THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Morrice	**AND**	**Royal Mail Group Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Teesside ON: 24,25,26 and 27 July 2017

EMPLOYMENT JUDGE Shepherd

Appearances
For the Claimant: Mr Morgan
For the Respondent: Mr Hutchinson

RESERVED JUDGMENT

1. The claim of unfair dismissal is well-founded and succeeds.

2. The total award for unfair dismissal is £2,966.41. The prescribed element is £917.11 and the balance of the unfair dismissal award is £2,049.30.
3. The Employment Protection (Recoupment of Income Support and Jobseekers Allowance) Regulations 1996 apply and their effect is set out in the Annex to this Judgment. The prescribed period is from 1 June 2016 to 27 July 2017.

4. No order is made in respect of Tribunal fees paid. The parties have liberty to apply in this regard.

REASONS

1. The claimant was represented by Mr Morgan and the respondent was represented by Mr Hutchinson.

2. I heard evidence from:

   Julie Fisher, Independent Casework Manager
   Mark Morrice, the claimant

3. I had sight of a bundle of documents in two lever arch files which, including documents added during the course of the hearing, was numbered up to page 594.I considered those documents to which I was referred by the parties.

4. The issues to be considered were agreed to be as follows:

   4.1. The claimant was summarily dismissed from his employment with the respondent on 1 July 2016. The claimant alleges his dismissal was unfair.

   4.2. Was the claimant dismissed for a potentially fair reason for dismissal, specifically;

   Conduct: s 98(1) & (2) (b) of the Employment Rights Act 1996?

   4.3. Whether the respondent acted reasonably in dismissing the claimant for his conduct having regard to all the circumstances, including the size and administrative resources of the respondent's undertaking and in accordance with equity and the substantial merits of the case.

   4.4. In determining whether the dismissal is fair when an employee has committed an act of misconduct the Tribunal must have regard to **British Home Stores v Burchell [IRLR] 379 EAT:**

   i) Did the respondent have genuine belief in the misconduct?

   ii) Did the respondent have reasonable grounds upon which to sustain the belief that the employee was guilty of misconduct?

   iii) Had the respondent carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

   4.5. In determining whether the dismissal was fair the Tribunal will consider whether:

   i) The respondent followed a fair procedure overall?

   ii) The respondent's decision came within the range of reasonable responses by a reasonable employer acting reasonably. The Tribunal cannot substitute its own view (**Iceland Frozen Foods v Jones [1982] IRLR 439 EAT**)

4.6. This test applies to both the decision to dismiss and to the procedure by which that decision is reached (**Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23**) this means that the Tribunal has to decide whether the investigation was reasonable, not whether it would have investigated things differently.

4.7. If the Tribunal determines that the respondent failed to follow a fair procedure, it should consider whether it should reduce the compensation to the claimant if the Tribunal finds that the dismissal would have occurred even if the respondent had followed a fair procedure, and by what amount. **Polkey –v – A E Dayton Service Limited 1988 ICR 142**

4.8. If the Tribunal finds that the dismissal was to any extent caused by or contributed to by any action of the claimant, what reduction of the compensation award should be made s 123 (6) Employment Rights Act 1996.

Findings of fact

5. Having considered all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings I made from which I drew my conclusions.

6. The claimant was employed by the respondent from 7 December 1995. He undertook the role of Delivery Office Manager (DOM) Support from 2014. Part of his duties included the inputting of overtime payments on the respondent's payroll system for members of staff.

7. On 15 June 2015, the claimant submitted a grievance in respect of issues including that of timekeeping.

8. On 1 October 2015, the claimant was interviewed by the Royal Mail Security Team following information received from local management at the Richmond Delivery Office in relation to unauthorised overtime payments relating to the claimant and another member of staff, Anthony Samways.

9. The investigation report from the Security Team provides as follows:

> "Following receipt of this information and after further enquiries conducted by this department it was established that on numerous occasions between 31 March 2014 and 13 August 2015 overtime payments had been made to Mr Morrice and Mr Samways which had not been identified in the office overtime record and which had not been authorised by local management. From 30 March 2015 until 13 August 2015 alone it was established that there had been a total of 82 overtime payments made to Mr Morrice which had not been authorised and which had not been inputted into the office overtime record which is where overtime is detailed and authorised by local management.

> In total Mr Morrice has been paid £3,283.57 for overtime that was not detailed on the office overtime record which has not been authorised by local management and for where there is no evidence that this overtime has been performed.
>
> It was also established that overtime payments were being made to Mr Morrice for times when the office alarm time showed that the Delivery Office was closed and the alarm set as well as for periods within Mr Morrice's duty times.
>
> It should be noted that Mr Morrice's duties include the inputting of overtime payments to the PSP system for staff which has been detailed on the office overtime records and authorised by a manager. Mr Morrice uses the account of a former Delivery Office Assistant and as a result is able to authorise his own overtime payments."

10. The claimant was suspended on 2 October 2015.

11. On 6 October 2015, the claimant attended a fact-finding interview with Darren Kidman, the manager assigned to investigate the alleged conduct issue concerning overtime payments made to the claimant and Mr Samways between 31 March 2014 and 13 August 2015.

12. Darren Kidman was the claimant's line manager and, following a Communication Workers Union (CWU) request, John Small was appointed as an independent manager to deal with the case. The claimant attended a further fact-finding interview with John Small on 4 December 2015.

13. During December 2015 and January 2016 John Small carried out interviews with a number of other employees.

14. On 11 January 2016 John Small wrote to the claimant indicating that the case had been referred to Simon Kelly for consideration of any further action and it was indicated that Mr Small considered the potential penalty to be outside his level of authority.

15. On 5 May 2016, the claimant attended a formal conduct interview with Simon Kerry. The meeting was adjourned and reconvened on 11 May 2016.

16. Simon Kerry carried out further investigations and on 26 May 2016 he sent copies of interview notes to the claimant indicating the relevance of those interview notes and asking the claimant for his comments on the additional evidence.

17. On 29 May 2016, the claimant wrote to Simon Kerry providing lengthy responses to the additional witness statements and requesting additional information and documents.

18. On 17 June 2016 Simon Kerry wrote to the claimant enclosing details of new evidence. The claimant responded on 18 June 2016 indicating that he did not

regard this as new evidence. The claimant also indicated that he was surprised that Simon Kerry had not challenge the managers and referred to all of his requests being ignored.

19. On 28 June 2016 Simon Kerry wrote to the claimant indicating that he had finished his investigation and inviting the claimant to a meeting to discuss his decision on 1 July 2016.

20. Simon Kerry provided a document setting out his deliberations and conclusions. The conclusions were set out in a letter provided to the claimant. This is a lengthy document and the conclusions were set out as follows :

> "This has been an extremely lengthy case compounded by the fact that Mr Morrice has raised a great deal of issues as mitigation for his actions or lack of them.
>
> I have carefully read the case papers leading up to the charge interview and considered what Mr Morrice said at interview and have completed further investigations that I saw appropriate and had interviews with his previous managers. I have also listened to the five CDs that represent the detail of his interview under caution with the investigations department and have spoken to them around this case. I have also had access to his messages from his mobile telephone.
>
> All the issues he has raised are an attempt to distract from the real and important issue that he has claimed overtime between 31 March 2014 and 13 August 2015 without the authorisation or even knowledge of his line managers. Mr Morrice has used the temporary managerial cover during 2014 – 2015 to assist him in his indiscretions and he has used this to his advantage in my belief.
>
> Mr Morrice made great emphasis that he had never been told he had to complete the office overtime recording sheet or P552 when claiming overtime and showed some remorse for this. Notwithstanding this he had placed some of his overtime on this sheet and had brought it to the attention of managers when other staff had not done so. This system has been in place with the business for a very long time and I do not accept this as mitigation for his actions. I also do not accept that he didn't have access to the sheet as it was locked away as he, himself, would input the data the very next day. He stated that staff claimed on pieces of card are also unfounded from when other staff members were questioned, with the exception of when they were off the following day.
>
> Mr Morrice claimed that a large number of claims by staff throughout Richmond would not be found on P552 and stated that he was being singled out. The investigations department looked at names he had mentioned and did not find many discrepancies to support this.

Mr Morrice's lack of training is also not accepted as mitigation as he had been doing the role for a fair period of time and worked in the same room as his managers who could support him if he was unsure. He was able to conceal his false claims for over a year which supports he knew his way around the systems.

Mr Morrice would input these figures into the RCS system and then PSP through V– pay and knew if these figures matched a sunrise gap would not occur and raise suspicions. It did raise suspicion when a permanent manager was recruited and discovered that despite absorbing workload within the office the hours continued to get spent elsewhere.

This elsewhere was Mr Morrice claiming for lock-up when his duty had been revised to incorporate this in his existing attendance time. He made great play on a long list of tasks he had to endure during the lock-up process when this was already built into his duty. None of the managers, both old and new, deputy or substantive were even aware that Mr Morrice had been claiming overtime to this extent and were even more surprised in terms of what he claimed he had been doing. On none of these occasions had Mr Morrice gained authorisation for this overtime as the managers had no knowledge of it. Mr Morrice was unable to give the names of managers authorising this overtime and as there are no records could not give the exact detail on what he had been doing on a given day.

As Mr Morrice was using the previous DOM support login he could input his own overtime into the system to get paid. This didn't raise any concerns with local management as they didn't expect him to be working any overtime in the first place. He was given authorisation to gain his own account but I believe he deliberately failed to chase this up so he could continue to fraudulently claim this overtime. The DOM support role is one of considerable trust which Mr Morrice has clearly taken advantage of.

It was also clear within his text messaging that he was providing a Mr Samways with lock-up overtime and even on an occasion gave him this work when he was on sick leave claiming it when he returned to normal duties. This is also a clear breach of health and safety and on top of this he lied by stating a manager had told him to do this.

I believe it is Mr Morrice's integrity and not that of the managers he has worked with that has come into question. I believe Mr Morrice has continued to lie throughout this case and he has been unable to answer the simple questions when asked directly "Who authorised this overtime and what were you doing". This is simply because he did not work it and he has claimed it and knowingly concealed it from his managers.

> Mr Morrice has failed to show any remorse for his deceitful completion of false overtime claims and has not been open or honest from the start of the investigations and while considering if a lesser penalty would be warranted I feel that his actions and mitigation do not outweigh the seriousness of the breach of conduct in this case not to mention the lack of trust and his integrity coming into question.
>
> Decision
>
> The Royal Mail code of business standards state that departure from established standards or integrity may expose you to action under the conduct code which in cases of gross misconduct could result in dismissal, and in serious cases may also amount to a criminal offence.
>
> Royal Mail has a responsibility in delivering mail on a daily basis to customers and depends on the reliability and professionalism of its workforce in terms of conduct. This is why they have an agreement with the CWU representing the majority of its staff about standards of conduct required. Theft is classed as gross misconduct and this has amounted to a total of 82 overtime payments made to Mr Morrice which totalled £3,283.57 that was not detailed in the office overtime record or authorised by local management and as such there is no evidence that this overtime was performed.
>
> I believe Mr Morrice's actions and breaches of conduct amount to summary dismissal and his last day of service is 1 July 2016."

21. The claimant appealed against his dismissal and Julie Fisher was appointed as the Appeals Manager. The appeal hearing took place on 9 August 2016. The meeting was adjourned and reconvened on 16 August 2016.

22. The claimant provided a document setting out points that he indicated that he would like to be noted and requiring a response in writing. This was a lengthy document setting out 39 points. He raised, among other things, that he had asked for clarification of the allegations that had been established that there were total of 82 overtime payments which had not been authorised. He said that he had been told by Mr Kerry that they would go through all the 82 times but this never materialised. There had been no interview with Mr Samways. Documentation he had requested had been deemed irrelevant. Evidence offered by the claimant had been refused and there was inadequate investigation in respect of the procedures and the basis on which overtime was authorised. The claimant said that he had not received answers to questions and the lack of investigation was unfair and biased. No criminal charges had been brought and the Investigation Branch had failed to disclose information. The claimant found the fact that Mr Kerry believed that he was attempting to 'muddy the waters' was offensive. The claimant said that he had been singled out and a proper and fair investigation had not been carried out.

23. On 7 October 2016 Julie Fisher wrote to the claimant indicating that she had carefully considered the appeal that had been presented on 9 and 16 August

2016. She had completed her rehearing of the case and given full consideration to everything that was put forward at the appeal meetings. She concluded that,

> "In the light of all the evidence, my decision is that you have been treated fairly and reasonably and therefore I believe that the original decision of dismissal with notice(sic) is appropriate in this case."

A document explaining the reasons for the decision was attached to the letter.

24. In the Appeal Decision Document Julie Fisher set out the background to the case and her deliberations. It was noted that Simon Kerry's view was that the claimant was "attempting to form a smokescreen with his request for further information and his points of mitigation". Julie Fisher said that she agreed with this view. She had decided to "take a step back and consider the background and the available evidence as the case, in simple terms, is that it was believed that the claimant had been paying himself and Mr Samways overtime that had not been authorised i.e. making fraudulent overtime payments over a period of time."

25. It was indicated that the case had come about as a result of a new manager at the Richmond delivery office, Darren Kidman

> "lapsing duties and yet his hours spend was not reducing and on looking into it he became suspicious of payments made to Mark Morrice and Anthony Samways."

26. I was informed that "lapse in duties" refers to duties being carried by employees already at work rather than bringing others in to cover those duties.

27. Mr Kidman had contacted the internal security team and they conducted investigations and Mr Kidman and another manager, Kenny Patterson had observed when the claimant was finishing and what overtime was being input by the claimant for himself and Anthony Samways. Payments had not been recorded on the office 552 forms. The claimant had raised issues regarding the fact that there had been the reference to 82 payments between March 2014 and August 2015 but no dates or other specifics of the charges had been provided.

28. Julie Fisher stated:

> "What I believe is important to consider is that no matter whether it had been one occasion, making fraudulent overtime payments is dishonest and I believe there is clear evidence within the case papers that on more than one occasion Mr Morrice had paid overtime to himself and Mr Samways knowing the overtime hours he was paying had not been authorised or indeed worked and this is a fraudulent and dishonest act.
>
> The examples I intend to focus on within the case files are as follows:
>
> "Page 320 of the bundle shows that on 12 May 2015 Mr Morrice was on annual leave and yet two hours overtime was input for that day on 18 May 2015 as seen at page 332 – record of PSP input.

> Page 321 of the bundle shows that on 26 June 2015 Mr Morrice was on annual leave and yet one hours overtime was input for that day on 27 June 2015 as seen at page 333 – record of PSP input.
>
> Page 323 of the bundle shows that on 9 July 2015 Mr Morrice was on annual leave and yet 1.67 hours of overtime was input for that day on 13 July 2015 as seen on page 333 – record of PSP input."

29. Julie Fisher's Appeal Decision Document went on to go through diary entries in which managers had observed the claimant and compared his finish times against the overtime hours claimed.

30. The document also referred to transcripts of text messages between the claimant and Mr Samways and these are quoted as follows:

> "Only 1 left puf, so will take you 15 minutes to lock up Max. Put you down for 2 hours as you came in for your Mate Brookes"
>
> "All yours mate, no need to put it down put it on the system for you already!"
> "How much for yesterday and still okay for today?" – And Mr Samways replies "one and okay for today" and Mr Morrice responds with "Put you in for 1 and a half, will leave it at that, because I love ya"
>
> "Put you down for two hours mate because I love ya!"
> "I know you're on the sick, but could you lock up tonight and will put it down as Docket tomorrow? Going out to do a couple of hours on Barton later." Mr Morrice later messages "so none can see you".

31. Julie Fisher concluded that these transcripts of text messages were also very damning and showed a clear intent on the part of Mr Morrice to make payments to Mr Samways that were not authorised and clearly fraudulent.

32. In her conclusions, Julie Fisher stated:

> "I have looked at the case independently of the decision made by Simon Kerry and clearly this has not been a straightforward case and has far-reaching consequences for Mr Morrice. I am also aware of the prolonged period of time the case had gone on for and although this was not ideal I do appreciate the amount of information involved and clearly Mr Morrice had been paid throughout this time and the decision had not been rushed to avoid paying him further unnecessarily. I do understand the seriousness of the situation facing Mr Morrice if he loses his employment, but I also have to consider this question from the employer's perspective in order to come to a balanced conclusion.
>
> I have deliberated at length and considered the points of mitigation that were raised during the case and the fact that in essence Mr Morrice had claimed he was the victim of poor processes and controls within

the office; however I do not believe that I was offered any new evidence to change the circumstances of the case or the application of the penalty. I believe Mr Morrice was guilty of the charges against him and that he had been making false and unauthorised payments to both himself and Mr Samways over a long period of time and therefore these payments were fraudulent. These are extremely serious charges and clearly a fundamental factor must be Mr Morrice's honesty and integrity and in this respect given the evidence available to me, on balance I believe Mr Morrice is guilty of the charge against him and has taken advantage of the trust placed in him in the DOM support role.

I have noted Mr Morrice's length of service and his clear conduct record and I feel that these have been given due consideration, however it must also be recognised that Royal Mail must be able to trust that staff at all levels can be relied upon to undertake their duties appropriately and honestly. I believe the actions of Mr Morrice in paying both himself and Mr Samways for overtime not authorised or worked has breached that trust and has caused a breakdown of trust between Royal mail and Mr Morrice.

Decision

After careful consideration of all the available evidence and comment, the appeal was concluded on 6 October 2016.

I have considered whether a lesser penalty is appropriate, however I believe that on the evidence available to me that a dismissal award is within the band of reasonable responses in the circumstances and do not believe it is appropriate to offset this in the light of the mitigation put forward at appeal. On the balance of evidence I believe Mr Morrice has not been honest in his role as DOM Support and has made fraudulent payments to both himself and Mr Samways. I believe a summary dismissal to be a reasonable outcome both in terms of his actions in the payments he has made to Mr Samways and also in terms of the payments he made to himself."

33. The claimant presented a claim of unfair dismissal to the Employment Tribunal on 30 October 2016.

The Law

Unfair Dismissal – Section 98 Employment Rights Act 1996 (the 1996 Act)

34. "98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –

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

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

(2) The reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed to do;

(b) relates to the conduct of the employee …

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

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

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

35. In accordance with the case of **British Home Stores Limited v Burchell [1978] IRLR379** it is for the respondent to establish that it had a genuine belief in the misconduct of the claimant at the time of the dismissal and that that belief was based upon reasonable grounds and the dismissal followed a reasonable investigation and a reasonable procedure. This formulation is commonly termed the "Burchell test". If the Burchell test is answered in the affirmative, the Tribunal must still determine whether the decision of the employer to dismiss the employee rather than impose a different disciplinary sanction (or no sanction at all) was a reasonable one. When Burchell was decided, the burden lay with the respondent to show some elements of fairness. That burden was removed by primary legislation in 1980 and there is now no burden on either party in relation to section 98(4) of the 1996 Act. The burden lies neutrally between them. It is of key importance to avoid substituting the Tribunal's view for that of the respondent.

36. A Tribunal should take heed of the Employment Appeal Tribunal's guidance in **Iceland Foods Limited v Jones [1982] IRLR 439**. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether the dismissal had been within "the band of reasonable responses" available to the employer. Once an employer has shown a Tribunal that one of the potentially fair reasons for dismissal applies, the Tribunal must determine whether the employer acted reasonably in dismissing for that reason. In doing this, the Tribunal must

apply the "band of reasonable responses" test – i.e. consider objectively the standards of the hypothetical reasonable employer rather than impose their own view of what would have been appropriate for the employer to do in the circumstances.

37. In the case of **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23** the Court of Appeal confirmed that the "band of reasonable responses" approach applies to the conduct of investigations as much as to other procedural and substantive decisions to dismiss. Providing an employer carries out an appropriate investigation and gives the employee a fair opportunity to explain his conduct, it would be wrong for the Employment Tribunal to suggest that further investigation should have been carried out. For, by doing so, they are substituting their own standards as to what was an adequate investigation for the standard that could be objectively expected from a reasonable employer. In Ucatt v Brain [1981] IRLR225 Sir John Donaldson stated:

> "Indeed this approach at Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, 'Would a reasonable employer in those circumstances dismiss', seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question 'Would we dismiss', because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, 'Well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing', because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances".

38. I have considered the decision of **A v B [2003] IRLR405** in which the Employment Appeal Tribunal reminded tribunals that in determining whether an employer has carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and the potential effect upon the employee. This decision was reaffirmed by the Court of Appeal in **Salford Royal NHS Foundation Trust v Roldan [2010] EWCA CIB522**.

39. I have considered the Judgment of the Employment Appeals Tribunal in the case of **Aslef v Brady [2006] IRLR 576** in which it was indicated:

> "It does not follow, therefore, that whenever there is a misconduct which could justify dismissal, a tribunal is bound to find that that was indeed the operative reason. Even a potentially fair reason may be the pretext for a dismissal for other reasons. For example, if the employer

makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal.

Accordingly, once the employee has put in issue with proper evidence a basis for contending the employer dismissed out of peak or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the Tribunal is left in doubt, it will not have done so. Evidence that others would not have been dismissed in similar circumstance would be powerful evidence against the employer, but it is open to the Tribunal to find the dismissal unfair even in the absence of such strong evidence. In a case of mixed motives such as malice and misconduct, the principal reason may be malice even though the misconduct would have justified the dismissal had it been the principal reason.

On the other hand, the fact that the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding that the dismissal was for a fair reason. There was a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing which that reason affords."

40. Length of service is relevant when deciding the appropriate sanction. In **Strouthos v London Underground Ltd [2004] IRLR 636** The Court of Appeal held that the fact that the claimant had been employed for 20 years with no relevant previous warnings was material. Whilst acknowledging that there can be conduct so serious that dismissal is appropriate irrespective of length of service, the EAT had been wrong to say that length of service was not relevant.

41. In the case of **Brito-Babapule v Ealing Hospital NHS Trust 2014 EWCA Civ 1626** The Court of Appeal indicated that it was an elementary rule of natural justice that a party should know the case that he or she has to meet and whether the allegation is one of dishonesty. However, there had never been any doubt about the allegations against the claimant and her misconduct had been clearly identified. Whilst there were dangers in using an emotive word such as fraud, as a label rather than as a description of alleged conduct, the nature of the charge and a full account of the evidence had been made clear to the claimant before the disciplinary hearing. Having found that the claimant had been told that seeing private patients during paid sick leave was impermissible, the trust had been entitled to conclude that her behaviour amounted to gross misconduct. Whether the label of fraud or dishonesty was attached as well was immaterial.

42. In **Taylor v OCS Group Limited [2006] IRLR613**. Smith L.J. stated, at paragraph 47:

> "The error is avoided if ETs realise that their task is to apply the statutory test. In doing that they should consider the fairness of the whole of the disciplinary process. If they found that an early stage of the process was defective and unfair in some way they will want to examine any subsequent proceedings with particular care. Their purpose in so doing will not be to determine whether it amounted to a re-hearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker the overall process was fair, notwithstanding any deficiencies at the early stage".

43. In the decision of **South West Trains v McDonnell [2003] EAT/0052/03/RN** HHJ Burke at paragraph 36:

> "Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or were arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole fair?"

44. In the case of **Orr –v- Milton Keynes 2011 ICR 704** Aitkens LJ provided guidance

> "…..the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. (7) The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". (8) A particular application of (6) and (7) is that an ET may not substitute its own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances. (9) An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal

(or any appeal process) and not on whether in fact the employee has suffered an injustice.

45. In the employment context "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Exactly what type of conduct amounts to gross misconduct will depend on the facts of the individual case. Generally, to be gross misconduct, the misconduct should so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. Thus in the context of section 98(4) of the 1996 Act it is for the Tribunal to consider:

(a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct and

(b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

46. The provisions of Section 123 of the 1996 Act refer to the fact that compensation must be 'just and equitable' and I have considered the decision of **Polkey –v – A E Dayton Service Limited 1988 ICR142**. The Polkey adjustment is only applicable to the compensatory award, not the basic award. The Polkey principle applies not only to cases where there is a clear procedural unfairness but also to what used to be called a substantive unfairness also. However, whilst it may involve a greater degree of speculation which might mean the exercise is just too speculative. The deductions can be made for both contributory conduct and **Polkey** but when assessing those contributions, the fact that a Polkey deduction has already been made or will be made under one heading may well affect the amount of deduction to be applied for contributory fault.

47. Langstaff P in **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274** provided guidance as to the correct approach to the Polkey issue.

> "A "**Polkey** deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer **would** have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would

have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand".

48. Section 207A of the Trade Union Labour Relations (Consolidation) act 1992 provides for adjustments to the compensatory award by percentage increase or reduction up to a maximum of 25% to reflect an unreasonable failure by the employer or employee to comply with the ACAS Disciplinary Code of Practice. Where there has been an unreasonable failure to comply with the code the Tribunal may increase or reduce the award if it considers it just and equitable in all the circumstances to do so. The code of practice makes it clear that employers should carry out any necessary investigations, to establish the facts of the case and should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

49. Section 123(6) of the 1996 Act provides – 'Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding'. For a reduction from the compensatory award on account of contributory conduct to be appropriate, then three factors must be satisfied namely that the relevant action must be culpable or blameworthy, that it must have actually caused or contributed to the dismissal and it must be just and equitable to reduce the award by the proportion specified. The Tribunal must concentrate on the action of the claimant before dismissal because post dismissal conduct is irrelevant.

50. I have considered the provisions of Section 122(2) of the 1996 Act and the basis for making deductions from the basic award. Brandon LJ in **Nelson –v- BBC (No 2) 1980 ICR 110**:

> "It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved".

51. In the case of Grantchester Construction (Eastern) Ltd v Attrill UKEAT/0327/12/LA, where a 50% **Polkey** deduction was made to the compensatory award, and both the basic and compensatory awards were also reduced by 10%. The EAT said:

> “Whereas it may be appropriate to moderate what would otherwise be the degree of contributory conduct that would reduce an award because there have been matters of conduct taken into account in assessing the chances of a fair dismissal, so that it might be in effect double counting to impose upon the claimant a further reduction by way of contributory conduct, that reasoning cannot apply to that part of the award to which the **Polkey** principle itself does not apply” (i.e. the basic award).

52. In **Rao v Civil Aviation Authority 1994 ICR 495** The Court of Appeal rejected the contention that the making of both deductions would amount to a double penalty for the employee. The Court of Appeal held at the proper approach is to first assess the loss sustained by the employee in accordance with section 123 (1), which will include the percentage deduction to reflect the fact that he or she would have been dismissed in any event, and then to make the deduction for contributory fault.

53. In deciding the extent of the employee’s contributory conduct on the amount by which it would be just and equitable to reduce the award for that reason under section 123 (6) it was made clear that the tribunal should bear in mind that there has already been a deduction under section 123 (1).

54. I heard submissions from Mr Morgan, on behalf of the claimant and Mr Hutchinson, on behalf of the respondent. I have not set the submissions out in detail but I have considered them carefully reaching my conclusions.

Conclusions

55. I am satisfied that the reason for the claimant’s dismissal was that of conduct. The claimant said that it was as a result of him raising a grievance on 15 June 2015. This was with regard to issues in the workplace including timekeeping. The investigation of the claimant took place shortly afterwards. The claimant was subject to investigation by the investigation branch on 1 October 2015. This followed information being provided by local managers, including Darren Kidman who was a relatively recently appointed Delivery Office Manager at Richmond. The diary entries that had been completed by the local managers in respect of the claimant’s working time and overtime claimed were in August 2015.

56. It is for the respondent to show the reason for dismissal. In this case, there was clear evidence that concerns had been raised in respect of the claims for

overtime processed by the claimant. There were lengthy investigations carried out. There was no credible evidence that the claimant's grievance had provoked the investigation and, in any event, however the investigation arose, I accept that there were genuine concerns raised about the claimant's conduct in respect of the processing of overtime claims. I have to determine the real reason behind the dismissal. I accept that the decision to dismiss was reached on the ground of conduct and that the respondent held a genuine belief in the claimant's guilt of that misconduct. The respondent had reasonable grounds on which to hold that belief.

57. There had been a relatively large turnover of District Office Managers in the Richmond district. It was accepted by Julie Fisher that there were poor checks and controls within the office. The 552 forms were not routinely completed and, when they were, they were not signed and authorised by the managers despite there being a space requiring this to be carried out on the 552 form.

58. Overtime request were provided to the claimant by employees in the Richmond district. These requests were set out in a variety of ways, sometimes being on pieces of paper or card, by text messages and, on occasion, verbally. The claimant would complete the RCS (Resource Control System) entry which was inputted on to the system and processed using an account in the name of a former DOM support employee. This account was used by the claimant and, on occasion, managers. The RCS information was then printed off for the claimant and another version for the managers. The managers' version was used as a summary. The claimant then completed the PSP or V pay system for the payment to be processed on the payroll.

59. Julie Fisher concluded that the claimant had taken advantage of poor checks and controls within the office in order to make fraudulent overtime payments to himself and Mr Samways.

60. The claimant said that managers would move the records of overtime claims around for balancing purposes and there was some evidence found to support this practice. This would have provided an element of doubt in respect of the allegations that the claimant was claiming overtime when he was on holiday. However, Julie Fisher said that it was clear, through the diary entries, that managers had been observing the claimant when they had become suspicious about overtime claims and payments.

61. The claimant was not given details of the 82 instances and the detailed findings by the investigation branch. The claimant was not given the opportunity to challenge the findings in this regard despite requesting the details.

62. With regard to the text messages, the claimant was not given the opportunity to challenge the majority of the evidence in those messages. He said he was not given the opportunity to place them in context. Mr Samways was not interviewed and not all the managers had provided statements. Where an allegation which is that two members of staff were alleged to be involved in a conspiracy, it would be appropriate to interview both of the employees who were under suspicion.

63. Anthony Samways' appeal against his dismissal was heard by a National Appeals Panel (NAP) which upheld the appeal by a majority decision. The reason why Mr Samways' appeal had been referred to the NAP and the claimant's appeal had not was because Mr Samways was a Trade Union representative. The majority NAP findings referred to the failure of management and the claimant to operate an overtime system properly. It was found that Mr Samways had contributed to this state of affairs by failing to complete form P552s but that this did not reflect dishonesty on his part.

64. It was also stated that the findings and conclusions of the NAP should not be regarded as demonstrating any view in relation to guilt or innocence of the claimant.

65. It was found that Mr Samways had accepted a payment on one occasion in respect of 30 minute's overtime knowing that he was not entitled to that payment. That was found to be an act of dishonesty which would normally warrant summary dismissal. However, it was concluded in Mr Samways case that it did not for the following reasons:

> "a. Knowingly accepting an overpayment, whilst dishonest, is less serious than actively making a fraudulent overtime claim;
>
> b. The amount of time involved was small;
>
> c. The context for accepting the overpayment was overtime being paid in circumstances when management knew (and accepted) that what was paid (for a full lock-up) did not necessarily reflect the exact amount of time worked;
>
> d. Mr Samways' very long service."

66. Julie Fisher said that she considered the NAP's findings and concluded that they would not have altered her decision to reject the claimant's appeal. She did not believe the cases were comparable. Anthony Samways had not inputted the overtime payments himself. She also considered that, whilst Anthony Samways had been dishonest by allowing himself to be paid overtime for hours he had not worked, the claimant's conduct was a step beyond this and that he had abused his position of power not only to record overtime for Mr Samways but also for himself, knowing that he had not worked for this.

67. In this case, there were serious procedural failures, the precise allegations that were the reason for the claimant's dismissal were not put to him and he was not able to challenge them. The same applied in respect of the majority of the text messages relied upon at the appeal stage. There was no interview of the claimant's alleged co-conspirator and full statements were not taken from all the managers involved. The reason for the claimant's dismissal was different from the reasons for Julie Fisher upholding the dismissal on appeal. She said that the security team had clearly identified a large number of payments that had not been authorised but she decided it was appropriate to consider the case in overall terms rather than individual points raised by the claimant. However, the

claimant was then not given the opportunity to challenge the evidence or her findings in respect of the majority of the text messages. The investigation carried out by the respondent was outside the band of reasonable responses and I am satisfied that the claimant's dismissal was unfair.

68. However, I am satisfied that the evidence contained within the text messages was sufficiently clear for the respondent to reach the conclusion that that the claimant was processing overtime payments for Mr Samways for time which had not been worked or authorised by managers. Also, there was one text entry on Wednesday, 18 March 2015 which stated:

> "Ok mate, will put you down for 2 hrs today, Thur, Fri and Sat, let me know if it is more…"

69. This was not one of the text messages referred to in Julie Fisher's deliberations at the appeal stage. However, I am satisfied that there was a high chance that the respondent would have dismissed the claimant if a fair investigation had been carried out within the band of reasonable responses.

70. It was concluded that the claimant had processed overtime claims to be paid regardless of what hours had actually been worked. There had been a previous practice of allowing a standard time of two hours for a lock-up. This practice had been stopped by the claimant at an earlier time, however, there was sufficient evidence to enable the respondent to conclude that the claimant had, on occasions, processed claims for two hours pay before the work had been carried out and without regard for the actual time worked.

71. If the respondent had gone on to find there was an element of doubt about the moving of the time claimed for overtime on the RCS system in respect of the claimant processing payments for himself, it may be that the respondent would have considered the position in a different light. The payments where there was the strongest evidence were those in respect of Mr Samways. The evidence still provides sufficient proof for the respondent to reasonably conclude that the claimant was guilty of processing overtime payments for time that had not been worked or authorised in respect of time paid in respect of Mr Samways and the claimant.

72. Bearing in mind the claimant's lengthy service and clear disciplinary record I have to consider what the chances are that the claimant may not have been dismissed if a fair procedure had been followed.

73. There is, inevitably, an element of speculation in this regard. I have to consider what is just and equitable and assess what is likely to have happened if a fair procedure had been followed. In **Software 2000 Ltd v Andrews and others 2007 ICR 825** Elias J stated:

> "The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It

may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise."

74. I have given long and careful consideration to this issue and I am satisfied that, had a fair procedure been followed, there was a high chance that the respondent, in these circumstances, would still have dismissed the claimant. I find it just and equitable to reduce the compensatory award by 70% in this respect.

75. There was a serious failure to comply with the ACAS disciplinary code of practice. The claimant was not given a fair opportunity to respond to the issues found against him. There was a lack of consistency between the dismissal findings and the appeal findings and the claimant was not given the opportunity to put his case in response before decisions were made. I am satisfied that the compensatory award should be increased by 25% to reflect this.

76. With regard to contributory fault, there was clear evidence, particularly in the text messages, that the claimant processed overtime payments for Mr Samways when the time had not been worked. This is a high level of contributory fault. I have taken into account that there has been a high Polkey reduction in respect of the compensatory award. I have been careful not to carry out double-counting in this regard in view of the matters of conduct which had been taken into account in assessing the chances of a fair dismissal. I had given consideration to a 100% reduction for contributory fault. However, there was no evidence of the 82 findings against the claimant, there was a poor procedure and the claimant had 20 years' service with a clear disciplinary record. However, I am satisfied that the claimant was culpable and had contributed to his dismissal. I am satisfied that, on the balance of probabilities, the claimant had processed payments for claims in respect of hours that had not been worked by Mr Samways and, in the circumstances, I find it just and equitable to reduce the basic award and the compensatory award by 80%.

77. The claimant had indicated that he was seeking a reinstatement or re-engagement order. I do not find it appropriate to make such an award. The claimant's conduct was such that it would not be practicable for the relationship between the respondent and the claimant to be continued. I do not consider that the respondent could genuinely trust the claimant again.

Compensation

78. Following the judgment of the EAT in the case of **University of Sunderland v Ms K Drossou UKEAT/0341/16/RN** I have included the employer's pension contribution of 8% in the gross weekly wage which had been agreed as £444.00. This provides an additional £35.52 and takes the weekly wage to £479.52. The relevant statutory maximum being £479.00.

Basic Award

79. The claimant was 43 years of age and had 20 years' continuous service at the date of termination. The parties agreed that the appropriate multiplier was 21 weeks and this provides a basic award as follows:

£479.00 multiplied by 21	£10,059.00	
Less 80% contributory fault	£8,047.20	
Total basic award		£2,011.80

Compensatory Award

80. The amount claimed is for loss of earnings from the date of termination to the date of the Tribunal hearing less sums obtained through mitigation. The claimant obtained further employment on 3 October 2016 which lasted for a period of 30 weeks until 30 April 2017 when he resigned from that employment.

The claimant confirmed that he had resigned of his own choice and there was no indication that there was any constructive dismissal. In those circumstances the continuing loss after 30 April 2017 is limited to a continuing loss of the difference between the net wage the claimant received from the respondent of £360 per week together with the pension contribution of £35.52 which provides a figure of £395.52.
Less the net weekly wage the claimant received in his new employment which was stated to be at the sum of £18,659.00 per year gross.

Mr Morgan, on behalf of the claimant, indicated that this should be reduced by 25% in order to reach the net figure which provides an approximate net figure of £13,994.25 per year and £269.12 per week.

Taking this from the claimant's weekly pay and pension contribution from the respondent of £395.52 provides a figure of £126.40 net loss of earnings per week for the period from 3 October 2016 to 27 July 2017.

This provides a calculation of loss of earnings from 2 June 2016 to 3 October 2016 of approximately 18 weeks at £395.52 providing £7,119.36
plus 42 weeks at £126.40 providing £5,308.80.

This produces a total loss of earnings claim of £12,428.16.

There was no claim for loss of earnings beyond the date of the Tribunal hearing and I do not find it just and equitable to award compensation beyond the 60 weeks to the date of the hearing.

Loss of statutory protection is included in the sum of £500 which provides a total compensatory award before adjustments of £12,728.16.

Less the Polkey reduction of 70% £8,909.71 = £3,818.45

Increase pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) act 1992 of 25% £954.61.

Compensatory award £4,773.06.

Less the reduction of 80% for contributory fault of £3,818.45 provides a final figure for the compensatory award of £954.61.

81. A figure of £80.00 was included in the claimant's schedule of loss in respect of "job seeking expenses" no evidence was provided in respect of these expenses and I make no award for this.

82. Also included was a claim for Tribunal fees in the sum of £1200.00. In view of the in the case of **R (on the application of UNISON) v Lord Chancellor Court [2017] UKSC 51**. In which the Supreme Court ordered that the Employment Tribunal fees order was quashed, I anticipate that the claimant will be provided with a refund in respect of the fees paid and I make no order in this regard. Had the fees remained payable I would have ordered the respondent to pay those fees to the claimant and in those circumstances, I give liberty to apply.

83. The total award for the claim of Unfair dismissal, following the appropriate adjustments, is £2,966.41. The claimant has been in receipt of Job Seekers Allowance during his periods of unemployment and, in those circumstances, the recoupment provisions apply. The prescribed period is from 2 June 2016 to 27 July 2017 and the prescribed amount is £917.11. The balance of the award for unfair dismissal is £2,049.30.

Employment Judge Shepherd

10 August 2017

ORDER SENT TO THE PARTIES ON

15 August 2017

P Trewick
FOR THE TRIBUNAL OFFICE

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