Case No 2403202/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr K Hitchen	Bury Football Club Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Manchester on 25 May 2018 and in Chambers on 18 June 2018

EMPLOYMENT JUDGE Warren

Representation:-

Claimant: Mr Gilbart, Counsel
Respondent: Mr Cameron, Consultant

RESERVED JUDGMENT

1 The claim for compensation for untaken and unpaid annual leave is dismissed on withdrawal by the claimant.

2 The claim of unfair dismissal was well founded. The claimant was unfairly dismissed.

ORDER

1. This case will now be listed for a Remedy Hearing. The parties are to provide none availability for the parties and their representatives with their time estimate for the hearing, to Manchester Employment Tribunal within 7 days of receipt of this order.

2. At least 7 days before the Remedy hearing, the claimant is to serve an updated schedule of loss on the respondent and Tribunal.

REASONS

Background

1.By an ET1 presented to the tribunal on 17 January 2018, the claimant alleged that he had been unfairly dismissed, and in breach of contract was owed notice pay, and sought compensation for unpaid untaken annual leave.

2.The untaken leave issue was resolved ahead of this Hearing, and this claim was withdrawn and dismissed.

The Issues

3.Did the respondent dismiss the claimant because for misconduct?

4.Were there reasonable grounds upon which the respondent could believe that the claimant had committed the misconduct in question?

a. Had the respondent unilaterally changed its agreement with the claimant about how he should perform his work and be paid?
b. Whether any such changes were implemented with immediate effect at the meeting of 13 October 2017.

5. Whether the respondent completed a reasonable investigation prior to dismissal?

6.Whether the decision to dismiss for purported misconduct fell within the band of reasonable responses?

7.Was the decision to dismiss fair in all the circumstances?

8.If the claimant's claim for unfair dismissal succeeds what is the appropriate amount of the award?

9.Did the respondent fail to comply with the ACAS Code of Practice in Disciplinary and Grievance procedures?

10.If so was the failure unreasonable?

11.To what extent would it be just and equitable to increase the claimant's award in accordance with section 207A TULRCA

12.Was there any contributory fault on the part of the claimant?

The Evidence

13.The Tribunal heard evidence from Mr Benjamin and Mr Evans on behalf of the respondent, and from the claimant and Mr Walmsley in support of the claimant. There was an agreed bundle of documents consisting of 68 pages. Page references herein relate to the agreed bundle.

14.The case was decided on the evidential test 'the balance of probabilities'. The evidence of the claimant and Mr Walmsley was more credible than that of the respondent witnesses.

15.Mr Evans admitted that he was taking telephone calls during the key meeting of 13 October, and that he left before it was concluded.

16.He gave evidence that when he undertook the appeal he had spoken to Mr Benjamin as part of his investigation. Mr Benjamin was adamant that he had not been spoken to by Mr Evans. Mr Evans gave evidence that he always followed up meetings and conversations in writing, because it was good business practice. He did not however supply a copy of the notes from the meeting on 13 October to the claimant, nor did he confirm what was to happen thereafter in writing. The notes were only prepared after the claim had been served on the respondent, and whilst Mr Evans gave evidence that he did have original notes at home, they have never been produced or disclosed. The claimant confirmed that none were actually taken in the meeting

17.The Tribunal has only considered evidence which was relevant to the issues in the case

18.The claimant and Mr Walmsley gave consistent and straightforward evidence. The claimant found answering questions in cross examination difficult, and showed signs of stress at times, (freezing and taking a long time to answer). Mr Walmsley has not brought a claim to Tribunal (for the utterly credible reason, that he had done so once before and never again) and therefore has nothing invested in this case.

The Facts

19.The claimant had been employed by Bury Football Club since November 2004. He and Mr Walmsley (who had even longer service) worked in the respondent's lottery scheme. They both sold lottery tickets door to door for cash. At the end of the week the claimant would deduct 15% from the cash he had collected and a fixed agreed amount for his petrol expenses. He would complete a work sheet showing the amount collected and the amount he had deducted and retained. The cash and worksheet would then be handed in to the club office. At the end of the month he would receive a pay slip with his salary set out, and tax and national insurance deductions.

20. From 2004 to 2017, nothing materially changed. In September 2017, the claimant was handed a contract of employment which purported to be from 2014, but which had never been signed by the claimant, and which he had never seen before. His conditions of employment were governed by a contract signed and dated 8 November 2004 (page 56). The contract made no mention of commission, petrol expenses, car allowances or particular ways of working.

21. In the Autumn of 2017, the club appointed Lee Cummins as a consultant to advise on the club's lottery scheme. Mr Benjamin was appointed to review the club's financial processes.

22. Mr Evans wrote to the claimant advising him that he would now report to Mr Cummins, and should support him with the redirection and relaunch of the Lottery (Page 30).

23. The claimant and Mr Walmsley sought a meeting with Mr Evans. It was arranged for 13 October 2017. They wanted to discuss Mr Cummins' appointment and terms of reference.

24. When they attended the meeting, Mr Cummins and Mr Benjamin were also present. Rather than discussing the claimant's concerns, Mr Benjamin set out the changes to the operation of the lottery which he wanted to see. These were:-

25. All fuel expenses were to be submitted to Mr Cummins on a Wednesday for authorisation, with receipts.

26. The weekly car allowance would be paid through payroll as it was taxable. The commission for canvassing would be paid monthly in arrears in the salary payment.

27. Collections involving cash would be logged and the figure given to Mr Cummins on a weekly basis. From this the commission would be calculated and any amounts due would be added to salary at the end of the month.

28. Neither Mr Walmsley nor the claimant agreed these changes. They had

already started to have their petrol expenses handled differently

29. Mr Evans admits that he took several telephone calls from the club chairman throughout this meeting, and then left before the end. No-one took notes within the meeting. Mr Cummins has since left the business and did not give evidence. Mr Benjamin was present throughout the meeting. He has since left. He confirmed in cross examination that he had since moved to a new job and had a baby. He could remember key points but 'not word for word'. He confirmed in evidence that he assumed the notes of the meeting at page 31 had not been sent to the claimant, he didn't know if they had only been provided as part of disclosure in this case. He agreed that on the face of the notes no one had endorsed them as regards accuracy. He was sure that the claimant had been told that changes had to be made immediately, and agreed that the claimant did not agree to the changes. The claimant believed that he would hear further, in writing. He does not agree that the notes of the meeting are accurate, notes they are undated and unsigned, and that he received a copy for the first time as disclosure in this case

30. The claimant heard nothing further in the following few days. He continued as he had before, collecting money, and on the 19 October, as he had for over 13 years, he accounted for the cash collected, net of his commission. He was called into a meeting with Mr Benjamin and Mr Cummins on the same day and immediately suspended on full pay on the grounds of gross misconduct (page 35).

31. The suspension was confirmed in a letter dated 19 October 2017 from Mr Benjamin. He was advised that there would be an investigation and then the respondent would write to the claimant, and if they considered there to be grounds for disciplinary action the claimant would be informed of those grounds in writing, and he would have the opportunity to state his case at the hearing, in accordance with the respondent's Disciplinary Procedure. (page 35)

32. In fact the claimant the claimant was called into a meeting on 23 October, with no prior written notice. He did not know what the meeting was for, nor what any allegations may be, or indeed what evidence was to be used. He was not invited to be accompanied. He described himself as 'ambushed'. The hearing was undertaken by Matt Caren, a manager within the respondent's business

33. He was told that he was being dismissed immediately for gross misconduct for taking his commission from the cash. He tried to explain that he did not believe anything had been agreed at the meeting on 13 October 2017, and that no start date had been agreed. There are no notes of any investigation, witness evidence, or notes of the disciplinary meeting. Matt Caren has since left the business. Mr Caren noted in the dismissal letter (page 37) that the claimant had said he did not know why he had taken the commission. The claimant confirmed

he could not remember what had been said in the meeting.

34. The claimant received a letter from Mr Caren dated 27 October 2017 (page37) confirming that he had been dismissed for gross misconduct. The reason given was 'a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship'. He referred to having considered the disciplinary procedure and ACAS Code, which he stated did not permit recourse to a lesser disciplinary sanction.

35. Mr Caren also stated that he considered the claimant's explanation to be unsatisfactory because of the lack of evidence.

36. The letter of dismissal did include a right to appeal to the CEO, Mr Evans.

37. Even before receipt of the letter the claimant had appealed.

38. The claimant was given a date for his appeal of 7 November 2017. He was not given any of the evidence which had led to his dismissal, nor given any notes from the disciplinary hearing, nor given the right to be accompanied. Mr Evans confirmed he overlooked the right to be accompanied.

40. The appeal was heard by Mr Evans. After the meeting Mr Evans claimed to have spoken to Mr Benjamin and Mr Cummins. As this is denied absolutely by Mr Benjamin, the tribunal finds that he did no such thing. Mr Benjamin also confirmed that he did not look at the ACAS code, and that he had no understanding of it. He had not read it and did not think he needed to. He was 'unaware that he was breaking the rules' (his words) by hearing the appeal when he had been involved in the meeting on 13 October. He agreed that his letter in response to the appeal (page 41) missed out a number of matters which he should have included.

41. He further agreed that he hadn't thought to look for someone else to hear the appeal and agreed that he was in no sense independent. He was aware of the right to be accompanied, but overlooked the need to tell the claimant.

42. Mr Evans further accepted that although he made reference to the employee's handbook, he only had the word of previous CEOs that the claimant would have a copy of it, and he did not use it in the appeal, or show him a copy.

43. In considering the appeal Mr Evans agreed that he had looked at the dismissal letter, referred to the disciplinary procedure and ACAS guidelines. He noted that the dismissing officer misunderstood the possibilities –by stating that the only possible sanction was summary dismissal, but made no mention of that in his decision letter, and that he also overlooked mentioning any points in

mitigation such as the length of the claimant's service.

44. He agreed that he had not checked the claimant's disciplinary record (had he done so he would have noted that the claimant had a clean disciplinary record for over 13 years), and that he had not thought about the level of trust in which the claimant had been held, collecting cash over the years.

45. Mr Evans also agreed that he had handwritten notes (scribbled) from the meeting of the 13 October, which had never been disclosed and still hadn't to the date of this hearing). The typed notes of the meeting had only been produced after the claim was brought.

46. The notes of the appeal hearing had been produced by Ms Kent who had been present as a note taker (page 40).

47. The notes reveal the claimant again asserting that in the meeting on 13 October 2017 there were no clear instructions as to when the new system was to commence. Mr Evans contributed that he remembered it being discussed, but that he had not been party to all discussions as he had been taking calls from the club's chairman.

48. In an undated letter Mr Evans refused the appeal, upholding the decision to dismiss. The reason given was that the claimant had given a differing explanation to him from that in the original disciplinary hearing.

The Law

49. Section 98 Employment Rights Act 1996 provides:-

> (1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> a) the reason (or if more than one, the principal reason) for the dismissal; and
>
> b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> b) relates to the conduct of the employee."

(4) "Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

50. It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the misconduct alleged. British Home Stores v Burchell 1978 IRLR 379. The tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

51. In the words of the guidance offered in Iceland Frozen Foods v Jones 1982 IRLR 439:-

a) the starting point should always be the words of section 98(4) themselves
b) in applying the section the tribunal must consider the reasonableness of the employers conduct, not simply whether they consider the dismissal to be fair
c) in judging the reasonableness of the dismissal the tribunal must not substitute its decision as to what is the right course to adopt for that of the employer
d) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another
e) the function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
f) The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

52. The Court Of Appeal in Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 3 concluded that the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in

> all the circumstances as it does to the reasonableness of the decision to dismiss. In A V B 2003 IRLR 405 the EAT concluded that when considering the reasonableness of an investigation it is relevant to consider the gravity of the charges and the consequences to the employee if proved. Serious allegations of criminal misbehaviour must always be the subject of the most careful and conscientious investigation.

53. The tribunal has considered the provisions of the ACAS code of practice to disciplinary and grievance procedures, in particular the 6 basic recommendations.

54. Was the instruction to change the way of working lawful?

55. *Farrant v Woodroffe School (1998) IRLR*
Where the conduct relied upon by the employer is the employees refusal to obey an instruction, the question as to whether the instruction is lawful is a relevant but not decisive question when considering the reasonableness of the dismissal under section 98(4) ERA in a case of unfair dismissal.

56. Shevlin v Innotech Advisers Ltd UKEAT/0278/14
The fairness of a dismissal for a refusal to obey a reasonable instruction will require consideration as to whether that instruction was reasonable and that, in turn, may require a determination as to whether the instruction was lawful under the contract.

On the issue of sanction

57. Brito – Babapulle v Ealing Hospital NHS Trust (2013) IRLR 854
It is the tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. This general assessments necessarily includes consideration of those matters that might mitigate

Representations of the claimant:

58. In summary –
The claimant was a longstanding employee with vast experience of the respondent's lottery system. He had always worked in the same way for almost 13 years.
The respondent chose to unilaterally change the claimant's way of working and the way he was to be paid. There had been no agreement by the date of dismissal, the claimant expected further discussion to reach agreement.

The respondent knew that the claimant had not agreed the changes. Karl Evans view that the claimant had been told the changes were final and immediate should be rejected, as Mr Evans did not refer to that in the appeal hearing or outcome.
Mr Evans assertion that he spoke to Mr Benjamin, was denied by Mr Benjamin in his evidence. The claimant did not see any meeting notes, which were not in any event contemporaneous, until he brought this claim. He denies their accuracy.
The instruction given was unlawful and unreasonable.
There were breaches of the ACAS code of practice
The claimant as not given notice of the meeting of 13 October and no evidence was provided at the disciplinary hearing. The claimant was not advised it was a disciplinary hearing. No notes were provided of the meeting.
It is unclear what the reason for dismissal was, loss of trust and confidence, or gross misconduct. There was no consideration of a sanction less than dismissal either at the disciplinary, or the appeal hearing.
The appeals officer accepted that he was not impartial, and the claimant was not invited to be accompanied. Mr Evans did not speak to Mr Benjamin.
Mr Evans took no account of long and faithful service *Trusthouse Forte (Catering) Ltd v Adonis 1984 IRLR 382*.
The sanction was not in the range of reasonable responses. *Brito – Babpulle v Ealing Hospital NHS Trust (2013) IRLR 854.* The claimant was dismissed for a single act which was to contravene an unlawful instruction which was the subject of ongoing discussion and negotiation, or at the height of the respondent's case had only just been imposed for the first time in the entire history of the claimant's working relationship with the respondent.

<u>Representations of the respondent.</u>

59.In summary-
The claimant was given a clear instruction which he understood to run from 13 October. The claimant ignored the instruction because he did not want to pay tax on his commission. He gave different reasons at different times.
He was told in writing that he had been suspended, and after the decision he did not object to Mr Evans hearing his appeal. Mr Evans had not been involved in the decision to dismiss. To deduct the commission and keep it after the instruction given is almost like theft, which must be dismissible because he was in a position of trust. There was an appeal and the claimant agreed he had the chance to state his case. He received a written outcome, and the procedure followed was fair.
In the event that it was not fair, any alternative fair process would have resulted in the same outcome. The facts were simple and there was little to investigate.

Conclusions

60. Did the respondent dismiss the claimant because for misconduct?
The letter of dismissal makes no mention of misconduct, alleging a breach of the term of trust and confidence. However the respondent's whole case has been based on the assertion that the claimant was given instructions on new ways of working, to be complied with immediately and which he wilfully ignored. It is fair to say that the real reason for dismissal was his perceived misconduct in failing to comply with the instruction.
The reason for dismissal was thus misconduct.

61. Were there reasonable grounds upon which the respondent could believe that the claimant had committed the misconduct in question?

a. Had the respondent unilaterally changed its agreement with the claimant about how he should perform his work and be paid?

The respondent had unilaterally changed the terms of the claimant's contract of employment by changing the way his commission was to be paid. Whilst the respondent says it had no choice, it did. It was well aware of how much the claimant was taking in commission every week, and if there were accounting irregularities, could have picked them up over the previous 13 years. The respondent was aware that neither the claimant nor his co-worker had agreed this particular change. Both believed that there would be further discussion, and that they would receive something in writing to confirm the new instructions and a start date. Mr Evans was in the habit of confirming matters in writing. It was not made clear to them that the change was instant. It related to a fundamental term of their contracts – how and when they were paid.

b. Whether any such changes were implemented with immediate effect at the meeting of 13 October 2017.

62. On the evidence and facts found it was not made clear that the change would be instant. Both affected employees believed that because they had not agreed it, there would be further discussion and then they would be expecting a start date. The communication with them was very poor – they believed they were having a meeting with the CEO to discuss their issues with the rebrand of the lottery.
In fact they were met with a panel of 3 managers, telling them that they would have to change the way they worked, and in effect that the terms of their remuneration under their contracts of employment were being changed (although it is equally clear that none of the managers had thought it through in these terms)
Without clear and credible evidence I am not satisfied that on the balance of probabilities the claimant could be expected to know there had been such a

change implemented immediately. The respondent however did in reality implement the change.

63. Whether the respondent completed a reasonable investigation prior to dismissal.
I heard no evidence of any real investigation. There is no evidence that Mr Caren, or anyone else took statements from the three managers to confirm what was said in that meeting. No evidence of minutes being prepared and agreed with the claimant and his co worker.

64. There is no evidence that Mr Caren considered the claimant's case that the the fact that the claimant and his co worker both continued to carry out the procedure that had been their work practice for at least 13 years may have been because it had not clearly been communicated to them that they were to immediately change their working practice.

65. In the absence of any evidence of an investigation I find that there was no reasonable investigation.

66. Whether the decision to dismiss for purported misconduct fell within the band of reasonable responses?

67. Within this I consider whether the respondents held a genuine belief that the claimant failed to comply with a lawful instruction. There is an issue of whether the instruction was lawful, if the terms of the contract had not been changed then it probably was not. I am satisfied that the contractual change was unilateral, the claimant did not agree it in the meeting on 13 October 2018.

68. There is no evidence that the respondent undertook sufficient investigation to hold a genuine belief, and thus the respondent could not found a dismissal on a genuine belief in the claimant's alleged misconduct.

69. In any event it is very clear that the decision to dismiss was based on the misconception that having categorised the claimant's behavior as gross misconduct the respondent had to dismiss, and should not consider other options (per Mr Caren). That being the case the decision to dismiss does not fall within the range of responses one would expect from a reasonable employer.

<u>70. Was the decision to dismiss fair in all the circumstances?</u>

No in all of the circumstances it was not. It is worth considering the time frames. The claimant became aware of the changes required in the way he was to be paid on the 13 October 2017 orally in an un-minuted meeting, when he had been unaware that this was going to happen. On the 19 October 2017 he had undertaken one set of transactions in the old way, believing that as he had not

had confirmation of the changes required, no agreement had been reached. He was suspended on the same day, and dismissed summarily 4 days later, as was his co-worker.

71. There were numerous breaches of the ACAS code of practice. The claimant rightly described himself as ambushed in the disciplinary hearing. He had no notice of the allegations against him, or of any evidence gathered. He was not given the opportunity to have anyone with him. The meeting was un-minuted. The reason given for the dismissal did not match the reason for the suspension. It is completely unclear how the decision was taken and what was taken into account.

72. There was an opportunity to put things right in the appeal. However again the claimant was not given the chance to be accompanied and the appeals officer agrees that he was far from independent. He did not consider lesser penalties, did not refer to the ACAS guidelines, did not have any knowledge of what was contained within them, and did not refer to the company's disciplinary procedure. He did not speak to the witnesses present in the meeting of 13 October 2017, and did not look at the claimant's clear disciplinary record, nor his long and trusted service. In particular he upheld the decision to dismiss on the basis of Mr Caren's note of the claimant's explanation (within the dismissal letter), which he considered to conflict with the explanation given to him. To so do may generally be appropriate, but not in a case where there were no minutes of the meeting with Mr Caren, let alone agreed minutes, and where the claimant had been unaware he was going into a disciplinary hearing, and was unaccompanied. All factors which a reasonable appeals officer may have considered relevant. I am satisfied that he did not consider lesser penalties

73. Did the respondent fail to comply with the ACAS Code of Practice in Disciplinary and Grievance procedures?

There are numerous instances of failures to comply with the ACAS Code of Practice listed in the paragraph above.
In particular – the claimant was not given notice of his disciplinary hearing, advising him of his right to be accompanied. He was not given a copy of any evidence against him, nor of the allegations.
He was dismissed summarily with no evidence of any mitigation being considered.
His disciplinary officer believed he was required to dismiss summarily.
His appeal was chaired by someone who admitted he was 'far from independent' and indeed a witness to part of the meeting on 13 October 2017.
He was not advised of his right to be accompanied at the appeal hearing.
The claimant did not receive any notes or minutes from the disciplinary meeting (nor did the appeals officer)

His appeals officer made reference to both ACAS guidelines and the company disciplinary code, but had not read the first and did not have the second in the appeal meeting.
No account was taken of the claimant's lengthy and trusted work history.

74. If so was the failure unreasonable?
In these circumstances it was unreasonable to treat the claimant in this way. The speed of dismissal left little time to reflect and allow time for the correct process to be completed

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Employment Judge Warren

Signed on 25 June 2018

Judgment sent to Parties on
18 July 2018
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For the Tribunal Office