



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr T Jordansen

v

Check4cancer Ltd

Heard at: Bury St Edmunds

On: 11 & 12 September 2017
13 October (in chambers)

Before: Employment Judge Laidler

Representation

For the Claimant: Mr Wrench, Lit Friend.

For the Respondent: Miss List, Solicitor.

RESERVED JUDGMENT

- 1. The Claimant was dismissed for conduct a potentially fair reason falling within section 98 of the Employment Rights Act 1996**
- 2. The Respondent acted fairly in all the circumstances of the case in treating that reason as one to justify the dismissal of the Claimant**
- 3. The Claimant was guilty of gross misconduct and the Respondent was entitled to dismiss without notice**
- 4. All claims brought by the Claimant as therefore dismissed.**

REASONS

1. The ET1 in this matter was received on the 24 November 2016. The only claims that this tribunal had jurisdiction to determine were the complaints of unfair and wrongful dismissal. The judge clarified at the outset of this hearing that the issue of whether or not reinstatement was an appropriate remedy was something that could only be determined once the tribunal had reached its decision on liability. The other matters claimed were not claims that could be brought before this tribunal. These included unfair dismissal compensation "uncapped" on the basis that the respondent had "hidden reasons" for the claimant's dismissal and damages for breach of the duty of trust and confidence. Further, the claimant sought damages for the detriment he had suffered as a result of bullying and intimidating behaviour on the part of the respondent. He accepted at the outset of this hearing that these were all matters that could not be brought to this tribunal and that the tribunal was confined to the issue of unfair and wrongful dismissal.
2. In its response, the respondent denied all the claims, stating that the claimant was dismissed for gross misconduct in falsifying an invoice and that the dismissal was fair in all of the circumstances.
3. The claimant had included as named respondents, various individuals within the respondent company and the claims against these four named respondents were dismissed by an order of this Employment Judge on 22 February 2017.
4. At the outset of this hearing the claimant handed up some additional documents. These were in addition to the bundle of 399 pages. These included a financial statement with the claimant arguing that the wrong statement had been put in the bundle. No objections to this being changed were raised on behalf of the respondent. The claimant had also obtained a notarised statement setting out some text messages that had passed between him and Kerry Learmouth. Again, the respondent raised no objections to those text messages being put in evidence.
5. The claimant had also produced a chronology to the respondent which had not been agreed. No further action was taken in relation to that, the Judge stating she could prepare her own.
6. The one objection that the respondent had was about an email chain between the claimant and two directors as it referred to matters that should not be before this tribunal. After discussion, the claimant agreed not to pursue the inclusion of those documents.
7. This hearing had been listed for 2 days only. There was a significant amount of reading to be done on the first morning of the hearing with the claimant's statement being 128 paragraphs over 35 pages. The evidence was heard and submissions and then the decision reserved.

8. The tribunal heard from the claimant and on behalf of the respondent;

Professor Gordon Wishart, Chief Medical Director of the respondent.

Lorraine Lander, Chartered Accountant.

9. From the evidence heard the tribunal finds the following facts.

The Facts

10. The claimant and Professor Wishart started the respondent company in 2008. It was then known as IHT Limited. They restarted the company in December 2013 following a voluntary liquidation with new investors and a year later changed the name to Check4Cancer Limited. The claimant was the Managing Director and Professor Wishart the medical director. They also had two investor directors Bill Gore and Jack Terras.
11. A letter of 23 February 2014 confirmed the offer of the position of managing director to the claimant starting on 1 January 2014. It acknowledged that his employment with the company started on 1 May 2008.
12. The company handbook gave examples of acts that would be considered gross misconduct, such as to justify instant dismissal without notice. These included “fraud, bribery, dishonesty or any other offence, which would be a breach of the law of the land”.
13. In early 2016 the respondent started working with two external advisers Lorraine Lander and Steve Bird. Lorraine Lander is a chartered accountant and advised on financial matters and Steve Bird is from an HR background.
14. In March 2016, the respondent had cash flow difficulties. Hewlett Packard (HP) was late paying it and there were insufficient funds to pay salaries. The claimant made a personal loan to the company of £25,000 to cover those immediate liabilities. That loan was repaid to him a month later after HP had paid the overdue invoice.
15. On the weekend of 22 – 24 May 2016 Professor Wishart, Steve Bird and the Claimant attended a strategy meeting in Corfu. Following this Professor Wishart sent an email to Bill Gore copied to Steve Bird but not to the Claimant confirming that the Claimant ‘has reacted well to encouragement from Steve and myself to a restructuring of the company in a way that will free his time to concentrate on sales’. The Claimant now takes issue with that stating that was ‘misrepresenting what we had discussed’. He also relies on other emails sent by Jack Terras and Gordon Wishart which he states show they were ‘ganging up on me’.

16. There were then discussions between board members about cost reduction confirmed in an email from Professor Wishart of the 10 July 2016. There was a meeting between Professor Wishart and the Claimant on 13 July to again discuss cost reduction and the Claimant taking on a more sales based role if the Professor was asked to take on day to day running of the company. It was agreed they would meet again on the 18 July with Bill Gore. Again the possibility of a sales consultant role with a bonus and the Claimant retaining his shareholding was discussed.
17. On 25 July 2016 Kerry Learmouth, the respondent's financial controller advised Professor Wishart and Bill Gore of an issue with regard to the sale of a Photo Dynamic Machine ("PDE machine") to a Spire hospital in Solihull in April/May 2016. It appeared the claimant had negotiated this sale and submitted an invoice for £45,600. This had not been generated by the respondent's accounts department and had a number of inaccuracies in it. The machine had been delivered on 3 May 2016 to Spire and their central office had noticed that the invoice sent by the claimant did not contain the respondent's regular bank account details. Spire contacted Kerry Learmouth to clarify the position.
18. Professor Wishart asked Kerry Learmouth to carry out a review and prepare a report of her findings. This was seen in the bundle and is signed by her on 27 July 2016. The notarised document the claimant produced for this hearing of text messages passing between himself and Kerry on 28 February 2017 confirmed the statement by Kerry as she stated in a text, "I stand by the statement I made to the board and I have a copy of it so I will know if they have changed it. As that's my recollection of the events."
19. Kerry's report confirmed as follows: -
 - 19.1. On 27 April 2016, the purchase order was received by fax from Spire. She contacted the claimant and he had confirmed "this was an error and that they were after a quote at this stage".
 - 19.2. On 3 May Spire Healthcare Head Office, Naomi Blackwood called Kerry advising the invoice she had received and that the bank details did not tie in with the records held on their system. Kerry asked her to email a copy which she did. She stated:

"As per our telephone conversation please see attached invoice showing bank details that differ to what we hold on our system.

Thank you for confirming the bank details to me which is what we currently hold on our system, however, the bank details on the attached invoice show different bank details. If you could look into this for me and advise then I can release the payment to you."

- 19.3 Kerry then called the claimant and advised him of this and emailed a copy of Naomi Blackwood's email and invoice. (3 May 2016 at 13:37 hours). He confirmed he did not raise this invoice and knew nothing about it.
- 19.4 Kerry emailed the claimant again on 6 May for an update.
- 19.5 The claimant and Kerry spoke about this and the claimant confirmed this was an error on their part and this was just a quote 'but he would push to get this as we had the order'. He then confirmed by email that Kerry should raise the invoice. (6 May 2016 at 13:07 hours).
- 19.6 Kerry then emailed the claimant back on the 9th with the invoice and he stated 'Pls leave this with me. We are still some phone calls away for this having fallen into place'. (9 May 2016 at 11.32 hours).
- 19.7 In every catch up meeting thereafter with the claimant Kerry requested an update on payment and the claimant advised 'he was hopeful.'
- 19.8 In the week commencing 11 July 2016 when the claimant and Kerry had a catch up she had again enquired about payment and the claimant had said the invoice should be cancelled. He was due to pay them a visit with a new machine as they were not happy with the one they had as it had some scratches on. The new machine he was going to take was a loan meant for another company, but if Spire wanted it he would order another. The claimant then confessed to Kerry that he did raise that "dummy old invoice but would not say why he did it".
20. The disputed invoice was seen in the bundle on various pages. Professor Wishart had the following concerns about it: -
- 20.1. It says it is a "quote for".
- 20.2. The invoice number is not correct.
- 20.3. It states at the bottom that cheques should be made payable to IHT Ltd, the old name of the company.
- 20.4. It gives an HSBC bank account, which is now known to be the claimant's own personal bank account.
21. The invoice Kerry rendered of 9 May 2016 shows the correct bank account of the respondent namely a Barclays bank account.

22. Professor Wishart asked Kerry to provide him with all the quotes and invoices so that he could carry out an investigation from 25 July onwards. He saw emails from the claimant to the supplier Diagnostic Green.
23. On 28 April 2016, the claimant wrote to his contact there confirming sale of a PDE machine and asking the invoice to be sent to him at his email address at the respondent but with his personal address on the invoice. He asked for a new demo kit to also be delivered to that address by the middle of the following week.
24. In an email of 2 May, he again stressed to the supplier “can I kindly get confirmation that 2 PDE machines will be shipped to me at below address today? It is very important that the machines go to my home address, and that the invoice is sent to me by email only”. Again, this was to his home address.
25. The claimant’s son Marcus works for the respondent. On 3 May 2016 the claimant sent the following email to Marcus: -

“Please see the address for the delivery today below. Please do not speak to anybody at work about this piece of work as they are not aware of the delivery.” The address was to Spire Parkway Hospital, Solihull.

26. There is another email from the claimant to Steve Lowry at Spire on page 211D in which the claimant stated that correspondence should only be sent to him because no one else at the respondent knew about the PDE machines and sales.
27. By email, letter of the 26 July 2016 Bill Gore invited the claimant to a disciplinary hearing on 29 July 2016. The letter made it clear the purpose of the hearing was to consider an allegation of gross misconduct against the claimant. The allegation was that he had: -

“raised a false invoice and issued it to a company customer, deliberately seeking to divert company funds for your own personal use.

The basis for this allegation is that on 25 April 2016 you raised an invoice (invoice number Off – 0218) addressed to Spire Parkway Hospital (a customer of the company) for one photo dynamic eye (PDE) in the sum of £45,600. This invoice had your personal services company’s bank account details noted for payment. We have carried out an investigation and note that a corrected invoice was subsequently issued (on 9 May 2016), but only after the original invoice was disputed by the customer. This corrected invoice included the company’s bank account details the payment.”

28. The letter stated it was understood that until recently the claimant had disputed that the invoices were raised by him and the matter had only recently been brought to the attention of the company.
29. Copies of the invoices referred to were included with the letter. The claimant was made aware that if found guilty of gross misconduct he might be dismissed without pay or pay in lieu of notice.
30. The claimant was advised the hearing would be conducted by Gordon Wishart and Bill Gore. The claimant was advised of his right to be accompanied.
31. There was no investigatory meeting held with the Claimant. In answer to a question from the Judge Professor Wishart stated that he could understand why that would be done in certain circumstances but the Claimant was so senior within the organisation they had to be decisive and come to a decision but he could understand why a separate meeting might sometimes be held.
32. The claimant's then solicitors Taylor Vinters wrote to the respondent on the 28 July 2016 disputing the allegations against him. They stated that the claimant had the requisite specialist knowledge of the PDE machine and delivered training on its use. It is not a mainstream item sold by the respondent, and it had become the claimant's habit to deal himself with the ad hoc sales of such machines as and when they arose. It was also his practice to produce the documentation himself relating to the sale.
33. They stated that in April 2016 he had intended to generate what he intended to be a valid invoice on behalf of the company but used a template invoice on his computer which had previously been used to invoice Deloitte in or about January 2014. At that time the respondent was still trading as IHT and therefore that name was still on the bottom of the invoice, with its bank account details.
34. The letter went on to state that within a few days of the claimant raising the invoice he was aware it was being queried because the bank details did not match the client's records. He was informed of this by Kerry Learmouth and she then arranged for the correct invoice to be issued on 9 May 2016.
35. With regard to the proposed disciplinary hearing the solicitors expressed grave concerns that it was to be conducted by Professor Wishart and Bill Gore. They suggested "your respective positions are already severely compromised by the matters set out above." It would be impossible for them to conduct a fair, objective and transparent hearing. They therefore took the view the disciplinary hearing could not proceed and asked for confirmation that it would be abandoned and the accusations of gross misconduct withdrawn in their entirety. If not, they would be advising their client not to attend the hearing.

36. At this hearing Professor Wishart explained how difficult it would have been to find someone else to conduct the disciplinary hearing. He had received a report from Kerry and had been coordinating the evidence but still considered he an appropriate person to hear the disciplinary in all the circumstances.

Disciplinary hearing

37. The disciplinary hearing did however proceed on 1 August 2016 and was conducted by Professor Wishart. There are no minutes as such but a list of questions Professor Wishart prepared beforehand and the claimant's answers to them. In answer to a question by the judge Professor Wishart confirmed that he had made manuscript notes of the answers and then had these typed up after the meeting.
38. The claimant's position at the disciplinary hearing was, as in his solicitor's letter of the 28 July 2016, that he had used an old template previously sent to Deloitte but had changed the logo and bank details. He stated he must have taken the wrong bank card out of his wallet and entered that by mistake. The claimant's reason for not having had this created by the finance team in the usual way was that he 'was not 100% certain that the invoice would lead to a sale and payment. Also, I have done all the invoicing for PDE in the past for the small number of sales that have been made. I only found out about the bank details being my personal bank account when the solicitor's letter arrived'. He had also wanted to expedite issuing the invoice and to do it himself was faster than waiting for the office to do it.
39. The claimant said in evidence that in fact it was not a Deloitte invoice that he had used but that he took a quote off the system he had issued to Spire in January and changed it into an invoice. He accepted that was not what he told the disciplinary hearing and that the Respondent consequently had the wrong information from him at that time.
40. The claimant further stressed in evidence that there was urgency in issuing the invoice. He had received a voicemail message that day from Spire that they wanted to move ahead, were on a tight deadline and requested the invoice as soon as possible. He referred in his witness statement to email exchanges with Steve Lowbridge in April that lead to the issue of the invoice.
41. On 25 April 2016 at 14:25 hours Steve asked 'If I can get an order placed this week would you be willing to offer a further 5% on the asking price?' The claimant replied, within half an hour that he was in the Netherlands but that 'I can give you 5% discount if we get paid before 1 May, I will be able to deliver on Saturday.' Steve Lowbridge then agreed to that and that he would get the order raised and email the claimant a purchase order. The claimant then sent him at 19.01 hours his invoice of the 25 April 2016.

42. The tribunal accepts the respondent's evidence that whilst this demonstrated that Spire wished to obtain the discount it does not demonstrate such an urgency that the claimant could not have asked the Respondent's finance department to prepare the invoice the next day in the usual way. The claimant accepts in his witness statement that he was 'careless and did not pay enough attention to the detail of what I was doing'.
43. The Claimant told this tribunal that he had not wanted to ask Kerry to do the invoice as he had a close relationship with her. She was working part time on a Friday and he didn't want her to have to do extra work. He didn't want to bother her at 19.00 and she has children. There is no note he said that at the disciplinary hearing.
44. The reason the claimant gave for wanting the machines sent to his home address was 'for practical reasons' as the office was busy and he was out a lot that week.
45. The claimant was asked by Professor Wishart why he had asked his son Marcus not to speak to any of the Respondent's staff about the delivery to Spire and he did not remember saying that to his son.
46. For the first time in cross examination the Claimant sought to explain that the machine that his son Marcus would have been delivering to Spire was a demo PDE already in the company that Professor Wishart had used in Ireland and many places. He was instructing Diagnostic Green to deliver the two new machines to his home address. There would then be three machines in total. The Claimant accepted he had not made this clear before. He however stated that from the notes (page 278) there was reference to 'BG/GW note for information we think there may be 3-4 machines with a total value of £100-150k'
47. When the claimant was asked why he did not simply tell Spire he had made an error with the bank account details he replied "this was negotiation tactics on my part. I made up a story to Steve to say that I had to arrange an invoice with an "alternative" bank account". When asked why he had asked Kerry to produce an invoice but to send the invoice she produced on 9 May to him rather than to Spire he responded, "the reason for that was to keep Steve Lowbridge very close to me, as he seemed very sensitive about the wrong bank account details being used".
48. The claimant was also asked why he had specifically deleted 138 emails on 19 July relating to PDE sales. He responded, "I was not aware that I had done that. I suspect that it was a mistake on my part." He was further asked why he specifically emailed details of PDE correspondence to his own personal email address and replied that "at the time, I was considering a future as a sales rep with this device in the UK with Diagnostic Green or a French competitor".

49. Professor Wishart acknowledged in evidence that the sale of the PDE may well have been part of the sales forecast in May after Kerry produced a correct invoice but was of the view that did not detract from their concerns about the production of the invoice by the Claimant.
50. By letter of 2 August 2016 Professor Wishart confirmed the claimant's dismissal on the grounds of gross misconduct. He set out the chronology. He confirmed that as the claimant and his solicitor had said that the claimant had relied on an old invoice to Deloitte dated the 23 December 2013 he had looked into that invoice and provided a copy to the claimant. This was also seen by the tribunal (page 52). That however he noted was different to the invoice submitted to Spire. The Deloitte invoice provided the bank account details of the claimant's personal services company whereas the Spire invoice of 28 April 2016 contained the claimant's personal bank account details.
51. Professor Wishart confirmed his conclusion that the use of the claimant's personal bank account details was not an error and that he had deliberately sought to conceal the proposed transaction from the company and divert the funds away from the company. He found that the following grounds confirmed that conclusion: -

51.1. That it was very unlikely that the claimant would fail to recognise that the account details used by him on the company invoice were those of a personal bank account held by him, for a number of years.

51.2. That on 8 March 2016 he emailed his wife to say, "seems like the summer holidays are saved". That email forwarded on an email from Anne Dancy at Spire, which indicated that Spire wished to purchase the PDE. The claimant had stated at the disciplinary hearing that this referred to the sale of the PDE benefiting the company during a time when the company was in financial difficulty. However, Professor Wishart stated the company had received funding at that time and was not in fact in financial difficulty. He believed the email indicated that the claimant would personally gain from the sale of PDE.

51.3. On 28 April 2016, the claimant had contacted Diagnostic Green who supplied the PDE to send the invoice for the equipment to his home address.

51.4. The claimant failed to correct the bank account details when producing the invoice dated 28 April, notwithstanding that he had clearly reviewed the original invoice by incorporating reference to the purchase order received from Spire.

51.5. On 2nd May the claimant emailed Diagnostic Green to get confirmation that the two PDE cameras would be shipped to his home address, and that the invoice be sent to him only. At that point, no one

else within the company was aware of the sale of the PDE to Spire. This was not in line with company practice and again indicated an intention to conceal the proposed transaction from the company.

51.6. The email to the claimant son on 3 May 2016

51.7. Emails to Steve Lowbridge stating he should deal with the claimant only.

51.8. The denial of raising the invoice to Kerry Learchmouth.

51.9. The deletion of a significant volume of emails from the company and forwarding a number to his personal email account.

52. The company had concluded that the claimant acted deliberately and with intent to defraud the company by the use of the Spire invoice and subsequent invoice dated 28 April 2016. Given the position of trust and seniority with the company the company considered the claimant's actions left it would no option but to summarily dismiss on the grounds of gross misconduct.

53. The claimant was given the right to appeal by 5 August 2016. His dismissal would take effect immediately, and his last date of employment would be 2 August 2016.

54. By letter 5th of August 2016 the claimant set out his grounds of appeal to Professor Wishart. The claimant asserted in his letter of appeal: -

54.1 There had been no proper investigation of the allegations made against him.

54.2 No attempt had been made to validate or corroborate his explanation.

54.3 The company had not produced first-hand third-party evidence to support statements which it said had been made by its staff and suppliers but had relied on hearsay.

54.4 The decision to dismiss was "perverse, irrational and unfair".

54.5 It was inappropriate for Professor Wishart to have participated in the disciplinary hearing when he had knowledge of and involvement in some aspects of the matters.

54.6 Neither Prof Wishart nor Bill Gore were competent to conduct a disciplinary hearing against the claimant.

54.7 Both Professor Wishart and Bill Gore stood to benefit financially from the dismissal of the claimant and it was “a travesty of natural justice that my employment is ended on this basis”.

54.8 In the absence of a full and independent investigation it could not reasonably be determined that the claimant was guilty of gross misconduct.

55. The claimant concluded that he had no confidence in the company’s ability to conduct a fair appeal hearing other than by the appointment of an independent outside investigator. He required the company to appoint such and to confirm that all the evidence would be made available for the purposes of the investigation.
56. By letter of the 11 August 2016 Jack Terras on behalf of the respondent invited the claimant to an appeal hearing on 26 August 2016. He advised that the hearing would be conducted by Lorraine Lander and Jackie Wishart would be there as note taker. He stated that Lorraine had been identified as being as appropriately independent from the original disciplinary proceedings. The claimant was reminded of his right to be accompanied. Notes of the disciplinary meeting were enclosed.
57. Lorraine Lander is a chartered accountant who has worked in senior financial positions for over 20 years. In answering questions put to her in cross examination from the claimant she accepted that she has invested in the respondent at the end of March 2017 and had been awarded incentive shares in the last 6-8 weeks. She had been aware of the investigation into the claimant and had been copied into emails but had not had any other direct involvement.
58. In dealing with the appeal hearing Ms. Lander worked in conjunction with Steve Ward an HR consultant. He had provided HR support to the respondent for 2 years and therefore was familiar with the business in an HR capacity.
59. The appeal hearing was held on 2 September 2016 at the respondent’s solicitors offices in London. The claimant did not bring a companion but was reminded of his right to do so. The claimant handed over a document at the outset of the meeting entitled “Strategy for Appeal Hearing” which he used a few times at the appeal meeting.
60. Ms Lander stated that they would be asking questions of the claimant to assist with their investigation. The claimant objected stating the investigation had already been conducted but Ms Lander can be seen in the minutes are stating that they were commencing their own investigation into

what had occurred, as the claimant's notice of appeal, said there had been no proper investigation. He was asked to be more specific.

61. The claimant referred to the email sent to his wife with the holiday reference. This had been interpreted by the company in the wrong way. He had explained at his disciplinary hearing why it was misinterpreted. At the beginning of the year they had been planning a holiday but the company's fundraising was short. He was hesitant about committing to the expense of a holiday. In February 2016, the revenue figures were encouraging and he added up the numbers including the PDE sale and thought they could go on holiday. The company was interpreting that to mean he would benefit personally from the sale which was not correct.
62. The claimant went on that the company had "Done a review in their eyes and found an indication of fraud. They've taken bits in pieces of invoices. There is no evidence. I have made a really bad mistake."
63. The claimant accepted he knew the mistake in May 2016 but he thought at that point that the mistake was that he had used the old company bank account details. It was Kerry who told him that and it was not until July 2016 that he found out they were actually his own bank account details. He was asked how he had inserted those bank account details into the invoice. The claimant said to the appeal hearing it was predominantly him doing the invoices for the PDE. He had taken a template and would have put in the details. He went on "my only way of rationalising it is that I have a small wallet and I took the wrong card from it (they are the same colour) and inserted the wrong details. I'm not a financial person so I can't remember the numbers. No sensations of any error were stirred in my mind."
64. The claimant was questioned as to how the old company bank account details would have been in his wallet as he no longer needed those. The claimant said he sat and did the invoice and 'made a mistake.'
65. The claimant stated that Steve Lowbridge requested the invoice quickly and he was asked why this was. He said he didn't know and they would have to ask him.
66. With regard to Gordon Wishart's involvement the claimant said that he 'got involved when sales become material. ' He couldn't remember when it was first mentioned but maybe in March or April 2016 he had said it was looking hopeful. Gordon had appreciated his efforts. Gordon was aware in about March 2016 that there was a potential sale to Spire.
67. The claimant was asked why he hadn't involved other staff in discussions about the PDE. The claimant said he was being blamed for keeping it to himself. "I kept it from the staff in the company because they wouldn't get many questions. It's a small part of the business."
68. He was asked why he considered Gordon Wishart and Bill Gore were not competent to conduct a fair disciplinary hearing. The claimant stated this

was because they were shareholders. He said that 'Gordon was personally motivated to enable himself to take over and so his wife could work for the company which is something I was against. Bill Gore benefits because he is a shareholder. Neither have HR experience therefore they are not competent.'

69. Ms Lander then went onto deal with the specific details of the agreement with Spire. With regard to why he had told his son not to let anyone know, the claimant said, "The reason for it was that if he called in late for example then confusion would be generated."
70. After the appeal hearing, Ms Lander spoke to Prof Wishart and Bill Gore. She then spoke to Steve Lowbridge. She found that cast further doubt and confirmed the inconsistencies in the claimant's version of events. Steve Lowbridge recounted the discussion he had with the claimant about the incorrect bank details on the sales invoice. The claimant had explained to Steve that the bank account should be used as it related to a factoring company and then he changed to explain that it was an intermediary. This was unusual behaviour as the payment should only have been due to be paid to the respondent's bank account and every error should have been investigated and corrected immediately once highlighted. The claimant had previously explained that Steve had requested the invoice to be raised quickly and Steve Lowbridge confirmed that he had not done so. It had been the claimant who was pushing for prompt payment.
71. Ms Lander also spoke to Jack Terras. She did not get an opportunity to speak directly to those who had left the company.
72. In an appeal outcome letter dated the 28 September 2016 Ms Lander set out her belief that the matter had been thoroughly investigated on behalf of the respondent and that the decision to dismiss would be upheld as a reasonable decision in all of the circumstances.
73. She endeavoured to address each of the points raised in the appeal in turn. She did not accept that asking Kerry Learmouth to send the invoice to Spire would have caused undue delay. In fact, any pressure to complete the payment was caused by the offer the claimant had made to reduce the purchase price by 5% if Spire paid by the end of the month.
74. She did not accept the claimant's lack of capacity to differentiate between the different bank accounts. The two accounts are with different banks so the details including the name of the banks which is meaningful data and should have raised the claimant's awareness to the error he had made. It was also hard to comprehend that the claimant thought the bank details were from a previous company IHT as this was not an active account and therefore the claimant was unlikely to have been carrying the bank card for that account and would therefore not have erroneously included those details in the invoice via the method he had explained.

75. In speaking to Steve Lowbridge he had reported that the claimant tried to claim the bank details were those of a legitimate third party. The claimant had not needed to do that when correcting the bank details would have sufficed. He failed to inform Kerry of the invoice being sent which would have been expected. Ms Lander therefore concluded that the claimant did intend to put his personal bank details on the invoice that was sent and the purpose for this was an attempt to defraud the company by diverting company revenues to his personal bank account. That alone would have been sufficient to warrant summary dismissal.
76. She then dealt with the request for Diagnostic Green to invoice the claimant personally. The claimant had said that this had been poor English and that he had requested them to deliver it to his home address. Ms Lander found that his statement regarding sending the invoice was clearly an instruction to send the invoice to his home address. It also conveyed a request for the claimant to be invoiced personally at that address. She therefore concluded the claimant intended the invoice to be sent to him personally and that further supported the conclusion that he was attempting to defraud the company.
77. The claimant had accepted he had asked Diagnostic Green to send the PDE camera to his home. His explanation that he was going to be using it at a conference on 6 May and that getting it delivered to home was a practical solution, was not accepted. She found that he intended the camera to be sent to his home address to conceal the transaction as part of his attempt to defraud the company.
78. Ms Lander further found there had been attempts to prevent involvement of his colleagues and board members in the sale of the PDE. This she was satisfied was to ensure they were not aware of his attempt to defraud the company.
79. Ms Lander took into account the email the claimant sent his wife on 3 March 2016. The board had informed her that around this time the company was not in immediate financial difficulty due to the fundraising in late 2015. She therefore found the email indicated a recognition of a potential financial gain from the sale of the PDE camera.
80. She did not consider Bill Gore and Gordon Wishart to be inappropriate individuals given the claimant's long standing with the company. They were suitably experienced and had support from a legal advisor. The claimant's appeal was rejected.

Mobile phone issue

81. Before the disciplinary process was commenced the company was looking to transfer the claimant's mobile phone number to him, and Professor Wishart had signed the top part of an ownership transfer to start the process. The form was not completed and signed by the claimant until after his dismissal, and the company decided not to proceed with the phone

number transfer as the claimant's mobile number was present on much of their sales and marketing material. The mobile phone supplier DR Communications was therefore warned that the number must not be transferred to the claimant under any circumstances. The claimant however filled in the rest of the paperwork and tried to contact DR Communications separately to get the phone transferred to him using Professor Wishart's signature on some of the paperwork he had filled in previously. The company reported the claimant to the Police in connection with this matter as they were concerned about fraudulent behaviour.

Submissions

For the respondent

82. On behalf of the respondent it was submitted that it had done enough to establish that conduct was the reason for dismissal and that that was a potentially fair reason within the terms of the Employment Rights Act 1996.
83. It was submitted that the clear facts in this case are that the claimant created this invoice. He admits that he created it with his personal bank account and phone details on it. He asked the representative at Diagnostic Green to keep the sale to herself and not talk to anyone at the respondent. He asked for the machine to be delivered to his home address and to invoice him personally by email.
84. The claimant chose not to put any questions in cross examination to Professor Wishart in relation to paragraphs 21 – 23 of his witness statement and the tribunal should draw an inference from that.
85. Had the respondent tried to create a situation to dismiss the claimant then logically that must mean that the respondent had some involvement in the creation of the invoice. It did not. The claimant created it and that was not on the instruction of the respondent.
86. The claimant accepted in cross examination that if a colleague had acted in similar circumstances he would have expected that to have been investigated.
87. The tribunal has been drawn to the inconsistencies of the invoice. There was information available to the respondent at the time and no dispute then that the claimant had based this on a Deloitte invoice.
88. The claimant deliberately sought to keep the respondent out of the sale. The sale however is not the issue but the fraudulent invoice is.
89. The respondent genuinely believed at the time the claimant was trying to sell to Spire a machine he was acquiring from Diagnostic Green. He has changed that today but at no time did he do that in the disciplinary process

90. When the respondent became aware on 25 July that the invoice contained incorrect details it acted immediately. The claimant was MD and shareholder. He was in a tremendous position of trust and ran the respondent company on a day to day basis. Any reasonable employer had to take this matter seriously, there was nothing wrong or improper with the respondent's investigation.
91. One of the claimant's arguments is that he mistook his bank card. The cards however would have been red and blue. The cards are very different. The solicitor for the respondent found it very surprising the claimant was not able to confirm that a Barclaycard is blue. That would be known to most people even if they were not a Barclay's customer. Whilst he may have used an HSBC account that was two years previously.
92. The respondent genuinely believed the claimant had financial difficulties. He had invested funds in the company. He told his wife their holiday was safe and he was loaning money to a friend. The claimant was relying on the sale and tried to hide it.
93. The claimant deleted emails and was trying to cover his tracks.
94. The claimant said he would not ask Kerry to do the invoice as their relationship was too close. That was a very odd comment to make and suggests there was something to hide.
95. Suspension is not a requirement. Careful consideration was given and the claimant was in any event away from the office at that time and Gordon Wishart was able to investigate without the claimant being present. It would be more difficult to explain why the claimant was not working as he was the MD. It may have been embarrassing. It shows that the respondent acted reasonably and that no decision had been made about guilt at that stage.
96. The respondent is a small company and all the directors are shareholders. It was not reasonable for the other director to hold the disciplinary hearing. It is usually a Line Manager. The claimant was MD though. The respondent did not have the luxury of someone else to deal with the investigation. It engaged an external HR Advisor for the appeal.
97. The ACAS code does not say that the investigator and the disciplinary officer should be different but if it is reasonably practicable. It was not in this case. It is not a fundamental issue and does not make the process unreasonable.
98. There is no evidence to suggest bias by Gordon Wishart. He did not want to believe the claimant had committed fraud, and had had a good working relationship with him. The claimant said he was happy for Gordon Wishart to deal with the disciplinary hearing in cross examination.

99. A reasonable employer was left with no other conclusion it could come to in all of the circumstances. The claimant gave very flippant answers at the disciplinary hearing and did not provide credible explanations. The respondent's notes show all the information the respondent had. The challenges the claimant now makes were not made at the time, he now tries to suggest that there was a genuine mistake but that is not what he said then. The respondent could not reasonably be expected to take into account matters that were not put to it at the time.
100. The claimant's evidence to this tribunal was inconsistent and confusing and not credible. The respondent's evidence was consistent and should be favoured.
101. The respondent had an objective belief that the claimant attempted to divert funds away from the respondent. That is a potentially fair reason for dismissal. The claimant sent work emails to himself and appeared to be setting up his own company in breach of his duty of confidentiality to the respondent. That would also be gross misconduct and relevant to the decision.
102. With regard to the appeal the respondent has shown that Lorraine Lander was not at the time a shareholder but an externally appointed consultant and not a director either. She was assisted by an external HR Advisor. The fact of paying an external HR consultant does not show bias. He had not been involved in the disciplinary process. They made a joint decision. They went to great lengths to start from scratch and carefully thought out the appeal outcome letter. They went through all the evidence and spoke to the claimant and others. They found no new evidence that the claimant had made a genuine mistake but found a deliberate intent to divert funds. This was confirmed by the statement made by Steve Lowbridge.
103. The respondent had a reasonable and genuine belief in fraudulent behaviour and that amounts to gross misconduct under the policy. The claimant was managing director and there was a clear breach of trust and confidence. These amount to grounds for summary dismissal.
104. It is not for the tribunal to substitute its view for that of the employer. The respondent had a reasonable suspicion amounting to belief in guilt at the time.
105. If in any way the tribunal should find the process flawed applying the principles set out in Polkey any award should be reduced by 100% as the claimant would have been dismissed in any event.

For the claimant

106. The claimant submitted he took the wrong card from his wallet without looking at the colour.

107. With regard to the email to his wife, there is a difference between what you report to your wife and tell the company. The claimant stated that the dismissal was unfair on four basic principles.
- 107.1. Pre-meditation
 - 107.2. Lack of process
 - 107.3. Lack of integrity
 - 107.4. No reasonable belief
108. Gordon Wishart had sent to others emails that showed that things were going on behind the claimant's back and something pre-meditated was going on. This was an opportunity for the claimant to be kept out of his shareholding.
109. Everyone who investigated are now shareholders and benefit from the claimant not having his shares. Gordon Wishart carried out a very short investigation. It was a fait accompli from day one. The appeal only took 4 weeks and was not measured. There are no recordings of the meetings. An audio recording would have helped everyone. There was not a fair process carried out.
110. Gordon Wishart said he knew the difference between right and wrong, yet he issued an invite to the disciplinary hearing after a day. He could not have investigated for more than a few hours. The claimant would have expected it to have lasted several weeks.
111. The claimant's fellow directors had an enormous financial motive for his dismissal. They gained a share of his £1.2 million and saved on his salary.
112. The respondent has done everything to paint the claimant in the worst possible light, demonstrated by their evidence on the Vodafone mobile phone number.
113. There is a lack of reasonable belief. The claimant used work emails and was open about what he was doing. He shared information with Lorraine Lander and Gordon Wishart with the May accounts. Gordon Wishart was well aware of the sale before Kerry told him about the invoice. Who would lend the company £25,000 and then commit fraud? The claimant co-founded the company. His work in the company was far beyond what others did. Lorraine and Gordon could not come up with any other claims against his name. He had kept the company afloat and this is how he has been paid back.

Relevant Law

114. It is for the Respondent to satisfy the tribunal that it had a reason for the Claimant's dismissal and that that was a potentially fair reason falling within section 98 of the Employment Rights Act 1996 ('ERA'). The Respondent relies on conduct (section 98(2)(c)). The tribunal must give consideration to the guidance laid down in *British Home Stores Ltd v Burchell* [1978] IRLR 379, which requires the tribunal to decide:

'decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time.'

This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. An employer who discharges the onus of demonstrating these three matters must not be examined further. It is not necessary that the Industrial Tribunal itself would have shared the same view in those circumstances. Nor should the Tribunal examine the quality of material which the employer had before him, for instance to see whether it was the sort of material which, objectively considered, would lead to a certain conclusion on a balance of probabilities, or whether it was the sort of material which would lead to the same conclusion beyond reasonable doubt.'

115. If the Respondent establishes such a reason the tribunal must determine whether, applying section 98(4) the Respondent acted fairly or unfairly in treating that reason as a sufficient reason for dismissing the employee having regard to all the circumstances and 'equity and the substantial merits of the case'.
116. In considering the decision to dismiss the tribunal must not substitute its view for that of the employer but decide whether dismissal was 'within the band of reasonable responses'.
117. The Claimant also claims wrongful dismissal and the tribunal must decide whether he committed an act of gross misconduct such as to entitle the employer to dismiss without notice.

Conclusions

118. The Respondent has established that it dismissed the Claimant by reason of his conduct a potentially fair reason falling within section 98 of the ERA.
119. At the time it formed that decision it had carried out a reasonable investigation and had reasonable grounds for believing that the Claimant had produced an invoice with his bank details on it with intent to defraud the Respondent.
120. Immediately Professor Wishart was advised by Kerry Learmouth about the invoice he required her to prepare a report for him which she did setting out all the relevant facts. She has confirmed to the Claimant for this hearing that she stands by that report. The Claimant is critical that the investigation was done in such a short period of time but it is not clear what more there was to investigate.
121. The Claimant in effect questions the genuineness of the belief in his misconduct suggesting that Professor Wishart and Bill Gore stood to gain financially by his dismissal with regard to shareholdings. The shareholding situation is separate and distinct to the Claimant's position as an employee and outside the remit of this tribunal. However, even if it were a matter to be taken into account it would require them to have somehow been complicit in the preparation of the invoice to Spire and even the Claimant has not sought to suggest that. The fact is that it was the Claimant's own conduct in creating the invoice as he did that lead to the disciplinary proceedings. He admitted creating the invoice with his personal bank details and phone details on it. He asked Diagnostic Green and his son to keep it to themselves and not talk to anyone at the Respondent. He asked for delivery to his home address and for the invoice to be emailed to him. The Claimant accepted in cross examination that any other employee in the same circumstances he would have expected to have been investigated.
122. The Claimant was called to a disciplinary meeting at which he was given the opportunity to state his case. He had legal advice by that time but sought not to be accompanied. He has stated matters to this tribunal that he did not state at that disciplinary hearing. The tribunal can only take into consideration matters that were before the employer at the time of the decision to dismiss.
123. It is the case that there was no investigatory meeting held with the Claimant. The ACAS Guide however does state that 'it is not always necessary to hold an investigatory meeting...' The Claimant was given the opportunity to state his case at the disciplinary hearing. The tribunal is satisfied this was a route open to the employer and cannot find it an unreasonable one in all the circumstances.

124. The Claimant was still then maintaining he had taken an old Deloitte invoice and amended it but that has been shown to not be the case and the Claimant has acknowledged that at this hearing but not before.
125. The Claimant has never been able to give a credible explanation as to why the wrong bank account details appeared on the invoice. The cards would have been different colours. It is not clear why he would rely on a card for a bank account that had not been used for 2 years.
126. The Respondent acted perfectly reasonably in finding that the Claimant had not established any urgency for the invoice such that it could not be produced by accounts in the usual way. If anything it was the Claimant who was pushing matters offering Spire a discount rather than the other way round.
127. Professor Wishart set out clearly in his decision letter the reasons for forming his belief in the Claimant's misconduct and that was a reasonable belief to have come to in all the circumstances.
128. The Claimant had also deleted many emails and the Respondent was entitled to conclude that he was covering his tracks and had something to hide.
129. It would have been preferable if the investigator and dismissing officer were not the same. However, the ACAS Code states that 'where practicable' different people should carry out the investigation and disciplinary hearing. Professor Wishart hadn't carried out all the investigation as Kerry Learmouth had prepared the report. The Claimant was the Managing Director and save for bringing in someone from outside it is difficult to see who else could have conducted the disciplinary hearing.
130. The Respondent offered the Claimant a thorough appeal process conducted by someone with minimal involvement and knowledge of the circumstances leading up to the disciplinary allegations against the Claimant. Lorraine Lander was a professional with limited financial involvement with the Respondent at that time. She was assisted by Steve Ward an HR Consultant. They not only heard from the Claimant but conducted their own investigations. It was a thorough process.
131. Having established the Claimant's misconduct dismissal was clearly within the band of reasonable responses. There was an intent to defraud the Respondent and such must amount to gross misconduct. Dismissal had to be within that band.

132. For all these reasons, the tribunal is satisfied the Respondent acted fairly in treating the Claimant's conduct as such to justify his dismissal. The conduct amounted to gross misconduct entitling the Respondent to dismiss without notice. All claims fail and are dismissed.
133. In the event that the tribunal had found procedural failings in the process such as to render it unfair (for example by the failure to hold an investigatory meeting with the Claimant and that Professor Wishart should not have conducted the disciplinary hearing) the tribunal would have concluded that when it came to remedy there should have been a 100% deduction under the principles set out in *Polkey v A E Dayton Service Ltd* [1987] IRLR 503 as dismissal would have occurred fairly in any event. Further any basic and compensatory award would have been reduced to nil as the Claimant by his conduct had caused or contributed to his dismissal and/or it would not be just and equitable to make any award.

Employment Judge Laidler

Date: 6 November 2017.....

Sent to the parties on: 6 November 2017

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For the Tribunal Office