therefor insist that you attend at 15:00 on Tuesday 30th October".

68. The Complainant responded by email dated 24 October 2012 stating:

"it is not my refusal to attend this meeting it is your continued refusal to allow me to attend with my lawyer that has resulted in the cancellation of this meeting. "

In that same email the Complainant goes on to threaten the Respondent that she would report the company to the authorities should her salary not be paid and concludes "I would also like to add that you picked on the wrong person to act as your scapegoat for yours and David's stupidity". The tone of the email overall was undesirable and a reflection of the state of the relationship

between the Complainant and the Respondent at that time. Furthermore, there was at that time, no reason for the Complainant to believe that her salary would not be paid.

69. Mr Bosbury response to that email on 24th October 2016 was calm and measured and the Complainant was invited to attend the meeting with either (i) a fellow colleague of the Respondent or a registered trade union official. The Complainant was also asked in the email dated 24th October to refrain from sending further slurs which he considered to be insulting and wholly inaccurate.

70. The Complainant responded to Mr Bosbury's email on the 25th October and once again requested clarification as to why she would not be allowed to attend with a lawyer. The Complainant also asked "Will your HR consultant be qualified to also advise on human rights law and accounting procedures and practice, including false accounting". Again, this was another serious, and from the evidence before this Tribunal, unfounded allegation.

71. Whether or not an employee is entitled as of right to attend a disciplinary meeting with a lawyer depends on whether Article 6 ECHR is engaged. As Elias LJ stated in *Mattu v University Hospitals of Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 641"

"I would unhesitatingly hold that the exercise of the contractual power to dismiss, even pursuant to agreed procedures does not attract the protection of Article 6 even where the dismissal effectively freezes the employee out of his chosen profession. The ECHR cases that establish that Article 6 applies to the right to exercise a profession or vocation are all concerned with decision taken by public bodies or professional bodies directly regulating that right. None of them has to my knowledge involved the exercise of contractual rights by an employer."

72. The current case is quite clearly a dispute about the exercise of the contractual rights and does not involve the adjudication of a public or professional body. In the circumstances, the Complainant did not have a right to attend the disciplinary meeting with a lawyer.

73. The Complainant admitted that she was reluctant to attend the meeting as she felt so unfairly treated and wanted someone there with her. It is totally understandable that she may wish to be accompanied to the meeting and the Respondent made that option available to her. The Complainant was invited to attend with a trade union representative or a colleague. The Complainant cannot have any complainants on this point.

74. When the Complainant was asked to explain during cross examination as to what she meant by false accounting during her oral examination she explained that false accounting is what "they accused me of in the meeting, that I had done the accounts wrong." The Complainant was of course not being accused of false accounting and has never been accused of false accounting. The Complainant also said "I wanted to know whether this person was qualified to see whether the accounts were wrong." I do not believe this explanation but this explanation should have been asked of the Complainant before taking the decision to dismiss.

75. In my view no one would used the term "false accounting", especially someone in the accounting world, to mean getting accounts innocently wrong by way of human error or capability. Further evidence in support of this finding can be found in the disciplinary meeting where the Complainant concludes the meeting by saying "*I know procedures that have taken place that should not have taken place and all that is in my disclosure to the FSC. That is all I wanted to say"*.

76. A disciplinary meeting was eventually held on 30th October 2015. Mr Morley chaired the meeting. The meeting was recorded (all parties were aware it was being recorded) and I set out below transcript of the hearing:

    Complainant: *"lets cut to the chase, I know your decision has already been made, before this meeting obviously. I don't want to justify myself because I have nothing to justify myself for. You are my four eyes, that means you are 100% responsible for my work. You did not pick up on anything, it was Peter that came back and picked up on those figures exactly the same figures that I had sent you two weeks earlier so you my four eyes should have picked it up two weeks earlier but like I said I am not going to go into to that, you have already come to the decision, you either want me to resign on my terms or you dismiss me, but if you dismiss me, I have got, I am just going to let you know that I will not take to the tribunals for unfair dismissal but I will be taking you to the courts for wrongful dismissal and I have also got a disclosure to the FSC that I am sure will make very interesting reading for them because I know your accounts procedurals on some point. So that is all I am going to say"*.

    Mr Morley: *"As directors, we are concerned that we have lost confidence in capabilities, you know one of the biggest roles that you have had other than to run the company accounts was to obviously report to the directors as to the financial state of the company. Now you did that on a monthly basis, recently we have been given numbers which are so far away from reality that it has put the company…[inaudible]*

That is all that we are here for today. The numbers reported to us were actually 78,000 to be paid in commission rather than the 40 – 45,000 that you reported. Advisors which should have been paid last month and which were not paid and that has made the position a lot worse. Complaints from advisors not receiving commissions, we found invoices which have not been paid for months, invoices all the way back to June. Numbers, which are so far away from [inaudible]

We didn't breach CAR but we got very very close to it. We have lost confidence in you, not the decision of the Company and nothing else. Totally lost confidence in yourself as the person.

It would appear that the emails that you have been sending to us and the slur that you have been putting on me and Peter it would appear that we are the last people you would want to work with anyway. I would have liked to have thought that we would have had a chance of reconciliation when we first asked you to come in which was ten, twelve days ago, or nearly two weeks ago, that didn't happen. I think you made things a lot worse in evidence in sending emails to us to effectively calling us things and making a slur on myself and Peter. Therefore, cutting to the chase, both the directors have come to the decision that there is absolutely only one way to go here as far as we are concerned here and that is to let you go. So we are going to be dismissing you. There is absolutely no question of that. Two ways which we can play that however the first one is and I hope you will seriously consider this and accepts this. I think it would be better for all concerned if you did but it is your choice at the end of the day and that is to pay you up to today, additional months money pro rata to your salary, to pay you up to November plus obviously holiday monies which are accrued and owing.

5 days to appeal against this decision, the procedure then will be to appeal to Peter Bosbury and by that point"

Complainant: *"I know procedures that have taken place that should not have taken place and all that is in my disclosure to the FSC. That is all I wanted to say."*

77. It is a fundamental core principle that employers should fully inform employees of the allegations made against them. Natural justice does not only require that the employee be aware of the charge against him but also its evidential basis. As the EAT in *Bentley Engineering Co Ltd v Mistry* [1978] IRLR 436 confirmed: "it is clear in a matter of this kind that natural justice does require not merely that a man shall have a chance to state his own case in detail, he must know in one way or another sufficiently what is being said against him".

78. The Complainant submits that she was never shown where she had meant to have erred but merely commented that she had [erred]. I must agree with this submission. Whilst the nature of the charges against the Complainant were made clear to her on a number of occasions the evidential basis was not. It does not appear that the evidence gathered by Mr Morley, showing that the Respondent was only £2,000 above their CAR, was ever shown to the Complainant. Indeed, documentary evidence showing this was not before the Tribunal either. It is a breach of natural justice for the Complainant to be expected to respond to those allegations without actually being provided with the information that gives rise to those allegations.

79. Furthermore, none of the evidence of Mr Britton relating to her capabilities had ever been provided to the Complainant. The Complainant was being accused, from my reading of the papers, of gross misconduct and lacking capabilities to do her role. The Complainant relied heavily on the evidence on Mr Britton during the course of these proceedings to establish its case and no doubt had that evidence in mind when it took the decision to dismiss on the 30th October 2012. None of that information/evidence was ever put to the Complainant.

80. The Complainant confirmed in her evidence that she not aware of Mr Britton's involvement until these proceedings. Mr Britton also confirmed he had never communicated or seen the Complainant. An employer should always give an employee an opportunity to put their case in response before any decisions are made. Whilst I appreciate that there were difficulties in the lead up to the disciplinary hearing, that hearing was the forum by which the Respondent should have granted the Complainant the opportunity to answer all of the allegations being made against her i.e. the allegations of gross misconduct, the allegation of lacking capability. I also have no doubt that the breakdown in the relationship caused by the Complainant's slurs and accusations were on the minds of the employer when they decided to dismiss. Again, the Complainant should have been given an opportunity to clarify those statements although they did not form part of the Complainant's reason for dismissal.

81. In the circumstances, the Complainant was never able to test the evidence of Mr Britton or even able to give an explanation for the methodology adopted by the Complainant. There could have been a valid explanation other than lacking capabilities. An example that comes to mind is that three days a week might not have been enough time for the Complainant to manage the accounts in the manner that Mr Britton later organised. I simply do not know, but the point of this is that the Respondent did not either and it was incumbent on them to allow the Complainant to explain her side of the story. It is only after

she has been given that opportunity that the Respondent is able to make an informed and fair decision.

82. Examples for the reason why employers should allow employees an opportunity to respond to the allegations and to put their side of the story across arose during the hearing. Firstly, Mr Britton quite candidly confirmed during his live evidence that he would have been able to train someone with AAT qualification to perform and undertake the work and methodology that he implemented. In other words, whilst the Complainant lacked capabilities in his view that could have been remedied with training. Had information been exchanged and discussions held between Mr Britton, the Complainant and the Respondent the result may well have been different and the Respondent may have offered training to the Complainant.

83. A further example arose in relation to the cashbooks. In his witness statement, Mr Britton states that he did not see any cashbooks during his investigation. During the hearing Mr Britton was presented with a document, which according to the Complainant were cashbooks. Whilst Mr Britton was of the view that what was presented to him was not a cashbook he confirmed that some of the characters of a cashbook could be found in that document i.e. the existence of a running balance including both receipts and payments. He stated "if these were kept up-to-date daily that would be a reference point, had I seen these I would have modified these." He went on to confirm that his opinion would have been slightly different and he would not have been as bland as he had stated in paragraph 5.2 of his witness statement. The Respondent did not know this at the time it made its decision to dismiss.

84. I appreciate Mr Morley's honesty when he says that the decision to dismiss the Complainant was taken before the disciplinary meeting. Even without Mr Morley's confirmation it was quite clear from the evidence that the decision had been taken prior to the disciplinary hearing. In other words, a decision had been taking, without having first heard the Complainant fully. This is a breach of natural justice and renders the dismissal unfair.

Conclusion

85. In the circumstances, and whilst I sympathise for the Respondent given that I believe that the relationship had irrevocably broken down between the Complainant and the Respondent, I must conclude that the dismissal was unfair.

Compensation

86. I now turn to consider the issue of compensation to which the Complainant has filed a Schedule of Damages amounting to £12,507.12 made up of the following:

    (i) Basic Award: £2,200
    (ii) Loss of earning (from 30-10-12 to 7-1-13): £2,785.72 (gross)
    (iii) Continued loss of earnings (multiple by 12 months): £4,729.68 (gross)
    (iv) Loss of contractual notice period (2 months): £2,785.72 (gross)

87. Under the Employment Act, compensation consists of the Basic Award and the Compensatory Award. Pursuant to the Industrial Tribunal (Calculation Of Compensation) Regulations 1992 the basic award shall be £2,200 or such higher amount as the Tribunal, at its discretion, shall determine. The Complainant has not made any submissions to the effect that I should award a higher amount. In any event, I do not believe there are any circumstances in this case which merit an increase to the basic award. In the circumstances, I award the Complainant the basic award of £2,200.

88. I now turn to the issue of the compensatory award. Pursuant to section 71(1) of the Employment Act the amount of compensation shall be such amount as the Tribunal considers just and equitable in all the circumstances of the case. The aim of the compensatory award is to put a realistic figure on the Complainant's actual loss flowing from the dismissal.

89. In the Schedule of Losses the Complainant submits that she earned £394.14 gross less per calendar month than she did whilst employed by the Respondent. An unfairly dismissed employee should only recover the net and not the gross loss because the net pay and not the gross pay is what the employee should have received from his employer. In total, the Complainant submits that she has made a loss of earnings of £10,307.12 (gross), which sum includes the two months notice period. In the circumstances, I reduce this amount by 20%, which is the rate applicable to earnings up to £25,001 in Gibraltar, to £8,245.70.

90. I have also formed the view that despite the failings of the Respondent in the procedure leading to the dismissal, which has led me to finding of unfair dismissal, there was a good chance, despite the possibility of training, that the Respondent would have been dismissed in any event. In *Polkey v Drayton Services* [1987] IRLR 503 it was held that a Tribunal can make a deduction from compensation to reflect the likelihood of the employee being fairly dismissed had he not actually been unfairly dismissed.

91. Taking all the circumstances of the case into account, it is my view that there was a good chance (70%) that the Complainant still would have been dismissed had a proper procedure been followed by the Respondent. In particular, I note the following:

    (i) I have made a finding of gross misconduct;

    (ii) To a lesser extent, I have made a finding that the Complainant lacked capability;

    (iii) In respect of issues of capability, Mr Britton confirmed that he would be able to train someone with the qualifications of the Complainant to manage the accounts to a good industry level; and

    (iv) The various accusations, slurs and threats made by the Complainant against the Respondent's directors as set out at paragraphs 62, 69, 71 & 77 above which may in themselves have amounted to gross misconduct and which in my view resulted in a complete breakdown in the relationship between the Complainant and the Respondent.

92. In order for there not to have been a dismissal it would have necessarily require a reconciliation between the parties and substantial rebuilding of mutual trust and respect and the Complainant would have also required to have successfully completed training with Mr Britton or someone equivalent. I do not believe the chances of both these events occurring at more than 30%.

93. In the circumstances, I therefore further reduce the award by 70% to £2,473.71. In conclusion, for the reasons stated above, the Complainant is entitled to the sums of:

    Basic Award: £2,200.00
    Compensatory Award: £2,473.71

    Total award: £4,673.71

Dated this 14th day of November 2016

Christopher Allan

Chairman