

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104027/2016

5 Held in Glasgow on 14, 15, 16 and 17 November 2016
and 21 December 2016 (written submissions)

Employment Judge Shona MacLean

10

Mr Joseph Smith

Claimant
Represented by:
Mr S Devine
Consultant

15

North Ayrshire Council

Respondent
Represented by:
Ms J Dunlop
Solicitor

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the application for unfair
25 dismissal is dismissed.

REASONS

Introduction

1. The claimant presented a claim to the Tribunal's office on 14 July 2016 in
30 which he complained that he was unfairly dismissed when the respondent
terminated his employment. The claimant maintains that the respondent
failed to carry out a reasonable investigation. The severity of the allegation
did not amount to gross misconduct and that the respondent failed to follow
the correct procedures.

35 2. The respondent presented a response in which it accepted that the claimant
was dismissed. The respondent maintained that the dismissal was on
grounds of conduct which is a potentially fair reason. The respondent
asserted that it followed a fair procedure and that in all the circumstances
the decision to dismiss falls within the band of reasonable responses.

3. At the Hearing the Tribunal heard evidence from Craig Hatton, Executive Director of Place, William Borthwick, Manager for Building & Services, Russell McCutcheon, Head of Commercial Services and Ainslie young, HR Operations Manager gave evidence for the respondent. The claimant gave evidence on his own account.
4. The parties lodged two volumes of productions to which the Tribunal was referred during the Hearing.
5. The Tribunal found the following essential facts to have been established or agreed.

Findings in Fact

6. The respondent is a local authority. The respondent employed the claimant from 3 November 2003 until his employment was terminated on 29 April 2016.
7. Since February 2012 the claimant was the Senior Manager for Road and Transportation. In this capacity, he represented the respondent's interests on a number of levels including Scottish Government, National Roads Bodies, Cabinet Committees and work with other local authorities throughout Scotland and the UK.
8. The claimant was also responsible for approximately 70 to 80 employees within the Roads Department. The claimant had responsibility for recruiting staff, dealing with health and safety, conduct issues, capacity and sick absence. The claimant carried out investigations and disciplinary hearings in respect of employees for whom he was responsible.
9. In September 2015, Craig Hatton, the Executive Director for Place received an anonymous note which alleged procurement irregularities within the Road Service (production 112-113). The allegations implicated and named a Road Technician, Chris Gooding. The anonymous note also referred to a Court of Session case, *McGivney Construction Ltd v (1) Joseph Kaminski*

and (2) Glen Maree Contracts Ltd [2005] CSOH 107 in which a hearing had taken place in March 2015 (the Court Case). A copy of the Court of Session Judgment dated 11 August 2015 (the Judgment) was enclosed with the anonymous note.

5 10. The Court Case related to a contractor McGivney Construction Ltd who had been regularly awarded works by the respondent. McGivney Construction Ltd claimed losses from another contractor, Glen Maree Contracts Ltd. The owner/director of Glen Maree Contracts Ltd, Joseph Kaminski had previously been a Director and employee of McGivney Construction Ltd and
10 had subsequently set up Glen Maree Contracts Ltd. It was alleged that Glen Maree Contracts Ltd was stealing the work from McGivney Construction Ltd which had been provided to it by the respondent.

11. Mr Hatton was concerned when he read the Judgment. It referred to the respondent and named Mr Gooding as the respondent's employee who had
15 given evidence at the hearing. Mr Hatton was unaware of the Court case. As Executive Director of Place he would have expected to have been known about it.

12. Mr Hatton was even more concerned that the Judgment was critical of the respondent's procurement exercise (production 116-117):

20 *"[17] A significant chapter of evidence related to the 2012 contract that the Council awarded to GM. The works in question related to traffic signals at a series of junctions on the main road from the centre of Irvine going north along the Ayrshire coast through Kilwinning, Stevenston, Saltcoats and Ardrossan. This contract would have
25 required heavy plant and machinery and several men to carry it out.*

*[19] The award of the contract is shrouded in mystery. No procurement exercise took place. GM was not on the framework agreement. At the time it did not have its own workforce, plant and materials. It was not registered with the Construction Industry Scheme ("CIS") operated by
30 HM Revenue and Customs.*

5 [20] *Mr Gooding, the Council official responsible gave evidence. His account was as follows. The Council made the award in haste to use up the funds from Strathclyde Partnership for Transport which would otherwise expire at the end of the financial year. Mr Kaminski told him that MCL and GM were in partnership. Accordingly Mr Gooding had assumed that there would be no difficulty with GM not being on the framework. When he had visited the sites to inspect the contract works from May onwards, Mr Kaminski had always been present. Mr Gooding never saw any sub-contractors, nor did he see any licences, insurance certificates or CIS forms.*

10

15 [26] *Mr Kaminski prevaricated and was unable to provide convincing answers to the key questions. He could not explain why the Council awarded the contract to GM, given that in 2012 (a) it was not on the framework agreement, and (b) it did not have its own workforce or plant.*

20 [30] *I conclude that Mr Kaminski is both incredible and unreliable. I therefore disregard his evidence except where it is supported by other credible testimony. With regard to the Council's award of the contract to GM, Mr Kaminski's account is inherently implausible. It cries out for an explanation that he is unable to supply."*

13. Compliance with procurement processes and regulations is a serious matter for the respondent. This was particularly so given that the respondent had been previously criticised by a report prepared by Audit Scotland because of which the respondent's employees had undergone training in respect of procurement processes and financial regulations to ensure that they were all aware of what was expected of them. The claimant had attended this training.

25

14. There are rules given to Standing Orders relating to contracts and contract procurement rules which sets out the value thresholds for procurement:

30 a. A single quotation for requirements under £1,000.

- b. Verbal quotations for requirements between £1,000 and £4,999.
 - c. Three written quotes for requirements between £5,000 and £9,999.
 - d. A quick quote obtained through Public Contracts Scotland Portal with a minimum of three quotes for requirements between £10,000 and £99,999 and;
 - e. For requirements above £10,000 a tender exercise is required or alternatively an appropriate and approved procurement framework may be used.
- 5
- 10 15. Mr Hatton passed the anonymous note and Judgment to the respondent's Corporate Fraud Team for investigation. Given Mr Gooding's involvement with the Court Case, in which the respondent had been implicated, he was suspended by Yvonne Baulke, Head of Service. This was in line with the respondent's Suspension Policy (production 47 to 52).
- 15 16. Mr Gooding was a member of the claimant's team. Mr Hatton informed the claimant of the note and Judgment. In a discussion, the claimant indicated that he had little or no knowledge of the Court Case.
- 20 17. On 16 November 2016, Mr Borthwick, Area Manager for Building & Services within the Place Directorate was appointed to investigate Mr Gooding. Mr Borthwick advised the claimant of his appointment. The claimant indicated to Mr Borthwick that he knew little to nothing about the Court Case.
18. On his appointment Mr Borthwick received a summary of the anonymous note, the Judgment and the interim report from the Corporate Fraud Team (production 418 to 425). Mr Borthwick examined these documents before starting the investigation.
- 25 19. Crawford Forsyth, Transportation Manager line managed Mr Gooding and directly reported to the claimant. In December 2015 Mr Borthwick met with Mr Forsyth (productions 254 to 273). Mr Forsyth said that he had been aware of the Court Case and had read Mr Gooding's witness statement. Mr Forsyth said he escalated the matter to the claimant who had also seen Mr
- 30 Gooding's witness statement. Mr Forsyth said that there had been a meeting

with him, the claimant and Mr Gooding on 9 May 2014 when procurement irregularities and the Court Case were discussed.

20. Mr Borthwick then met Mr Gooding who confirmed during the meeting that Mr Forsyth was aware of the procurement irregularities and the Court Case (production 283 to 403). When pressed Mr Gooding also confirmed that the claimant knew; the claimant had met with him. Mr Gooding was unable to provide any specific dates of meetings at which the claimant was present.
21. Mr Gooding resigned on 17 December 2015. Mr Borthwick was unable to have any further discussion with him.
22. Mr Borthwick met Mr Forsyth again on 18 December 2015 (production 309 to 325). Mr Forsyth said he had had meetings with the claimant and Mr Gooding on 9 and 14 May 2014. At these meetings, the claimant was given full details of the procurement irregularities and the Court Case. The claimant knew of the Court Case ten months before the hearing. The claimant also met with the lawyer representing Mr Kaminski and Glen Maree Contracts Ltd at the end of February 2014 which was before the hearing. Mr Forsyth said that the claimant took Mr Gooding's witness statement home with him over the weekend between 9 and 12 May 2014 and the claimant had indicated to Mr Forsyth that he did not think that the Court Case would go ahead.
23. Mr Forsyth also provided a supplementary statement (production 207 to 210). The information provided was as follows:
- "In January 2014 Mr Gooding explained the procurement irregularities and that he had provided a witness statement for a court case.*
- On 7 May 2014 Mr Gooding attended a meeting with the lawyer acting for McGivney Construction Ltd. As a result of what Mr Forsyth learned at this meeting he was concerned and spoke to the claimant about this.*

A meeting was held on 9 May between the claimant, Mr Forsyth, and Mr Gooding where the procurement irregularities were explained to the claimant and he was advised of the witness statement and the court case.

The claimant reviewed the witness statement over the weekend.

5 *There was a follow up meeting on 14 May 2014 with Mr Forsyth.*

At the beginning of February 2015 Mr Forsyth had confirmed to the claimant that Mr Gooding had been cited as a witness. Just before the court hearing in March 2015 the claimant met with the lawyer representing Glen Maree Contracts Ltd.”

10 24. Mr Borthwick provided an investigation report about Chris Gooding on 8 January 2016 (production 426 to 457). As part of that investigation report Mr Borthwick recommended that the claimant be interviewed regarding the allegations from Mr Gooding and Mr Forsyth that the claimant was aware of the procurement irregularities and the Court Case.

15 25. Mr Hatton read the investigation report and supporting documentation. Mr Hatton decided that further investigation was need in relation to the claimant. Mr Hatton considered that it was appropriate for Mr Borthwick to undertake this given his previous involvement.

20 26. Given the seriousness of the allegations Mr Hatton decided that the claimant should be suspended.

25 27. Mr Hatton met with the claimant on 15 January 2016 and confirmed that it was alleged that the claimant knew of the procurement irregularities and the Court Case (the Suspension Meeting). The claimant had not escalated them and he had advised subsequently that he knew little to nothing about them. The claimant was advised that he would be suspended until further notice.

28. The Suspension Meeting was followed by a letter confirming the terms of the suspension (production 123). The letter enclosed a copy of the respondent's

Disciplinary Policy. The reason given for the suspension was *“to enable an investigation to be carried out concerning procurement irregularities and actions arising.”*

5 29. Mr Borthwick wrote to the claimant on 27 January 2016 inviting him to attend an investigatory interview with him on 5 February 2016 (production 128). The letter explained that Mr Borthwick was investigating incidents of misconduct and that it was alleged that:

- 10 *“(1) It is alleged that J Smith took no action despite evidence to suggest a clear and significant breach of procurement regulations and financial standing orders;*
- (2) It is alleged that J Smith did not alert his line manager to a court case regarding fraudulent activity in the execution of the Council’s contract and therefore did not allow the Council to ensure:*
- 15 *(a) That the circumstances were fully investigated; and*
- (b) Manage any potential reputational damage arising from the proceedings.*
- (3) It is alleged that J Smith became involved in and influenced the preparation of C Gooding’s court statement that may not have represented the true events and therefore may have resulted in*
- 20 *perjury and reputational damage to the Council.*
- (4) It is alleged that there are insufficient processes and management controls in place to ensure works awarded to contractors are undertaken and completed appropriately.”*

25 30. The claimant was also advised that arrangements could be made for him to be accompanied at the interview either by a trade union representative or a fellow employee of his choice.

30 31. Mr Borthwick met with the claimant on 5 February 2016 (the Investigatory Interview) (production 327 to 403). The claimant said that he had spoken to his adviser and was comfortable to continue without representation. The claimant denied that he had seen Mr Gooding’s witness statement. He also

denied that meetings took place on 9 and 12 May 2014. The claimant admitted that he had met the lawyer representing Mr Kaminski and Glen Maree Contracts Ltd. The claimant maintained that he did not know about the procurement irregularities and that he did not know the specifics about the Court Case.

5

32. Mr Borthwick asked the claimant about his relationship with Peter McGivney. Mr Borthwick's impression was that the claimant took some time to admit that Mr McGivney was a friend of his and that they had known each other for 16 years and had attended each others' weddings. The claimant acknowledged that he had a telephone call with Susan Bell, Solicitor initially instructed by McGivney Construction Ltd and that he had provided her with information regarding the contracts awarded to McGivney Construction Ltd (production 212 to 213). The claimant's position was that he did not escalate this information to his manager as he did not see it as a priority. The claimant also had not responded to emails from the respondent's Internal Legal Department (Aileen Craig) regarding the case as he had been on holiday when they were sent and on his return to business he did not see the connection between the internal emails and the correspondence with Ms Bell. The claimant thought the emails had been dealt with by Mr Wilson and he did not consider this a priority.

10

15

20

33. After the Investigatory Interview Richard Lennon, the HR Adviser who was present advised Mr Borthwick that he had provided the claimant with a guidance leaflet and explained there were several supports available to him. Mr Lennon also advised the claimant that Tommy Strain was the claimant's HR contact with whom he should liaise. The claimant did not contact Mr Strain at any point during his suspension.

25

34. Mr Borthwick also interviewed Mr Forsyth, Mr Dempster, Assistant Network Manager, Mr Crawford, Engineer and Mr Wilson, Team Manager lighting and Design. The claimant provided an additional statement on 26 February 2016. Additional information was collated arising from Mr Gooding's investigation.

30

35. Mr Borthwick completed the Investigation Report into the claimant in early March 2016. Mr Hatton reviewed the Investigation Report and concluded that there was a case for the claimant to answer and that a disciplinary hearing should be held.
- 5 36. Mr Hatton wrote to the claimant on 11 March 2016 inviting him to attend a disciplinary hearing on 31 March 2016 (production 600). The letter outlined the allegations which were identical to those set out in the letter dated 27 January 2016 along with the addition of a fifth allegation that the claimant had breached the Council's Code of Conduct in relation to receipts of gifts and hospitality. This letter also indicated that the claimant had the right to be accompanied at the disciplinary hearing by a trade union representative or a fellow employee.
- 10
37. Although Mr Hatton signed the letter dated 11 March 2016 it was prepared by his Personal Assistant. He understood it was a template letter used by the respondent. Although the letter referred to misconduct Mr Hatton considered that given the claimant's role he knew how serious the allegations were and having been suspended the claimant would be aware of the potential outcome.
- 15
38. This letter was followed by a further letter sent on 22 March 2016 enclosing the Investigation Report (production 601).
- 20
39. On 23 March 2016, the claimant wrote to the Chief Executive, Elma Murray complaining about the appointment of Mr Hatton as the Disciplinary Chair (production 602 to 604). The basis of the complaint was that the claimant had been suspended for ten weeks and during this period he had not been contacted by Mr Hatton or the Head of HR in contravention of the respondent's policy. The claimant therefore felt a complete dubiety about the status of his suspension and the progress of investigation. Further the claimant considered that neither Mr Hatton nor the Head of HR had shown concern about the claimant's wellbeing. The claimant also complained about
- 25

the fact that he had not received the Investigation Report in sufficient time to allow him to prepare for the disciplinary hearing.

40. Ms Murray spoke to Mr Hatton. She remained of the view that he could still Chair the disciplinary hearing. However, in order to be flexible, she agreed that Russell McCutcheon should chair it. Ms Murray confirmed this to the claimant in a letter dated 7 April 2016 (production 606). Mr Hatton had no further input in the claimant's disciplinary procedure.
41. Ms Murray asked Mr McCutcheon to chair the Disciplinary Hearing which was to be re-scheduled. Mr McCutcheon went through the investigation pack that he had been sent. He also reviewed the letter dated 11 March 2016. Mr McCutcheon used the same letter as a template. Mr McCutcheon reiterated that the claimant had the right to be accompanied at the disciplinary hearing by a trade union representative or colleague. In addition, he confirmed that the claimant's suspension would continue until the outcome of the disciplinary hearing which was scheduled for 27 April 2016 (the Disciplinary Hearing) (production 608 to 609).
42. At the outset of the Disciplinary Hearing Mr McCutcheon asked the claimant if he knew that he had the right to be represented. The claimant confirmed that he did but there was no one within the organisation who he wanted to represent him. The claimant confirmed that he was happy to proceed. Mr McCutcheon also confirmed that the potential outcome of the Disciplinary Hearing was dismissal. The claimant indicated that he had not been made aware of this but he confirmed that he wished to proceed. Mr McCutcheon considered that this was reasonable as the claimant had been suspended and his role as a Senior Manager he would know that the outcome could be potentially dismissal.
43. During the Disciplinary Hearing Mr McCutcheon asked the claimant about the telephone call and email correspondence with Ms Bell, the Solicitor for McGivney Construction Ltd. The claimant advised that he did not see this correspondence as significant. Mr McCutcheon then explored the internal

correspondence from the respondent's Internal Legal Department (Aileen Craig) and Mr Wilson (productions 214 to 217). The claimant said he did not connect the emails as being about the same case and that he assumed that the matter had been dealt with as he was on holiday. The claimant denied meetings took place on 9 and 12 May 2014. He also denied that he took Mr Gooding's witness statement home to read. The claimant was evasive regarding his friendship with Mr McGivney. The claimant confirmed that he did meet the lawyer representing Glen Maree Contracts Ltd in February 2014. He said that this was only a discussion about general procurement procedures.

44. The Disciplinary Hearing was adjourned. Mr McCutcheon did not find the claimant's position to be credible particularly in relation to the significance of the correspondence from Ms Bell and the fact that he did not link this with the email that were received from Ms Craig and Mr Wilson some six weeks later relating to the same Court Case. Mr McCutcheon felt that given the correspondence related to a friend it was likely that the claimant would have placed more weight on the correspondence than he was suggesting at the Disciplinary Hearing. Mr McCutcheon was also concerned at the fact that the claimant was evasive and non-committal regarding his friendship with Mr McGivney. Mr McCutcheon did not believe the claimant when he said that the meetings did not take place on 9 May and 12 May 2014. While McCutcheon acknowledged that Mr Gooding did not provide dates of the meetings he had confirmed that there was one. Further Mr McCutcheon believed having two individuals confirm independently of each other that it took place and that the claimant was present suggested it was more likely than not that a meeting had taken place. Further, Mr McCutcheon did not believe that the discussion with the solicitor from Glen Maree Contracts Ltd in February 2014 related to the general procurement procedures. By this stage the Court hearing was imminent and the claimant had spoken to Mr Forsyth beforehand. It therefore seemed more likely to Mr McCutcheon that meeting was about procurement irregularities rather than about general procurement procedure.

45. Mr McCutcheon believed that the claimant was aware of the procurement breaches and the Court Case and that he decided not to escalate the matter to his line manager. Mr McCutcheon believed that this was dishonest as he had denied this when repeatedly asked. Further he believed that the claimant was aware of the procurement breaches in the Court Case and he deliberately did not alert his line manager to this. Mr McCutcheon believed that the claimant had seen Mr Gooding's witness statement and had taken it home over the weekend. The claimant had denied that. Again, Mr McCutcheon believed that the claimant was being dishonest. Mr McCutcheon believed that Mr Gooding did not make the changes requested by the claimant so he did not believe that the claimant had influenced the preparation of the witness statement. Mr McCutcheon did not consider that there were sufficient processes in place as Mr Gooding had not followed the procurement procedures. About the fifth allegation Mr McCutcheon did not find any evidence to suggest that the claimant had not paid his own fees to attend a golf event so he considered that this was allegation was unfounded.
46. Having reviewed all the evidence Mr McCutcheon concluded the claimant had been dishonest in that contrary to what he said the claimant knew the procurement irregularities and the Court Case and chose not to escalate them. Mr McCutcheon considered this to be gross misconduct in terms of the respondent's Disciplinary Policy (production 71 to 94). He felt that this amounted to a breach of trust and confidence. Mr McCutcheon confirmed this in a letter to the claimant dated 29 April 2016 in which he also advised that the claimant had the right of appeal (the Dismissal Letter) (production 630 to 631).
47. The claimant exercised his right of appeal. The appeal is heard by an Appeal Panel comprising of three elected members.
48. Before the appeal hearing the claimant enquired whether he could bring Mr Devine to the appeal hearing as his representative. Mr Devine was not a trade union representative and he was not a colleague. Accordingly, the claimant was advised that Mr Devine would not be allowed to represent the

claimant at the appeal hearing as this was not in line with the Disciplinary Policy (production 98 to 107).

5 49. The claimant's appeal was considered as a meeting on 8 July 2016 (the Appeal Hearing). Ms Young attended in her capacity as HR Adviser to the Appeal Panel.

10 50. The claimant arrived with Mr Devine. Ms Young was surprised to see Mr Devine given previous exchange of correspondence. However, following a discussion with the Appeal Panel it was agreed that although Mr Devine would not be allowed to sit in the Appeal Hearing he would be provided with a room and facilities. The claimant was informed that he could adjourn the Appeal Hearing at any point to speak with Mr Devine. The claimant agreed to this and took advantage of speaking to Mr Devine during the Appeal Hearing.

15 51. The Appeal Panel comprised of Alan Munro, Grace McLean and Alex Gallacher. Mr Munro was the Chair. Mr McCutcheon was present as was Fiona Carlyle of HR. Christine Andrew from the Legal Department was also present.

20 52. Mr McCutcheon set out a statement at the Appeal Hearing (production 670 to 680). The Appeal Panel and the claimant then had an opportunity to ask Mr McCutcheon questions. The claimant then read his submission in which he advised the Appeal Panel that:

- 25
- a. He had not been able to be represented at the Disciplinary Hearing or the Appeal Hearing.
 - b. He had not been aware of the allegations amounting to gross misconduct although he acknowledged that he had been aware of this at the Disciplinary Hearing. If he had known, it amounted to gross misconduct he would have answered differently; and
 - c. Not being contacted during his suspension despite the policy saying that he should have been.

53. Following the submissions, the Appeal Panel had an opportunity to ask the claimant questions. Both Mr McCutcheon and the claimant then summed up their positions. It was normal practice that no minutes were taken of the Appeal Hearing. The only minute noted was the public document advising that there was an Appeal Hearing and the outcome.
54. After the Appeal Hearing Mr McCutcheon, Ms Carlyle and the claimant left the room. The Appeal Panel then had the opportunity to ask both Ms Young and Ms Andrew any questions regarding procedure. Ms Young could not recall the Appeal Panel asking any questions of her or Ms Andrew. Ms Young and Ms Andrew then left the room and the Appeal Panel deliberated. Once a decision was reached Ms Young and Ms Andrew were called back into the room and were informed that the Appeal Panel had decided not to uphold the Appeal. The Appeal Panel did not confirm why or how they had reached this decision.
55. Ms Young wrote to the claimant to confirm that his appeal had not been upheld on 11 July 2016 (production 692). It is not normal practice to provide information as to the reasoning of the decision in the outcome letter.
56. At the date of termination, the claimant was 51 years of age. He had been continuously employed by the respondent for 12 years. His gross weekly wage pay was £1,049.60. His net weekly pay was £755.39. The claimant found alternative employment. He is currently working.

Observations on Witnesses and Conflict of Evidence

57. The Tribunal considered that Mr Hatton was a credible and reliable witness. The Tribunal did not detect that he had any animosity towards the claimant. The investigation into Mr Gooding and subsequently the claimant was prompted by an anonymous note. Whilst Mr Hatton decided that disciplinary proceedings should be instigated against the claimant he was not involved in the decision to dismiss him nor in the Tribunal's view did he have any influence over Mr McCutcheon's decision.

58. Mr Borthwick was in the Tribunal's view a credible and reliable witness. He was asked to undertake the investigation into Mr Gooding. The information relating to the claimant came as a surprise to Mr Borthwick. There was no evidence to suggest that he had any hostility towards the claimant. While he recommended further investigation, he was not involved in the decision-making process leading to the claimant's dismissal. The Tribunal believed Mr Borthwick's evidence that the claimant was told after the Investigation Interview about his HR contact.
59. The Tribunal considered that Mr McCutcheon gave his evidence honestly and based on his recollections of events. While the Tribunal acknowledged that there was no contemporaneous note of Mr McCutcheon's reasoning for reaching his decision to dismiss the claimant it is considered that Mr McCutcheon's oral testimony was plausible and the Tribunal had no reason to believe that this was not his rationale at the time.
60. Ms Young was also in the Tribunal's view a credible and reliable witness. Her evidence was primarily concerning the normal procedures that are adopted by the respondent during the appeal process. Given she was not involved in the actual decision making process her evidence was somewhat limited.
61. The Tribunal considered that the claimant's evidence had been consistent during the internal procedures and at the Hearing. He has maintained throughout that he had little or no knowledge of the Court Case. He maintained that he placed little or no significance on correspondence received from lawyers in relation to the Court Case. He denied attending the meeting in May 2014 with Mr Gooding and Mr Forsyth.
62. Given the claimant's seniority and length of service the Tribunal considered that his position on a variety of matters was implausible. For example, the relationship between the claimant and Mr McGivney was more than a business relationship. It was therefore in the tribunal's view highly likely that he would recall being asked to provide information to the solicitors acting for

Mr McGivney's company particularly as it involved in a considerable amount of work. It was also in the Tribunal's view surprising that the claimant would have attached no significance to the exchange of correspondence some six weeks later received from the respondent's Internal Legal Department. The Tribunal also considered that it was incredible that someone of the claimant's position and experience would not know that in circumstances giving rise to an employee being suspended that the allegations made against them were significant and could lead to their dismissal. The Tribunal felt that the claimant was aware of the position and had he been genuinely taken aback at the Disciplinary Hearing that dismissal was a potential outcome he would have sought a postponement or expressed some concern about that. The claimant clearly had no difficulty in escalating matters when he wished to do so as he had raised a grievance in relation to the proposal that Mr Hatton conduct the Disciplinary Hearing.

63. In relation to conflict of evidence there was a dispute whether the claimant knew there had been procurement irregularities and understood the Court proceedings. In the Tribunal's view in to determine the issues in this case it was not necessary for it to make finding in this respect. The Tribunal's role was to consider whether the respondent had a genuine and reasonable belief that the claimant was aware of the procurement irregularities and the details of the Court Case and that that belief was based upon a reasonable investigation.

64. There was a conflict of evidence in relation to whether at the appeal stage there was reference to the sixth allegation. Mr McCutcheon vaguely recall reference by the Appeal Panel to a "sixth allegation". Ms Young did not recall this. The claimant said that there was reference to a sixth allegation. There are no notes of the Appeal Hearing. The Tribunal considered that is was likely that the Appeal Panel sought clarification about the Dismissal Letter on whether the actions which Mr McCutcheon considered to be dishonest was a further allegation arising out of the view he formed on the five allegations discussed at the Disciplinary Hearing. Mr McCutcheon's position throughout the proceedings has been that the dishonesty was his

belief that the claimant lied about his knowledge of the Court Case and his actions at that time.

Submissions for the Respondent

5 65. The respondent accepts that the claimant was dismissed under section 95(1)(a) of the Employment Rights Act 1996 (ERA). It was therefore for the respondent to establish the reason for the dismissal and that it falls within one of the potentially five fair reasons. It was then for the Tribunal to consider if the dismissal is fair – that the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the claimant; and
10 that the procedures followed were fair in all the circumstances. The burden of proof on the fairness of the dismissal is neutral and does not rest on either party.

15 66. The claimant was dismissed on grounds of conduct which is a potentially fair reason in terms of section 98(2)(b) of the ERA. Turning to the reasonableness of the decision to dismiss the Tribunal was referred to the claimant's position as Senior Manage of Roads and Transportation. It was a role which had a high level of responsibility, trust and respect. The claimant was responsible for a significant number of employees. The respondent believed that the claimant was aware of procurement irregularities and a
20 Court Case which had the potential to cause reputational damage to the respondent deliberately did not escalate this to his line manager. The claimant denied all knowledge of the procurement irregularities and the Court Case.

25 67. The claimant was dismissed because of a breakdown in trust and confidence in the employment relationship. The claimant's position was that he was not aware of the procurement irregularities or the Court Case. However, there was evidence that he knew of the procurement irregularities and Court Case but did not escalate these to his line manager or to anyone.

30 68. The Tribunal was referred to Mr Hatton's evidence in relation to the anonymous note and the subsequent investigations which were undertaken

by Mr Borthwick. The Tribunal was then referred to the inference of Mr Borthwick in relation to investigations and the reports that he prepared. The Tribunal was also referred to Mr McCutcheon's evidence and the conclusions that he drew at the end of the Disciplinary Hearing. The Tribunal was reminded of Mrs Young's evidence in relation to the Appeal Hearing. The Tribunal was invited to accept the respondent's witnesses as being credible and reliable. Each held a senior management role, had a vast amount of qualifications and experience. Each of them carried out several disciplinary proceedings. Each spoke about having an open mind and dealing with matters fairly. Their evidence was clear and had set out the reasoning for reaching the conclusions that they did.

69. In contrast the claimant was evasive and non-committal. He was unable to provide relevant dates with any certainty. He was unable to explain why he did not disclose the information that he was supposed to and at the time he was supposed to do so.

70. In considering the overall fairness of the decision, the Tribunal must only consider whether the employer has acted in a manner which a reasonable employer might have acted even though the Tribunal itself might have acted differently. The Tribunal must not substitute its own opinion as to what the right course of action may be. To find the dismissal was unfair, the Tribunal must determine that the respondent acted in a manner which no reasonable employer could have acted in the circumstances.

71. The respondent's decision to dismiss the claimant fell within the band of reasonable responses in accordance with the test set out in *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*.

72. It was submitted that the decision to dismiss the claimant was within the band of reasonable responses open to the employer.

73. Where an employer considers more than one allegation of misconduct by the employee the reason for dismissal would be the set of facts which led to dismiss the employee. The EAT in *Governing Body of Bearwood*

Humanities College v Ham UKEAT/0379/13 at Paragraph 16 said that a question for a Tribunal will not be whether the individual acts of misconduct individually or accumulatively amounted to gross misconduct but whether the conduct in its totality amounted to a sufficient reason for dismissal.

- 5 74. What constitutes gross misconduct is the question of fact and law in
(*Sandwell and West Birmingham Hospitals NHS Trust v Westwood*
UKEAT/0032/09). In this case the EAT held that the Tribunal must consider
both the character of the conduct and whether it was reasonable for the
employer to regard that conduct as gross misconduct and the facts of the
10 case. In this case the claimant was engaged in deliberate wrongdoing. He
deliberately did not tell the respondent about the procurement irregularities
or Court Case and for the sole reason he did not see it as a priority or that
he was unaware of the Court Case.
- 15 75. Where trust and confidence have been lost it must always go to the root of
the contract entitling the party that has been wrong to terminate the contract
with immediate effect (see *Morrow v Safeway Stores [2002] IRLR 95*). The
Tribunal heard evidence from Mr McCutcheon that the trust and confidence
he had in the claimant had been lost given the nature of his role within the
respondent and the duties that he was entrusted with. He was required to
20 bring to the respondent's attention any procurement irregularities which he
was aware of considering the importance of the procurement procedure
within the respondent.
- 25 76. He was clear in several different ways that there was a duty on the claimant
to have informed the respondent of procurement irregularities, his role, the
disciplinary rules and the code of conduct. Even if the Tribunal finds that the
claimant could not have been aware that he had a duty to disclose the
procurement irregularities and the Court Case (which is denied) the
respondent submits that the claimant should have known that he should
30 have told the respondent about the procurement irregularities and the Court
Case. His failure to disclose the information regarding the procurement

irregularities and the Court Case at the time he found about them was sufficient grounds to dismiss him.

- 5 77. The Tribunal was referred to *Asda Store Ltd v Caughlan* *UKEAT/0453/10/DM* which was a successful appeal against an EAT decision that the claimant was unfairly dismissed because the dismissal fell outwith the range of reasonable responses. The EAT ruled that it is only if the Tribunal finds that the employer's response fell outside the range can a respondent be said to have acted unfairly. The EAT went on to say that "the question of how an employer balances personal dedication against a disciplinary offence is a matter for the employer. On the conclusions from
- 10 *outside the range can it be said to have acted unfairly.*"
78. Considering the evidence before it the respondent's decision to dismiss the claimant was reasonable. The respondent acted reasonably in dismissing the claimant as determined in accordance with equity and the substantial
- 15 merits of the case. It cannot be said that no reasonable employer would dismiss such an employee. The claimant was a Senior Manager in the Roads Department of the respondent. He was in a position of trust and responsibility. Dismissing him fell within the band of reasonable responses open to the respondent. The claimant's dismissal was substantively fair.
- 20 79. About the procedure, the respondent complied with the ACAS Code and its own internal policy when dismissing the claimant. The ACAS Code requires the employer to establish the facts, inform the employee of the problem, hold a meeting to discuss matters, allowing the employee to be accompanied, decide on appropriate action and provide an opportunity for
- 25 an appeal. The respondent did all this and complied with its own policies and procedures.
80. For the Tribunal to determine whether dismissal for misconduct is fair Tribunals follow the test set out in *British Home Stores Ltd v Burchell [1978] IRLR 379*.

81. The Tribunal was invited to hold that after reviewing all the documents collated and using the fact-finding investigation and having read the Investigation Report and having considered the terms of the relevant policies and having held a Disciplinary Hearing with the claimant where he could articulate his position Mr McCutcheon did genuinely believe that the claimant had committed an act of gross misconduct.
82. Based on the information in front of him Mr McCutcheon did have a genuine and reasonable belief that the claimant had committed gross misconduct. The claimant was employed in a senior management role. He was aware of the policies and codes applying to him and the content of them. The claimant was aware that dishonesty constituted gross misconduct. The claimant confirmed in evidence that he was aware of a significant importance placed on the procurement within the respondent. The claimant knew that he was to report procurement irregularities which he was aware of to line management within the respondent.
83. Mr McCutcheon took into consideration that the claimant maintained that he was unaware of the procurement irregularities and the specifics of the Court case. However, Mr McCutcheon found that the claimant was being dishonest in relation to this and this constituted gross misconduct. It was reasonable for Mr McCutcheon to hold this view as the claimant had a phone call and e-mail correspondence with Ms Bell, the Solicitor representing McGivney Construction Ltd regarding the case. In addition, the claimant had received internal e-mail correspondence from Ms Craig and Mr Wilson regarding the case.
84. Furthermore, the claimant met with the Solicitor representing Mr Kaminski and Glen Maree Contracts Ltd just over a week prior to the start of the Court hearing. In addition, it was alleged by two employees independently of each other that the claimant had met with them where the procurement breach and court case were discussed in detail and the claimant had read the witness statement. Mr McCutcheon's evidence was that he believed that these meetings took place. As such Mr McCutcheon does have a genuine

and reasonable belief that the claimant as dishonest regarding his knowledge of the procurement irregularities and the details of the court case. Mr McCutcheon considered the seriousness of the dishonesty in the context of his job and role and the trust placed in him by the respondent and listened fully to the claimant's position.

5

85. On these grounds Mr McCutcheon had sufficient knowledge of the facts and issues in question to sustain a reasonable belief that the claimant was guilty of misconduct.

10

86. The respondent took as much investigation into the alleged misconduct as was reasonable and possible in all the circumstances. It carried out a full and thorough investigation. The respondent asked the claimant for his position at the Investigatory Interview, the Disciplinary Hearing and at the Appeal Hearing.

15

87. The degree of investigation required depends on the circumstances. The Court of Appeal in *Shresthe v Genesis Housing Association Ltd [2005]* EWCA Civ 94 made it clear that it is not necessary for an employer to extensively investigate each line of defence advanced by the employee. This would be too narrow an approach at the "unwarranted gloss" to the *Burchell* test. What is important is the reasonableness of the investigation.

20

88. In any event the disciplinary procedure complied with the ACAS code and the respondent's own disciplinary procedures and guidelines. The respondent informed the claimant of the allegations and he was aware that due to his suspension as a role as Senior Manager that the allegations amounted to gross misconduct. He was also aware due to his suspension that his role and the outcome could potentially be dismissal. He was informed that he could be accompanied. A further investigation was undertaken and a fair hearing took place to discuss matters. Any mitigating circumstances were considered. The claimant was made aware of the outcome in writing and he was provided with an opportunity for appeal. The respondent had reasonable grounds for believing the claimant was guilty of

30

gross misconduct having carried out as much investigation into the matter as was reasonable in the circumstances. The disciplinary procedure adopted by the respondent fell within the band of reasonable responses. It cannot be said that no reasonable employer would have adopted that disciplinary procedure. The dismissal was procedurally unfair.

5
89. In determining the fairness of the dismissal, the Tribunal was referred to the EAT's binding Judgment in *Western Recovery Services v Fisher [2010] UKEAT 0062/10*. That case is an authority for the proposition that dismissal on grounds of conduct will be fair provided the employer has a genuine and reasonable belief in the employee's guilt based on reasonable grounds and dismissal is within the band of reasonable responses. Accordingly, even if the Tribunal finds that the claimant's actions did not amount to gross misconduct justifying dismissal this did not necessarily render dismissal unfair.

10
90. If the respondent's primary submission is accepted the Tribunal does not need to consider remedy.

15
91. If the Tribunal decides the dismissal is unfair it is not just and equitable to make a basic award in the circumstances. The claimant's conduct leading to the dismissal was such that it was just and equitable to reduce the value of any award to which the claimant may be entitled to nil. The claimant is wholly or largely to blame for his dismissal. Turning to the compensatory award the claimant is seeking past and future losses of £33,037.65. The claimant has not provided any wage slips from his former or new employer or details of the start date and end date of his current or temporary role. The claimant confirmed on cross-examination his current or temporary role had been extended. No details of salary at the end of this role were supplied to the Tribunal. There is no evidence to accurately calculate the claimant's calculation of past and future loss.

20
25
30
92. About pension loss it is for the claimant to demonstrate his loss and no actual report has been produced. It is impossible to know what pension is

sought. Further the respondent cannot comment now if the substantial loss approach would be the most appropriate method given that the claimant is applying for roles within other Councils.

5 93. In any event if the Tribunal decides that the claimant's dismissal was unfair because of some form of procedure based on the evidence presented there is a 100 percent chance that the claimant would have been dismissed in any event had the correct procedure been followed. Accordingly, there should be 100 percent reduction in compensation.

10 94. The claimant would not have been dismissed had he escalated his knowledge of the procurement irregularities to the court case. The claimant is therefore wholly or largely to blame for his dismissal. The act of deliberately withholding the information was culpable or blameworthy. That conduct also contributed to the dismissal. It is just and equitable to reduce the award. The claimant's conduct was wholly or largely to blame for his
15 dismissal. It is open to the Tribunal to apply a percentage reduction in respect of *Polkey* and separately in respect of contributory conduct.

95. It is submitted that there has been no unfair dismissal and accordingly there should be no loss of statutory rights.

Submissions for the Claimant

20 96. The claimant has been unfairly dismissed under section 98 of the ERA as the respondent has failed to show that the reason for his dismissal had been reasonably established.

25 97. It is incumbent on the respondent to set out the alleged misconduct clearly and should throughout the disciplinary process be consistent in what it is accusing the claimant of. The disciplinary sanction imposed should be in respect of those allegations that were properly investigated and brought to the claimant's attention as part of the proceedings.

98. In this case the claimant faced five separate allegations for which no credible evidence of misconduct has been presented. The claimant has been dismissed for gross misconduct and the subsequent sixth allegation which only came to light in his dismissal letter and again for which no credible evidence has been presented.
99. This evidence is that the respondent has breached both its own disciplinary procedure and the basic elements of employment law. The respondent has conducted its own investigation into the facts. The severity of the allegation in no way equates to gross misconduct. Given the 31 years of local authority service there was no reasonable or logical analysis which considers dismissal for gross misconduct as a fair outcome in these circumstances.
100. The Tribunal was invited to the certain findings in fact.
101. The claimant received three letters which contained allegations against him. The first is production 128 (containing four allegations). During the investigation process a fifth allegation arose and was communicated to the claimant on 11 March 2016 in a letter from Mr Hatton (production 600) and again in a letter from Mr McCutcheon (production 608 to 609). None of these letters referred to allegations of gross misconduct only misconduct.
102. The five allegations were the basis upon which the claimant had to prepare his defence to the case. The claimant was not dismissed for any of those allegations provided to him before the Disciplinary Hearing but rather he was dismissed on grounds of dishonest behaviour. In cross-examination of each of the allegations shows that Mr McCutcheon has unreasonably and unfairly dismissed the claimant on grounds that were neither supported by the allegations or the evidence of the law. In the first allegation, it is alleged that the claimant took no action despite evidence to suggest that a clear insignificant breach of procurement regulations and financial standing orders – it is ambiguous that it is not clear whether the evidence suggested a breach of procurement regulations and standing orders whether the evidence was clear that there had been a breach of procurement

regulations. The respondent must have formed the view one way or the other during the investigation whether evidence suggested a breach or it was clear that there had been a breach. It must be “suggested”, it must be “clear” but it cannot be both.

5 103. Notwithstanding the ambiguity there is no explicit or implied suggestion that the claimant was dishonest contained within this allegation; this was again an allegation on a failure to act on the claimant’s part. In no way, can any alleged failure to act be construed as dishonest behaviour.

10 104. It would have been dishonest if the claimant had stated that he had acted when in fact he had not. However, this was neither alleged nor established in fact. In any case the claimant was not informed by Mr McCutcheon of his findings in respect of this allegation in the disciplinary hearing outcome letter (production 637 to 638).

15 105. About the second allegation which is like the first in that it is alleged the claimant failed to alert his line manager to a court case between two private companies because of this somehow prevented his employer from investigating fully the circumstances of the case in court to which the respondent was not a party. There is also an allegation that the claimant’s inaction did not allow his employer to manage any potential reputational damage arising from the proceedings between two private companies in a commercial dispute to which the respondent was not a party.

20

106. It is difficult to imagine the scenario where the claimant would have been aware of any risk to the respondent arising from court proceedings between two private companies in a commercial dispute to which the respondent was not a party.

25

107. Notwithstanding this alleged failure to alert his line manager to the Court Case this failure could not reasonably have been deemed to be dishonest. It would have been dishonest if the claimant had been asked by his line manager if there were any Court Cases that he should have been aware of just in case there was any potential reputational risk to the respondent and

30

the claimant had replied in the negative. However, the claimant was not dishonest by any stretch of the imagination. The failure to alert his manager was in his own evidence to the Tribunal because he just had not regarded the case as that significant. This does not constitute dishonesty.

5 108. Again, the claimant was not informed of Mr McCutcheon's findings to this allegation in a Dismissal Letter.

109. The third allegation against the claimant follows a similar pattern in that it is alleged the behaviour on the part of the claimant that he became involved in an influence to a witness statement with Mr Gooding. This allegation is not
10 one of dishonesty.

110. Mr McCutcheon stated on more than one occasion that it was not his place that the claimant influenced Mr Gooding's witness statement as it had remained unchanged. Mr McCutcheon did state that he believed that the claimant had attempted to influence Mr Gooding's witness statement but
15 had been unsuccessful.

111. It would seem highly unlikely that the claimant as a Senior Manager would seek to alter, effect or influence a member of staff he simply believed to be appearing in court as an expert witness in a procurement process. The claimant said it was reasonable for Mr Gooding to appear in court as an
20 expert witness because of his technical expertise and knowledge. The claimant believed Mr Gooding's appearance in court to be that of an expert witness in relation to the procurement process. If there had been any other issues that had been raised it would be reasonable to suggest that Mr Gooding and Mr Forsyth that it was reasonable for him to attend court and
25 there was no attempt at any point by Mr Forsyth to suggest that Mr Gooding should not do so only that he did not agree with the content of Mr Gooding's statement.

112. The claimant was not informed of Mr McCutcheon's findings in relation to this allegation in the Dismissal Letter.

113. The fourth allegation bears no relation to the reason for dismissal and does not directly allege any misconduct on the claimant's part and it is merely a statement of fact about the respondent's own view of shortcomings they perceived in its own processes and procedures. There was no suggestion to any state of dishonesty on the claimant's part regarding this allegation nor was there any evidence ever shown or reasonably established that the claimant had been dishonest about the process and management controls in place.
114. The claimant was not informed by Mr McCutcheon of his findings in relation to this allegation in the Dismissal Letter.
115. About the fifth allegation Mr McCutcheon gave evidence that he could not prove or disprove that the claimant had received gifts of hospitality that the claimant had been a guest at a charity golf event in which the claimant had paid for himself.
116. Given that the fifth allegation was not found against the claimant by Mr McCutcheon and that the claimant's honesty was not in question regarding the other four allegations, how the respondent reached the conclusion that the claimant should be dismissed for gross misconduct relating to dishonest behaviour is beyond logic.
117. Mr McCutcheon gave evidence regarding the Appeal Hearing and he recalls some discussion about the sixth allegation with the chair of the Appeal Hearing though his response was very vague. Ms Young when questioned on the same matter stated that she was clear that there was no discussion of a sixth allegation. The evidence of these two officers is contradictory. Mr Borthwick maintained throughout his evidence to the Tribunal that the claimant had been consistent in his position throughout the investigation and did not seem to change his story. This was not the case for Mr Gooding. The respondent has sought to create an elaborate pantomime for the Tribunal to distract from the fact that the allegations against the claimant do not relate substantively to honesty or otherwise. The decision to dismiss is a deviation

from the allegations which focuses solely on dishonest behaviour which was neither demonstrated by the claimant as supported by the evidence in his case.

- 5 118. The duty on the employer is summed up in *Gurnett v ASOS.com Ltd (Employment Tribunal 2010)*. From the outset, the employer must tell the employee of the possible outcome of the disciplinary action. To give them a fair chance of defending the allegation properly it should not come as a surprise to the employee later that dismissal is a possibility.
- 10 119. In a letter from Mr Hatton and Mr McCutcheon both stated that the claimant faced allegations of misconduct not gross misconduct.
120. The respondent's own disciplinary procedure makes a clear differentiation between the two and outlines the possible outcomes that employees could face.
- 15 121. It was unreasonable to expect the claimant would have understood that the letter containing allegations of misconduct could lead to dismissal and this was not the case in his experience.
- 20 122. Notwithstanding the short comings of the allegation the claimant was not informed that one of the potential outcomes was dismissal or indeed that there were any other possible outcomes. The respondent seeks to rely on the claimant's experience as a disciplinary chairperson. The claimant was not properly advised of the potential outcomes of his case.
- 25 123. The Tribunal was then referred to the breach by the respondent of his disciplinary policy, failing to review the claimant's suspension within fourteen days and every fourteen days thereafter in speaking to the claimant about his continuing suspension. This is to ensure that no member of staff is suspended and forgotten about.
124. The claimant's position that despite being suspended on 15 January 2016 until the Disciplinary Hearing the respondent did not review the period of the

claimant's suspension and that other than a brief telephone contact there were no intents by the respondent to speak to the claimant or review his suspension. The respondent did not fulfill his duty of care to the claimant to enquire after his wellbeing despite his suspension lasting nearly four months.

5

125. Mr McCutcheon described the claimant as being vague about emails and meetings which took place over three years ago. Despite being a Senior Manager with operational responsibilities Ms Young was vague and evasive during cross-examination regarding her understanding of HR policies which were well within her sphere of experience. The claimant was not spoken to in relation to his suspension or written to using the standard template then there is a risk that employees who are suspended for considerable periods contrary to best practice are forgotten about. It was therefore reasonable for the claimant to believe that the terms of his suspension remained unchanged and this was a further breach by the respondent.

10

15

126. The respondent also clearly impacted the claimant's ability to exercise his statutory duty to be accompanied during the disciplinary process due to the explicit terms set out in Mr Hatton's letter of suspension. The claimant was unable to take use or advantage of his statutory right to be accompanied he was not allowed to contact any work colleagues. This effectively ruled out his capacity to choose to have a colleague of his choosing to accompany him at the Disciplinary Hearing. The claimant was not a trade union member and therefore was unable to access that support either.

20

127. The claimant made a reasonable request to have Mr Devine represent or accompany him at the Disciplinary Hearing. A request was also made at the Disciplinary Appeal Hearing and was refused.

25

128. Unfortunately, the Disciplinary Hearing did not meet the legal terms of the respondent's disciplinary policy and did not give due consideration to the incompatible nature of the claimant's suspension letter. The respondent failed to consider whether it placed the claimant in a position where he was

30

unable to be represented because of their unwillingness to consider a reasonable request to allow the claimant's representative of his choosing to represent him.

- 5 129. The respondent's adherence to the literal terms that the employer should do nothing to seriously damage their relationship of trust and confidence without good and sufficient reason and this subjected the claimant to an unfair hearing.
130. The Tribunal was requested to take time to consider the Judgment in *Stevens v University of Birmingham*.
- 10 131. It was not good enough for the respondent to show that the reason for dismissal was a potentially fair reason. The Tribunal must decide in the circumstances the decision to dismiss was fair, taking account of the reasons for the claimant's dismissal. The Tribunal was referred to the statutory test.
- 15 132. The substantive case against the claimant has been exaggerated by the respondent. It was evident by the size of the productions that had been produced.
- 20 133. The respondent relied upon an unsigned typed statement from Mr Gooding to corroborate his statement of Mr Forsyth. There was no evidence that Mr Gooding made any of the comments contained in the statement attributed to him. The respondent already had demonstrated a cavalier approach to the truth in this case specifically regarding the support provided to the claimant during his suspension.
- 25 134. The trust and confidence that the claimant should reasonably expect from his employer had been seriously damaged under several occasions throughout his employment. The respondent has sought to bring this case to an Employment Tribunal without any attempt to conciliate through ACAS. In a determined effort on the part of the respondent to impact the reputation of

a trusted senior manager based on the weakest of cases, contrived evidence and failed to support the claimant throughout the process.

135. The respondent has failed to establish that the reason for dismissal bears any real relationship to the allegations made against him given his role and service at the outcome of dismissal in these circumstances was not reasonable.
136. The respondent has shown scant regard for the ACAS Code of Practice and similarly their own policies and procedure and standard letters. Ms Young gave vague responses in relation to the respondent's duties and its own policy regarding suspension of employees. She went as far as to explain that although the policy states that managers must speak to a person who is suspended and then confirm in writing there was a fine line between writing to someone and harassing them. It is reasonable that if writing to suspended staff members it is for such a serious issue.
137. The respondent failed to establish reasons for dismissing the claimant in fair and reasonable circumstances. The claimant's position was consistent and reasonable given the circumstances of the case. The respondent has sought to demonstrate its own misbehaviour on the claimant's part but if there is no evidence of dishonesty and simply seeks to suggest that because of the claimant's evidence does not suit the respondent's narrative the claimant must therefore be dishonest. There was a rash judgment in this case and the respondent had to effectively decide to only investigate the version of events put forward by Mr Forsyth who was involved in the procurement irregularities directly but he was not suspended in the same way as the claimant and therefore the claimant was not treated consistently.

Deliberations

138. The Tribunal referred to section 98(1) of the ERA. It provides that the respondent must show the reason for the dismissal and that it was for one of the potentially fair reasons set out in section 98(2). At this stage the Tribunal noted that it was not considering the question of reasonableness.

139. The Tribunal asked whether the respondent had shown the reason for the claimant's dismissal. The respondent admitted that the reason for dismissal was the claimant's misconduct – a potentially fair reason under section 98(2)(b). The claimant accepted that conduct had been a reason for his dismissal.
140. The Tribunal then referred to the case of *British Homes Stores v Burchell (above)* where the Employment Appeal Tribunal held that in cases of alleged misconduct an employer must show that (i) he believed the employee was guilty of misconduct; (ii) he had in his mind reasonable grounds to sustain that belief and (iii) at the stage he formed that belief on those grounds he had carried out as much investigation was reasonable in all the circumstances of the case. The *Burchell* test was approved by the Court of Appeal in the case *Foley v Post Office [2000] IRLR 827*.
141. Mr McCutcheon confirmed his belief that:
- a. the claimant was aware of the procurement breaches and the Court Case and that he decided not to escalate the matter to his line manager. Mr McCutcheon believed that this was dishonest as the claimant had denied this when repeatedly asked.
 - b. The claimant had seen Mr Gooding's witness statement and had taken it home over the weekend. The claimant denied that. Again, Mr McCutcheon believed that the claimant was being dishonest.
 - c. The claimant had not influenced the preparation of Mr Gooding's witness statement.
 - d. There were insufficient processes in place as Mr Gooding had not followed the procurement procedures.
 - e. The claimant had not breached the respondent's Code of Conduct in relation to receipts of gifts and hospitality.
142. The claimant's conduct was the reason why Mr McCutcheon dismissed the claimant. The Tribunal was satisfied that the respondent had shown the reason for the dismissal was conduct. The Tribunal therefore concluded that

the respondent was successful in establishing that the dismissal was for a potentially fair reason.

5 143. The Tribunal referred to section 98 of the ERA and section 98(4). It noted that it had determine whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, and the answer to that question depends upon whether, in the circumstances (including the size and administrative resources of the employers' undertaking) the employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee; and this should be determined in accordance with equity and the
10 substantial merits of the case.

144. The Tribunal moved onto consider the reasonableness of the respondent's conduct. The Tribunal noted that it must not substitute its own decision as to what the right course to adopt for that with the respondent.

15 145. The Tribunal applied the range of reasonable responses approach to whether the respondent had carried out a reasonable investigation and had reasonable grounds for its belief that the claimant was aware of the procurement breaches and the Court Case, he had seen Mr Gooding's witness statement and that the claimant decided not to escalate the matter to his line manager.

20 146. The Tribunal turned to consider the investigation in this case. Mr Bothwick had prepared an investigation report in respect of Mr Gooding's conduct in which Mr Bothwick recommended that the claimant be interviewed regarding the allegations from Mr Gooding and Mr Forsyth that the claimant was aware of the procurement irregularities and the Court Case. There was no
25 suggestion that Mr Bothwick had any issue with the claimant. Mr Hatton appointed Mr Borthwick to carry out the investigation to maintain consistency. The Tribunal considered that this was an entirely reasonable approach.

30 147. The invitation to the Investigatory Interview outlined the allegations. The allegations were put to the claimant at the Investigatory Interview and he

was given the opportunity to give his explanation. The claimant denied that (a) he had seen Mr Gooding's witness statement and (b) meetings took place on 9 and 12 May 2014. The claimant admitted that (a) he had a telephone call with the solicitor initially acting for McGivney Construction Ltd, and that the claimant had provided her with information regarding the contracts awarded to that company; and (b) he had met with the lawyer representing Mr Kaminski and Glen Maree Contract Ltd. The claimant had not responded to emails from the respondent's Internal Legal Department regarding the same case as he had been on holiday when they were sent; he did not make the connection between the correspondence with the solicitor for McGivney Construction Ltd; he thought they had been dealt with and he did not consider them to be a priority. The claimant maintained that he did not know about the procurement irregularities and did not know the specifics about the Court Case.

148. Mr Borthwick re-interviewed Mr Forsyth and other colleagues in the claimant's team. He did not re-interview Mr Gooding as he was no longer an employee. While the Tribunal accepted that Mr Bothwick could still have contacted Mr Gooding, the Tribunal considered that it was reasonable for him not to do so giving that it was unlikely that his position would have changed or his recollection would have improved.

149. Although the Investigation Report was passed to Mr Hatton who concluded that there was a case to answer he did not carry out any further investigation.

150. The investigation continued throughout the Disciplinary Hearing with Mr McCutcheon. The Tribunal turned to consider the investigation undertaken by him.

151. At the Disciplinary Hearing the claimant's position was he did not connect the emails as being about the same case and that he assumed that the matter had been dealt with as he was on holiday. he denied meetings took place on 9 and 12 May 2014. He also denied that he took Mr Gooding's witness statement home to read. The claimant was evasive regarding his friendship with Mr McGivney. The claimant confirmed that he did meet the

lawyer representing Glen Maree Contracts Ltd in February 2014. He said that this was only a discussion about general procurement procedures.

5 152. The Disciplinary Hearing was adjourned. Mr McCutcheon did not find the claimant's position to be credible particularly in relation to the significance of the correspondence from Ms Bell and the fact that he did not link this with the email that were received from Ms Craig and Mr Wilson some six weeks later relating to the same Court Case. While the Tribunal could understand that having been on holiday the claimant would have been preoccupied with dealing with matters that required his immediate attention the Tribunal did not consider that it was unreasonable for Mr McCutcheon to be doubtful of this given the nature of the claimant's relationship with Mr McGivney (about which he was being surprising evasive) and information that had previously been requested by Ms Bell.

15 153. The claimant continued to deny that he attended meetings with Mr Gooding and Mr Forsyth in May 2014. Mr McCutcheon made no further enquiries of Mr Gooding. However, for the reasons stated above the Tribunal did not consider that it was unreasonable for him not to do so. Mr McCutcheon had to reach a conclusion on which version of event he preferred. The Tribunal did not consider that it was unreasonable for him to reach a conclusion based on the information before him.

20 154. The claimant accepted that he met with the solicitor from Glen Maree Contracts Ltd in February 2014 but maintained that related to the general procurement procedures. Mr McCutcheon could have spoken to the solicitor concerned but did not do so. The Tribunal did not consider that this was unreasonable especially as the claimant did not suggest it and Mr McCutcheon would be making enquiries of a third party about a meeting that had taken place a year previously.

25 155. Mr McCutcheon did not believe the claimant when he said that the meetings did not take place on 9 May and 12 May 2014. While McCutcheon acknowledged that Mr Gooding did not provide dates of the meetings he had confirmed that there was one. Further Mr McCutcheon believed having two

individuals confirm independently of each other that it took place and that the claimant was present suggested it was more likely than not that a meeting had taken place. Further, Mr McCutcheon did not believe that the discussion with the solicitor for Glen Maree Ltd was about general procurement procedure. By this stage the Court hearing was imminent and the claimant had spoken to Mr Forsyth beforehand. It therefore seemed more likely to Mr McCutcheon that meeting was about procurement irregularities rather than about general procurement procedure.

5
10
15
156. The Tribunal turned to consider what Mr McCutcheon and whether he had reasonable grounds for so doing that was based on the investigation that had taken place. Mr McCutcheon believed that the claimant was aware of the procurement breaches and the Court Case; that he decided not to escalate the matter to his line manager; and deliberately did not do so. Mr McCutcheon believed that the claimant had seen Mr Gooding's witness statement and had taken it home over the weekend. The claimant had denied all of this when repeatedly asked. Accordingly, Mr McCutcheon believed that the claimant was dishonest.

20
25
30
157. The Tribunal considered in relation the claimant's awareness of the procurement irregularities and the Court Case and deliberateness or otherwise of not escalating the matter much rested on whether it was reasonable for Mr McCutcheon to believe what was said by Mr Gooding and Mr Forsyth rather than the claimant's position. As indicated above the Tribunal did not consider that there was any further investigation that Mr McCutcheon could make in respect of these issues. Mr McCutcheon formed his view based on the statements provided during Mr Bothwick's investigations. There was no evidence to suggest that there was collusion by Mr Gooding and Mr Forsyth. Neither were seeking to absolve themselves of blame or responsibility for their involvement. There was no benefit in Mr Gooding involving the claimant and Mr Gooding's position was broadly consistent with that of Mr Forsyth. There was no apparent reason why Mr Forsyth would not have raised the matter with the claimant; while he was Mr Gooding's line manager he was not involved in award the contract or giving

evidence in the Court proceedings. The Tribunal therefore concluded that there were reasonable grounds for Mr McCutcheon believe that the claimant was aware of the procurement irregularities and the Court Case.

5 158. For the reason stated above the Tribunal considered that it was reasonable for Mr McCutcheon to prefer what was said by Mr Gooding and Mr Forsyth and to believe that the claimant had seen Mr Gooding's witness statement.

10 159. Mr McCutcheon also believed that the claimant deliberately did not escalate the matter. The Tribunal considered that in the summer of 2013 the claimant adopted a casual approach to the exchange of email and might not have appreciated the significance of the Court Case. However, by May 2014 and certainly by the February 2015 the claimant's cavalier attitude to the Court Case and failure to escalate the matter is difficult to understand. The Tribunal felt that it was reasonable for Mr McCutcheon to believe that the claimant made a deliberate choice not to having previously proceeded on the basis that it would settle.

15

160. Having reached the conclusions which, he did the Tribunal considered that it was reasonable for Mr McCutcheon to believe that the claimant was being dishonest as he had consistently denied what was alleged by Mr Gooding and Mr Forsyth.

20 161. It was suggested that the allegation of being dishonest was a "sixth allegation" about which the claimant had no knowledge until he was dismissed. The Tribunal considered that to have alleged that the claimant was being dishonest before Investigatory Interview and Disciplinary Hearing would have been prejudging the matter. The dishonesty related to the position he adopted immediately before and during the internal proceedings.

25

There was no suggestion or belief that the claimant was dishonest in relation to the procurement irregularities or the Court Case.

162. The Tribunal acknowledged that while other employers may have acted differently it could not conclude that the investigation carried out by the

respondent did not fall within a reasonable band of responses to the situation.

5 163. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.

10 164. The Tribunal found that considering the investigation report following the investigatory interview into Mr Gooding's conduct Mr Hatton instructed Mr Bothwick to interview the claimant about certain allegations that had been made. The Tribunal considered that given the claimant's seniority, the seriousness of the allegations which would involve interviewing his team, it was understandable that the claimant was suspended pending the outcome of the investigation. While the Tribunal accepted that the length of the suspension should be kept to a minimum, there was no evidence that the investigation was unnecessarily delayed. The Tribunal appreciated that the respondent did not formally review the suspension every 14 days. However, 15 the claimant was aware that he continued to be on suspension; the investigation was on going; and he was receiving pay. The claimant had a HR contact but chose not to make contact. The claimant was a senior employee who was familiar with the respondent's disciplinary policy.

20 165. During the suspension, the claimant attended the Investigatory Interview. He was aware of the allegations made against him; offered access to the respondent's disciplinary procedures and informed that he could be accompanied.

25 166. The delay in holding the Disciplinary Hearing was due to the claimant raising a grievance about Mr Hatton's appointment as chairperson. Ms Murray agreed to Mr McCutcheon chairing the Disciplinary Hearing. Mr McCutcheon had no previous involvement.

30 167. The Tribunal acknowledged that neither invitation to the Disciplinary Hearing stated expressly that the outcome could be dismissal. The Tribunal was satisfied that this was an administrative oversight. The Tribunal reached this conclusion because everyone was content to proceed with the Disciplinary

Hearing albeit that they knew of the omission in the letters. The Tribunal had no doubt, given the claimant's experience of conducting disciplinary hearings that had claimant genuinely believed dismissal was not an option he would have sought a postponement. Further although the claimant said in his grounds of appeal that had he known he would have answered differently the Tribunal thought this unlikely given the claimant's position at the Appeal Hearing and the Tribunal Hearing. The claimant was offered the right of appeal which he exercised.

5
10
15
168. The Tribunal accepted that the claimant was unaccompanied at the Investigatory Interview and Disciplinary Hearing. This was his choice. While the Tribunal noted that the claimant asked for Mr Devine to be present at the Appeal Hearing and this was refused, the Tribunal considered that the respondent was entitled to do so and in any event reached a compromise to ensure that the claimant could speak to his adviser when he wanted to do so.

169. The claimant was aware of the allegations against him at each stage of the proceedings. He was given an opportunity to respond to these allegations. The Tribunal considered that it was unfortunate that Mr McCutcheon did not set out his reasoning in the Dismissal Letter. The Tribunal was satisfied that Mr McCutcheon considered each allegation carefully and did not consider that all the allegations had been substantiated.

170. The Tribunal considered that facts which lead Mr McCutcheon dismissing the claimant. The Tribunal focused the nature and quality of claimant's conduct and how it impacted on the sustainability of the employment relationship. The respondent believed that the claimant knew about the procurement irregularities and the Court Case and deliberately chose not to escalate the matter. The claimant was a senior manager with significant line management responsibilities and represented the respondent at a high level. He was aware of the importance of procurement procedures. He did not consider certain matters to be a priority and appeared indifferent to the respondent's situation when the Judgment was issued. Mr McCutcheon also disbelieved the claimant's position during the disciplinary process. This was

not a situation where employees had a different perception of events; they had different versions and therefore believing one version meant that the other was being untruthful. Having reached the conclusion that the claimant was being untruthful the Tribunal could understand why Mr McCutcheon felt that the trust and confidence he had in the claimant had been lost given the nature of his role within the Respondent and the duties with which he was entrusted.

5
171. The Tribunal could not conclude that considering the evidence that no reasonable employer would dismiss such an employee in a position of trust and responsibility. The Tribunal concluded that Mr McCutcheon's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

10
172. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process.

15
173. The Tribunal was satisfied that the claimant was given an opportunity to expand on his grounds of appeal at the Appeal Hearing. The grounds focused on procedure. There was no new evidence. The Tribunal was satisfied that the respondent had carried out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage.

20
174. The Tribunal concluded that the dismissal was fair. Having reached this conclusion, the Tribunal did not consider it necessary to go onto determine the question of remedy.

175. The Tribunal therefore dismissed the claimant's claim for unfair dismissal.

Employment Judge: Shona MacLean

Date of Judgment: 27 March 2017

Entered in register: 29 March 2017

5 and copied to parties