



EMPLOYMENT TRIBUNALS

Claimant: Mr A Featherston

Respondent: Cottingham Technical Services Limited

Heard at: Hull

On: 3rd to 5th October 2018

Before: Employment Judge Eeley

Representation

Claimant: Mr A Crammond, counsel

Respondent: Mr D Maxwell, counsel

RESERVED JUDGMENT

The claimant's claim of unfair dismissal fails and is dismissed.

REASONS

1. By a claim form presented on 8th May 2018 the claimant presented a claim for unfair dismissal arising out of his employment with the respondent. The respondent defended the claim.
2. The following issues arose for determination by the tribunal:
 - a. What was the reason for the dismissal? Was the dismissal for a potentially fair reason namely conduct?
 - b. Did the respondent have a genuine belief in the claimant's guilt?
 - c. Was that genuine belief based on reasonable grounds, following a reasonable investigation?

- d. Was the decision to dismiss fair within the meaning of section 98(4) of the Employment Rights Act 1996? Did it fall within the range of reasonable responses?
 - e. If the dismissal was procedurally unfair should compensation be reduced following the principles in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503?
 - f. If the dismissal was unfair should the basic or compensatory awards be reduced by reason of the claimant's conduct pursuant to the principles in s122(2) and 123(6) of the Employment Rights Act 1996?
3. In determining the case I received written witness statements and heard oral evidence from:
- a. The claimant
 - b. James Hitchen, a contractor who worked alongside the claimant on site.
 - c. Stephen Palmer, Director of the Respondent.
 - d. David Rowe, Director of the Respondent
 - e. Matthew Brain, employment law solicitor and external consultant.

I was referred to the relevant pages within an agreed bundle which ran to 389 pages. I received oral submissions on behalf of both parties and a skeleton argument on behalf of the respondent.

Findings of fact

4. The claimant was both an employee and a founding director of the respondent company. The claimant was employed as Installation Director from 1st September 2012 until his dismissal on 15th January 2018. The claimant was responsible for overseeing installations and audits on the respondent's sites. The respondent is an installer of machinery in distilleries and breweries throughout the UK. It also conducts testing and audits. The respondent employs 12 employees. The other two directors and founders of the company were Mr Palmer and Mr Rowe. All three directors were equal shareholders.
5. The claimant's role as Installation Director included supervising contractors on site and overseeing installation and audit projects on clients' sites. He worked remotely from the other directors and his was therefore a position of trust. Mr Palmer and Mr Rowe were office based in Cottingham.
6. The respondent mostly engages contractors to carry out work for on site projects. They are paid on an hourly rate based on an anticipated 10 hour day. They also receive a daily subsistence allowance of around £20 to £25 per day. The first 8 hours of a weekday shift are paid at £12.50 per hour and the remaining 2 hours are paid at overtime rates. On site projects vary in length and can last for several days. On a multi-day project, the claimant and the contractors would travel to the site and then stay over in nearby hotel accommodation for the duration of the project. During the project the claimant would liaise with the client's on site staff and would attend on site contractors' meetings, usually on a daily basis.

7. The jobs done for clients are done on a fixed price which is quoted to them and agreed in advance. As part of agreeing the fixed price the respondent estimates how many 'man hours' are required to complete the project. This forms the basis for the price quote to the client and, naturally, the respondent's profit margin will be worked into this calculation taking into account anticipated labour costs.
8. The claimant's role on site included ensuring that projects were properly completed and brought in on time. In certain circumstances the claimant would be able to send contractors home early from a given shift but the claimant had an overall obligation to ensure that he acted in line with the respondent's best interests and that he did not send contractors home when there was work available which could and should be completed as part of the normal shift hours in question.
9. On 20th October 2017 Rory Gilligan (one of the respondent's employees) was interviewed by Mr Palmer as a result of allegations that he had fraudulently filled out his timesheet on 12th October 2017 to claim a full day's pay when he had in fact only worked until 3pm. During his interview Mr Gilligan stated that this had been the claimant's decision, that this was not the first time that this had happened under the claimant's instructions and that he (Mr Gilligan) did not want to work with the claimant again due to his bad performance and lack of support.
10. These allegations triggered a wider review of the claimant's working practices. The respondent investigated the time stamps on credit card receipts submitted as expenses by the claimant and his team of contractors together with their timesheets. It appeared to the respondent's directors that the claimant had been signing off on contractors' timesheets to show that they had completed full shifts when in fact they had left site early and had visited various bars and pubs, sometimes consuming alcohol. The cost of the drinks was either paid for on the claimant's company credit card or paid for on his own credit card and then claimed back as expenses from the respondent. The respondent's directors were therefore concerned that it had been paying the claimant and the contractors for time when they had not been on site but had been drinking elsewhere. They were also concerned that the last two hours of any shift were paid at overtime rates which meant that if contractors were leaving site early and going to the bar not only were they being paid for this but they were also being paid enhanced rates for this. An initial spreadsheet was compiled by Mr Rowe covering the period April 2016 to September 2017.
11. There was also a complaint from Alan Buckley (Distillery Manager at Slane Castle Distillery) addressed to Mr Palmer on 22nd August 2017 (p147) which stated: "Due to irregular start times, your contractors working Sunday and not showing on a Monday and not putting in the hours as agreed previously with Duggan it has made negotiating Sunday work incredibly difficult for me. Site management are here from 6am-7pm Monday-Sat and are incredibly amenable and flexible. They also need a day off." Mr Rowe confirmed that he had spoken to the claimant about keeping irregular hours but he had vehemently denied it. It was Mr Rowe's view that projects would sometimes overrun and the claimant would usually blame this on external factors.

12. On 7th November Mr Palmer interviewed the contractor Andy Edwards who worked with the claimant (p64-66). He confirmed that contractors occasionally left the site earlier than timesheets depending on the claimant's mood. He said that this was inconsistent depending on the claimant's mood. He confirmed that there was a general inconsistency with the claimant's mood, working times, efficiency and performance. He confirmed that where contractors did finish early this led to more drinking.
13. On 10th November 2017 Mr Palmer held an investigatory meeting with the claimant to discuss the concerns which had arisen. At that meeting the claimant was asked about the events of 12th October 2017 when he had allegedly dropped Mr Gilligan off before the end of the shift. On prompting the claimant recalled that he had dropped Mr Gilligan off early, possibly around 3pm. When asked why he had done this he said that as he was a director he could decide when the day was over and let Rory book a full day. He said that Mr Palmer and Mr Rowe were being petty and they should not be having that conversation. On questioning he confirmed that if he thought Rory could go home early and book overtime it was within his rights to decide this.
14. The claimant was also asked about the Charles Wells Brewery job on 3rd June 2017 and the first full day of work on the Saturday. He was asked about credit card receipts which showed that drinks had been purchased at 1.35pm, and then at 4.14 pm, 5.04 pm and 6.33pm indicating that work had finished before 4pm. The claimant reiterated that if he decided that they had had a good day on site he could decide when work was finished. Mr Palmer put it to him that all labour was being paid to be on site until 6pm and that letting them go 2 hours early was not right. He asserted that the number of hours taken was significantly lower than expected to audit over 30 machines and the only way this could have been done was by doing a poor job and rushing it. He said that he had taken the risk of the client finding out that CTS engineers had gone to the pub at 4pm or earlier and that he had paid twice as much for the job when you look at the hours spent. The claimant said that the client would not make a complaint as he was not like that. Mr Palmer said that some clients would notice and referred to the email from Alan Buckley from Slane distillery highlighting unpredictable start and finishing times.
15. Mr Palmer tried to ask the claimant about the next date in question. The claimant asserted that this was "Big Brother" watching him and that he could not recall any events. He said he would not go on with this. Mr Palmer said that the questions had to be asked as it was procedure. The claimant said that he was not continually being questioned like a schoolboy and again asked Mr Palmer who he thought he was. The claimant stressed that when on site engineers had to be flexible and that work times were decided by him and that if they had had a good day they could leave early. The claimant went on to say that Mr Palmer was acting like a managing director and was trying to force him out. The claimant said he would form his own company and that the only reason CTS was having some success was through his efforts. Mr Palmer asked the claimant further questions about various credit card receipts.
16. In a meeting on 20th November with Mr Rowe and Mr Palmer the claimant was defensive and made various allegations of wrongdoing against his fellow directors.

He alleged that the other directors wanted to get rid of him because they could see the potential in the company. The claimant said that he would not go quietly and threatened to “dish the dirt” on the respondent and ‘finish’ them.

17. In a meeting with Mr Rowe on 21st November the claimant complained of a character assassination and explained that he would not be bringing in the receipts (as Mr Palmer had requested in his letter) and instead said that they could collect them from the letter box of his house. In the end the other directors agreed that he could put them through their letterbox.
18. The claimant was informed by way of a letter dated 20th November 2017 that he was suspended on full pay (p89) pending investigation into allegations of potential gross misconduct. The allegations were:
 - a. defrauding the company;
 - b. actions which have brought, or which risk bringing, the company into disrepute;
 - c. serious breach of health and safety rules;
 - d. a serious breach of trust and confidence.
19. Due to these concerns the respondent commissioned an investigation report from a third party, an independent investigator, Mr Brain. he was provided with the letter inviting the claimant to a disciplinary hearing and a number of attachments (page 97 to 152). The documents include various spreadsheets analysing credit card receipts and timesheets. He was also provided with notes of interviews carried out with Rory Gilligan and Andy Edwards and an email from Alan Buckley.
20. The respondent wrote to the claimant on 29th November 2017 to invite him to attend a disciplinary hearing on 7th December to respond to a number of allegations of potential gross misconduct which can be summarized as:

Allegation 1: falsification of a timesheet (potential gross misconduct). It was alleged that on 12th October 2017 the claimant permitted a junior member of staff to finish early and instructed him and/or knew that he did not accurately record this on the timesheet, falsely claiming to have worked hours which were not worked and which were payable by the company. (“The Gilligan Incident”)

Allegation 2: serious incidents whilst on client site (potential gross misconduct). It was alleged that on a number of occasions and as a supervisor of the contractors on a client site the claimant authorized or was aware that the contractors had left site earlier than the contracted hours (taking into account an anticipated 10 hour shift). It was alleged that the client and/or the respondent company had a reasonable expectation that contractors would be on site for the duration of those contracted hours in order to complete the job to a satisfactory standard. It was alleged that during the working day the claimant had taken those contractors to a pub/bar and purchased alcohol on the company’s credit card. Again, this was alleged to have occurred during contracted time and permitted contractors to be under the influence of alcohol when later working on client sites. Specific dates were referred to including:

- a. 3rd June (Charles Wells brewery) where the receipts were timed 1.35 pm and the contractors then returned to site allegedly after consuming alcohol. Further receipts for the same day were timed 4.14pm. The contractors were paid until 6pm. The next day (Sunday) the contractors returned to work to tidy up.
- (b)-(f) A number of dates referred to work at the Slane distillery (28th June, 29th June, 22nd July, 31st July) where receipts showed drinks purchased at various times between 2.18pm and 5.25pm with contractors being paid until 6pm.

Allegation 3: Fraudulent claiming of expenses (potential gross misconduct)

Allegation 4: Slane Distillery 16/17 July (potential gross misconduct) It is alleged that the claimant arranged travel to the distillery in Ireland by overnight ferry rather than travelling during the day. The next day the contractors were said to be tired due to the overnight travel and left the client site early. Receipts indicated that drinks were purchased from 11.26am to the sum of €72.10 throughout the day.

The allegations were said to amount to potential gross misconduct under the respondent's disciplinary policy namely:

- Actions which have brought or which risk bringing the company into serious disrepute; and/or
- Falsification of timesheets; and/or
- Fraudulent and/or dishonest conduct in relation to the client and/or
- In relation to allegation 2, a serious breach of health and safety (namely if it was found that the claimant and contractors had returned to site and operated machinery on Saturday 3rd June after having drunk alcohol); and/or
- In relation to allegation 3, fraudulent claiming of expenses.

It was also pointed out that in light of these alleged incidents the respondent was also concerned that the relationship of trust and confidence had broken down irretrievably.

21. The claimant was sent a copy of the relevant documents attached to the invitation letter including the notes of interviews with Rory Gilligan, Andy Edwards and Alan Buckley, a copy of the disciplinary procedure and the health and safety policy statement and a beverages spreadsheet detailing a breakdown of drinks expenses claimed by date and contractor comparing this with the hours claimed on the relevant contractors' timesheets. The claimant was informed within the invitation letter of his right to be accompanied at the hearing and was warned that one possible outcome of the hearing was dismissal without notice or payment in lieu of notice.
22. Two further letters were issued by Mr Rowe confirming the arrangements for the disciplinary hearing (1st December and 7th December.)

23. A disciplinary hearing was held on 15th December and was chaired by Mr Brain. Mr Brain reviewed the available documentation in advance of the hearing. The claimant attended with his trade union representative. The transcript of the recording the 2 ¼ hour long meeting was provided at p155-192 of the bundle.
24. Following the hearing Mr Brain also met with Mr Palmer and Mr Rowe to give them an opportunity to respond to the issues which the claimant had raised in his defence. Mr Brain summarized the contents of this meeting in an email for the claimant dated 3rd January 2017 (p198). Amongst other things this confirmed that:
- a. Mr Rowe and Mr Palmer confirmed that they would have been in regular contact with the claimant throughout any project when he was on site with contractors. They had said that if there were any problems in terms of the claimant or the contractors not being able to work full days the claimant would have raised these issues at the time or at least would have mentioned it to them at some point. Save for one point they confirmed that the claimant did not mention or raise any adverse operational issues with them regarding Charles Wells or Slane Distillery or any other projects on the spreadsheet. The only exception was the shift on 17th July at Slane where Mr Palmer had confirmed that the claimant had told him that they would be leaving site early due to fatigue following the overnight ferry journey. At the disciplinary hearing on 15th December the claimant had been unable to remember why he had left site that day early enough to be purchasing drinks at 11.26am.
 - b. Mr Palmer and Mr Rowe had confirmed that on any occasions that the contractors were allowed to leave site early due to operational reasons it would be expected that this would be noted on their timesheets before the claimant signed them off.
 - c. Mr Palmer and Mr Rowe could not understand the claimant's references to "difficult working conditions" at the sites in question as the projects were during the summer and were indoors and whilst there might be a degree of discomfort at times, the contractors would be used to this.
 - d. Neither Mr Palmer nor Mr Rowe were aware of equipment or parts being delayed or not available at the jobs in question.
 - e. Historically, the claimant had on occasion asked Mr Palmer and Mr Rowe if they were ok with him taking contractors out and buying them a few drinks at the end of a project if he thought they had done a good job. In these cases the claimant did not inform the directors that he was taking the contractors out at the end of these projects, let alone on the days and during the hours when they should have been working.
 - f. Around 18 months previously Mr Palmer and Mr Rowe had asked the claimant whether he was "knocking off early" at sites with contractors. The claimant had assured them that this was not true and the contractors always worked the hours on their timesheets. Mr Palmer and Mr Rowe had been agreeable to the claimant working shorter hours in the office on the basis that he was working with the contractors to maximum capacity (including Saturdays).
 - g. Following Alan Buckley's email of 22nd August 2017 Mr Palmer and Mr Rowe had spoken to the claimant about Buckley's comments about

irregular hours and they confirmed that the claimant had denied that he and the contractors had been leaving early and keeping irregular hours and had again said that contractors worked full days as per their timesheets.

- h. Mr Palmer and Mr Rowe were concerned that the Charles Wells job was rushed as it was expected to require about 90 ‘man hours’ to complete whereas the evidence suggested that it had taken about 30 hours maximum.
25. Following the hearing the claimant emailed Mr Brain on 23rd December 2017 to provide a purported explanation of one of the allegations of his early departure from the Charles Wells site. He had previously been unable to recall this explanation at the disciplinary hearing. He was now able to recall the reason that he had left site early on 3rd June (p193). In essence he said that due to electrical and software problems on site he had decided to leave early as no progress was being made. He and the contractors returned the next day for test running and made adjustments as required.
26. As part of the ongoing investigation into the disciplinary allegations Mr Brain sent a detailed email to the claimant dated 3rd January 2018 in relation to a number of issues on which he required further clarification (p199A to 199C). The claimant responded (p204A-204B). Mr Brain followed up with a further email on 9th January as he was concerned that not all the points had been addressed. The claimant provided further responses.
27. Following further correspondence between the claimant and Mr Brain and consideration of matters generally the investigation report was completed and sent to the respondent’s board on 12th January 2018. Having investigated, Mr Brain concluded that the allegations in respect of Mr Gilligan and fraudulent claiming of expenses should not be upheld due to a lack of supporting evidence and recommended that these allegations be dropped (allegations 1 and 3 above).
28. Allegations 2 and 4 were considered together on the basis that they seemed to involve the same type of alleged misconduct. Mr Brain noted that the respondent had provided evidence from June and July 2017 that the claimant had signed off contractors’ timesheets which represented that they had completed their full hours on a specific day whereas the claimant had in fact taken them off site with him early and together they had visited various establishments and consumed alcohol. The cost of the drinks was either paid for on the claimant’s company credit card or paid on his own credit card and then claimed back by the claimant on his expenses. He noted therefore that on the face of it the claimant was engaging in a fraud on the respondent which had financial repercussions for the business and which involved conduct that seriously jeopardised the reputation of the respondent with its clients. He noted that the evidence which showed the early departures and subsequent purchasing of alcohol on the relevant dates seemed pretty clear and noted that the claimant did not dispute what the documentation showed. Mr Brain recorded that the claimant had been asked for an explanation at the hearing and in summary his position was that:
 - (1) There would be occasions when he would take contractors off site early but this would only be if there was a good operational reason;

- (2) He did not rigorously check timesheets before signing them- the important issue was not whether the specific hours had been worked as such but rather whether a good job had been done; and
- (3) The contractors should still get paid for a full day's work if they have left site for reasons beyond their control i.e. because the claimant had authorized it.

Mr Brain noted that the Mr Palmer and Mr Rowe did not agree with this approach. They did not agree that there would always be good operational reasons to leave site. They considered that the claimant did not always want to work 'full' days and whilst they accepted that the claimant was probably entitled to leave site if he wanted to it was quite a different matter for him to take the contractors and disappear to the pub and then charge the cost of the drinks to the respondent and sign timesheets to enable contractors to claim full pay for the day.

29. Mr Brain noted that the claimant had been unable to recall the specifics as to what had caused him to leave site early on the dates in question. He had referred to general explanations such as non-delivery of relevant parts or adverse working conditions but was unable to recall which reason applied in any particular case. Mr Brain found this surprising given that the events were not that long ago and the claimant had had plenty of time to pre-prepare his responses to the allegations.
30. Mr Brain also noted that the claimant tended to focus on the absence of specific company procedures when responding to the claims (e.g. lack of an alcohol policy, lack of an expenses policy). In Mr Brain's view this was rather missing the point as it was not a question of what should and should not be drunk at particular times but rather of whether or not the claimant should have been drinking with the contractors during working hours at all. This seemed to Mr Brain to be a matter of commonly understood principles of appropriate working practice rather than something that needed to be contained in specific written policies.
31. Mr Brain noted that on 23rd December the claimant had been able to recall his reason for leaving site in relation to allegation 2(a) when he had previously been unable to recall anything about this matter at the disciplinary hearing itself. In relation to other questions posed by Mr Brain it was noted that the claimant had failed to address the points raised despite being given more than one opportunity to do so. However, he also noted that in relation to the events of 17th July the claimant was now able to give an explanation whereas at the earlier disciplinary hearing he was unable to recall it, despite having been given forewarning of the allegation and time to prepare. He now accepted Mr Palmer's recollection of the reason given for leaving site early (tiredness due to overnight travel). Mr Brain was also concerned about the claimant's suggestion that the working conditions were so bad at Slane that it caused sickness and diarrhoea in the workforce. This was his explanation for the shorter working hours. Mr Brain would have expected the claimant to report this to Mr Palmer or Mr Rowe (which they say he did not do). He further felt that if sickness was the genuine reason for leaving site early he would not have expected to see the contractors out drinking in the afternoons of those shifts. Mr Brain therefore concluded that the claimant's responses to questions were evasive and

unsatisfactory. Where there was a conflict he preferred the information provided by Mr Rowe and Mr Palmer.

32. Mr Brain summarized the contentions of Mr Palmer and Mr Rowe as being that the claimant's actions prejudiced the company because:
 - a. The respondent was paying for contractors' hours that were unproductive because they had been taken drinking which obviously causes cost to the business.
 - b. Further cost was incurred because the respondent was reimbursing the claimant for the drinks.
 - c. The decision to leave site was the claimant's and there were no genuine operational reasons underlying that decision.
 - d. The claimant had misled the respondent by signing the timesheets which made a false declaration of contractor hours; and
 - e. The respondent's reputation was being harmed or at least jeopardized by the claimant's conduct.

33. Mr Brain accepted that as a director the claimant did have some discretion about knocking off site early if he considered it appropriate. However, he concluded that there was strong evidence to suggest that the claimant had acted inappropriately when at clients' sites. He felt that there was a clear cost to the company and a serious risk to its reputation occasioned by regular early departures of the claimant and the respondent's contractors, especially if it was to become known that the claimant and the contractors were drinking rather than working. He felt that the email from Alan Buckley indicated that there were such rumblings of discontent apparent at Slane.

34. Mr Brain doubted that the operational reasons that the claimant eventually proffered for the early departures were in fact true in every case. Mr Palmer and Mr Rowe say that they should have been made aware of any such matters at the time but deny that the claimant raised these matters with them. Mr Brain felt it reasonable to accept what they said about this. He pointed out that Mr Palmer and Mr Rowe accepted that the explanation proffered by the claimant about 3rd June (power shortage) could be true and unless the respondent was prepared to look into that further with the client in question then allegation 2(a) could not be upheld. However, the remaining issues at allegation 2(b)-(f) and allegation 4 still stood and Mr Brain felt that it was reasonable to assume that they represented typical behaviour of the claimant.

35. On that basis Mr Brain felt that it was reasonable to conclude that the claimant did regularly take contractors off site early to drink alcohol and that it was wholly inappropriate to do so in the absence of genuine operational reasons. He also considered it reasonable to conclude that the claimant had tried to conceal the situation from his fellow directors by signing the contractors' time sheets showing full hours being worked which the claimant knew was a false representation. He also considered it reasonable to accept that Mr Palmer and Mr Rowe were reassured on at least two occasions by the claimant that contractors were working their full hours. He believed that what Mr Palmer and Mr Rowe said about this and was also influenced by the claimant's failure to respond to questions 7 and 8 of his

email dated 3rd January despite having several opportunities to do so. He felt that that was further evidence of concealment. On that basis he recommended to the Board that it was reasonable to find that the claimant had conducted himself in such a way that the summary termination of his employment due to serious breach of his duties was a conclusion that was available to the respondent as a sanction in this case.

36. In carrying out his investigation Mr Brain concluded that it was not appropriate to get evidence direct from customers about the reasons why the claimant might have left site early on any given day as this would essentially have meant that he was 'washing the respondent's dirty linen in public'. Likewise, it was unattractive to question all the contractors given that it was essentially embroiling them in a disciplinary matter against a director. He felt that asking them for further information might be seen as suggesting that they were participating in a fraud and would have been a very lengthy exercise. In any event Andy Edwards had been interviewed already. He had not provided any of the specific explanations for early finishes which were subsequently proffered by the claimant. He said that they sometimes left earlier than the timesheets depending on the claimant's mood. He said there was a general inconsistency with the claimant's mood, working times, efficiency, performance. He said that when there was an early finish this generally resulted in more drinking such that the following day the claimant generally tried to keep them on site longer to avoid drinking. Given the difficulties in getting evidence from contractors and customers Mr Brain was especially keen to get the claimant's own explanation, hence the emailed questions with emailed responses. The problem was that the claimant could give general categories of explanation but could not specify which explanation applied on any given day. Mr Brain felt that the claimant was being dishonest in misrepresenting hours. This was not a situation where he was just using his director's discretion.
37. I accept that Mr Brain was genuinely trying to carry out a fair and balanced investigation. He was open to receiving the claimant's explanations and was not just looking to 'convict' the claimant. This is demonstrated by the fact that he did not uphold two of the original allegations.
38. The respondent adopted the report's findings in full and decided to terminate the claimant's employment with immediate effect on grounds of gross misconduct. This decision was made by Mr Rowe and Mr Palmer as the remaining members of the respondent's Board and was based on the findings and recommendations set out in Mr Brain's report.
39. On 15th January Mr Rowe wrote a letter to the claimant confirming the decision to dismiss and enclosing a copy of Mr Brain's report. The letter was emailed to the claimant the same day. The letter informed the claimant of his right to appeal the decision to dismiss. The claimant's effective date of termination was 15th January 2018.

40. The claimant confirmed his intention to appeal his dismissal via undated letter which was received by the respondent around 24th January 2018. The claimant's grounds of appeal included:
- a. Mr Brain had incorrectly found against the claimant for returning to client sites under the influence of alcohol;
 - b. There was a lack of company policies and procedures which he was alleged to have breached and therefore summary dismissal was a "harsh and unjust decision";
 - c. The reason stated for the claimant's dismissal in his outcome letter (i.e. serious breach of your duties") was not an allegation stated in his disciplinary invite letter; and
 - d. There was a lack of investigation regarding alleged site conditions or delays and no statements were taken from clients.
41. Mr Rowe wrote to the Claimant's trade union representative on 24th January 2018 requesting some clarification on the appeal. The union representative responded and by letter dated 5th February 2018 the claimant was invited to an appeal hearing to take place on 13th February 2018.
42. Mr Rowe again wrote to the claimant's union representative on 5th February 2018 to advise that he would be hearing the appeal, to set the date for the hearing and to ask again for clarification of the grounds of appeal. The claimant's representative confirmed that he and the claimant would be attending and that the grounds of appeal would be clarified at the appeal itself.
43. On 13th February 2018 the claimant's appeal was heard by Mr Palmer and Mr Rowe. At the hearing the claimant's representative sought to argue that one of the initial allegations that the claimant had returned to site after consuming alcohol was the basis on which Mr Brain had found against the claimant. The respondent sought to reassure that this was not the case but the claimant's case was that this allegation had clouded the decision making process against the claimant.
44. The claimant's representative argued that, as there was no expenses policy or alcohol policy, employees should not be disciplined for acting in a way that they did not know was wrong. Mr Rowe could not understand this argument and made it clear that the director of the company was in a position of trust and responsibility and should not need a guiding policy to tell him not to leave site early and go to the pub and claim the drinks back as expenses. He felt that as a director the claimant should know better.
45. The majority of the appeal hearing centered around the various reasons the claimant put forward to explain his early departures and the claimant's argument that there had been a lack of investigation undertaken to verify those reasons. The claimant was able to give various explanations for leaving early which could apply to the jobs in questions but was unable to specify which explanation applied on which day. Rather, his explanations were generalized. It was argued on the claimant's behalf that the respondent's failure to conduct a thorough and full investigation had impeded the claimant's ability to answer the points raised due to the inability to recall matters at the hearing. Mr Rowe pointed out that the claimant

had had a significant period of time from receiving the disciplinary invite letter up to the date of the appeal hearing to offer coherent explanations which could be backed up with verifiable facts. The claimant made the point that he was extremely busy 'firefighting' when on site which contributed to his inability to recall why he had left site early. Mr Rowe pointed out that this in itself showed that it was unacceptable to simply leave site when there was, by the claimant's own admission, so much to be done.

46. The claimant raised arguments regarding the weather being responsible for him leaving site, delays in deliveries and issues such as the roof not being intact as possible reasons for the claimant leaving site early. The respondent was criticized for not interviewing each and every contractor. The respondent's view was that there was no reason to do so and this would have been harmful to the company and its reputation. The claimant accepted that he would usually tell the other directors if there was problem but had not raised these issues with the directors on these occasions.

47. Following the appeal hearing Mr Palmer and Mr Rowe considered the historical weather reports and also photographs of the sites in question and checked records of phone calls, texts and emails sent between the claimant and Mr Palmer or Mr Rowe. They concluded that the on the whole the weather seemed to have been largely fine on the days in question apart from some instances of "light rain or scattered showers". They were therefore not satisfied that this would have prevented the claimant from working in the way that he had alleged. They also noted that the phone records revealed that the claimant had called the office and Mr Rowe's mobile on the days in question but had not mentioned the issues he now claimed had prevented him from working. Mr Rowe found this particularly puzzling given that the claimant would on past occasions call to raise issues of this nature. Although the directors were not able to verify the nondelivery of equipment on site as a reason for the early departures it was Mr Rowe's view that there is always something to do on site. If there was nothing to do because of lack of equipment how would the claimant have been able to return to work on site the following day? Surely the same problem would have been encountered?

48. Following consideration of the appeal it was concluded that the decision to dismiss would be upheld. The directors concentrated on the two allegations that had been upheld by Mr Brain summarizing the claimant's arguments and their responses to them. In summary, they concluded that the investigation had been sufficient and the claimant had not been able to give satisfactory reasons for leaving early on the specific dates in question. They did not accept that the claimant had needed a written policy in order to know that leaving site without good reason and then signing off full hours on a timesheet was wrong. They considered the claimant's length of service and previous clean disciplinary record but noted the requirement for trust in the claimant given that he worked remotely from the office. The remaining directors no longer had that trust in the claimant as a result of the matter. Hence the decision to dismiss was upheld. An outcome letter dated 23rd February (p379) was sent to the claimant setting out the reasons for the directors' decision.

49. I accept that the claimant's departure from the respondent company has had an adverse impact on the respondent, particularly as the claimant is still in contact with the respondent's customers and has set up his own business carrying out the same work as the respondent.

The Law

50. The relevant sections of the Employment Rights Act 1996 are as follows:

Section 98 General

- (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-
 - ...
 - (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.

Section 122 Basic award: reductions

...

- (3) Where the tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further limit that amount accordingly.

Section 123 Compensatory award

...

(6) 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 amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

....

51. It is for the respondent to show that the reason for the claimant's dismissal was potentially fair and fell within section 98(1)(b). If the reason does fall within section 98(1)(b) neither party has the burden of proving fairness or otherwise within section 98(4).

52. Where the reason for dismissal is conduct the tribunal is guided by British Homes Stores v Burchell [1978] IRLR 379 and will look to find whether the respondent had a genuine belief that the claimant was guilty of the alleged misconduct. It will then consider whether that belief in guilt is based on reasonable grounds and that such belief was reached after a reasonable investigation and a fair process.
53. The tribunal must be satisfied that the misconduct was sufficient to justify dismissing the claimant and that the decision to dismiss fell within the band of reasonable responses (Iceland Frozen Foods v Jones [1983] IRLR 439). The tribunal must not substitute its own judgment for that of the reasonable employer. The band of reasonable responses test applies to the procedural fairness as well as to the substantive fairness of the dismissal (J Sainsbury Plc v Hitt [2003] ICR 111). It applies to the appeal hearing as well as to the original dismissal. The tribunal must consider whether the process as a whole was fair (West Midlands Co-operative Society v Tipton [1986] IRLR 112). In considering the fairness of the procedure in an unfair dismissal claim the tribunal should consider whether the appropriate decision makers have been appointed at each stage of the case and whether there is a risk of bias. The size of the employer and the absence of sufficient different decision makers of sufficient seniority is a matter to be taken into consideration. It may be unreasonable, particularly in smaller businesses, to expect the different stages of investigation and adjudication to be conducted by different individuals, or to expect those individuals to be unaffected by daily contact with each other. The question is whether the disciplinary tribunal acted fairly and justly. The ACAS Guide states that, wherever possible, an appeal should be heard by someone senior to the person who took the original disciplinary decision although it recognises that this may not always be feasible, particularly in smaller organisations. Whoever deals with the appeal should deal with it as impartially as possible.
54. The more serious the allegation against the employee and the more serious the consequences of a finding of guilt then the greater the burden on the employer to carry out a full investigation (Salford Royal NHS Foundation Trust v Roldan [2010] ICR 522, A v B [2003] IRLR 405)
55. In the event that there is a finding of unfair dismissal based on procedural flaws the tribunal can consider what would have happened in the absence of such procedural flaws and make a reduction in compensation accordingly (Polkey v AE Dayton Services Ltd). Furthermore, if there is a finding of unfair dismissal the tribunal can examine the claimant's conduct and conclude whether it was blameworthy or culpable and whether it contributed to the decision to dismiss. If so, it can consider reducing the basic or compensatory award by a suitable percentage.

Conclusions

56. I conclude that the reason for the claimant's dismissal was the potentially fair reason of conduct i.e. authorizing contractors to leave site early and approving their false time sheets as per allegations 2(b)-(f) and 4 above. This was the principal reason for the dismissal as per section 98(1)(a) ERA 1996. Whilst there were

possibly problems in the working relationship between the respondent's three directors, these were not the principal reason for the dismissal. Had the allegations of misconduct not come to light the disciplinary procedure would not have been instigated and dismissal would not have ensued.

57. The claimant asserts that the whole procedure was effectively a smokescreen for the directors' intention to remove him from the business so that they could have it for themselves without his interference. The difficulty with that argument is that dismissing the claimant from his employment with the respondent would not achieve that aim. It did not affect his position as a shareholder with the company. If anything, it made the remaining directors' position more difficult as they would now have to run the company with a disgruntled ex-employee rather than a person who was committed and working day-to-day within the business. To the extent that the personal relationship between the claimant and the other directors had deteriorated this was more background to the events in question. It certainly did not constitute the sole or principal reason for the dismissal.
58. I conclude that the respondent had a genuine belief that the claimant was guilty of misconduct and that this belief was based on reasonable grounds. To some extent the documentary evidence spoke for itself: the relevant timesheets claimed the full 10 hours of pay but the receipts showed that the relevant contractors were not on site for the full shift that they claimed to have worked. In fact, the claimant essentially accepted that he had signed off timesheets which did not accurately reflect the hours which had been worked. He did not dispute this. For him the question was really whether he was acting properly within his authority when he did so i.e. were such actions properly to be characterized as misconduct or gross misconduct?
59. The claimant put forward various explanations as to why he had authorized the early finishes and signed off the incorrect times on the timesheets. Initially he said that as a director he was entitled to authorize this where he felt that the contractors had done a good job. He felt that this was part of his discretion. Essentially, he felt that as a director he had full authority to do as he saw fit in this regard. When this was not accepted he then put forward other operational explanations and justifications for his actions. These included inclement weather and the absence of relevant parts or equipment. However, he was unable to specify which applied on which day and could not point to having told his co-directors of the specific problems at the time even though his co-directors confirmed that he had notified them of such problems in the past (and this was not denied by the claimant during the disciplinary procedure). In any event, even if there had been an applicable operational difficulty on any given day one might have expected that there would either be a written note to this effect on the relevant timesheets or that the claimant would have shortened the hours claimed to reflect the hours actually worked based on this. He did not do either of these things and allowed the timesheets to be authorized on a completely misleading basis. The absence of this written or oral contemporaneous explanation undermined the credibility of the explanation itself. Furthermore, the absence of specificity as to when a particular explanation applied further undermined the explanation's credibility. Whilst it would be understandable that the passage of time might undermine some of the claimant's

recollection it is less likely that his recollection had failed across all the dates in question. Indeed, the more unusual the circumstances the more likely that the claimant would remember what had happened on that occasion. For example, one might have thought that the early finish following the overnight ferry journey might have been sufficiently unusual to be noteworthy. As it was, the claimant was unable to recall this explanation until some time later when he adopted the account proffered by Mr Rowe. Likewise, the claimant sought to argue that working conditions were so poor that contractors were coming down with attacks of diarrhoea. It is difficult to reconcile that justification for an early finish with contractors then socializing in the bar during what would otherwise have been working hours. The explanations the claimant gave changed over time and were not consistent.

60. There was at least some evidence from contractors (such as Mr Edwards) that the claimant had periodically allowed an early finish. That was attributed to the claimant's mood rather than to extraneous circumstances. Whilst the respondent did not put the claimant's specific operational justifications to such witnesses one could reasonably have expected them to volunteer some of the operational reasons if they were applicable rather than to attribute it to the claimant's personal mood. If torrential rain were coming through the roof or the relevant parts were not available or the workforce was ill as a result of working conditions it might reasonably be expected that this information would be volunteered without prompting.
61. Furthermore, there was evidence available from Messrs. Rowe and Palmer that they had previously had cause to ask the claimant whether contractors were working their full shifts and he had specifically denied any early finishes. This further undermined the explanations he sought to give during the disciplinary procedure.
62. Taking all the available information in the round I conclude that there were reasonable grounds for the respondent's belief in the claimant's guilt.
63. There was a reasonable investigation insofar as all the relevant documents were obtained and examined. Some evidence from contractors was obtained and there was independent evidence of concerns regarding timekeeping (e.g. Mr Buckley's email). The claimant was asked for his response to the allegations and was given sufficient opportunity to put this forward.
64. The claimant argued that customers should have been interviewed as part of the investigation. The respondent says that it did not do that because of the adverse impact upon its reputation. There is some force in that argument. Whilst it might have been advantageous to do this I do not consider that failing to interview clients took the investigation outside the reasonable band in all the circumstances. I remind myself that I am not to substitute my own view for that of the respondent. The claimant also did not produce evidence from any of the customers in his own defence at any stage.

65. The claimant also argued that the contractors should have been asked to provide evidence. Some evidence was obtained but the specifics of the claimant's explanations were not put to all the available witnesses. Once again, it might have been advantageous to put more specific questions to all the contractors. However, it would also mean airing the respondent's problems in public. Furthermore, the claimant did not bring forward evidence from any of these potential witnesses himself during the disciplinary process. I also note that because the claimant was unable to specify which justification/explanation applied on which specific date it would have been difficult to go back to the contractors and get them to confirm or deny the presence of a justification. Which explanation would they be being asked to confirm and on which day? Again, this gap in the investigation does not take the investigation outside the reasonable range even if it does mean that the investigation was not perfect.
66. The claimant was given numerous opportunities to put forward his own defence and to think at length about what had happened on the particular dates in question. He had been forewarned of the detail of the allegations and had sufficient time and opportunity to prepare his defence.
67. The respondent engaged an independent person to carry out the disciplinary investigation and make recommendations. This was designed to ensure fairness to the claimant given his seniority within the organization and the absence of more senior employees who could carry out this task. I consider that Mr Brain's involvement was a genuine attempt at guaranteeing fairness to the claimant. This is demonstrated by the fact that he dismissed some of the factual allegations against the claimant and the respondent's directors abided by that decision. This was not a fig leaf to cover up the directors' decision.
68. I have been asked to consider the fairness of the process given the directors' involvement in it. Mr Palmer and Mr Rowe were witnesses to the material events and were also involved in carrying out some investigation and determining whether to dismiss and whether to overturn the dismissal on appeal. On that basis it could not be said that they were impartial. However, this issue has to be looked in the context of the claimant's seniority and the absence of other people to carry out the relevant parts of the process. It would have been preferable if the two directors had divided the dismissal and appeal stages between them rather than carrying out both together. However, they could not have avoided being witnesses in the case and realistically they could not have avoided taking the disciplinary decision at one stage or another. They could not keep completely out of the process. It is also difficult to conclude that the respondent could reasonably be required to delegate not only the disciplinary hearing/investigation to an outsider (Mr Brain) but also the decision to dismiss itself. Whilst some companies might be content to delegate such a function outside their own organisation I do not think it can be said to be outside the range of reasonable responses for the respondent not to delegate the actual power of dismissal to an outsider. It might have been an option open to them but I do not think it is a legal requirement placed upon them. It was reasonable of them to implement the findings and recommendations of an independent report. It is also important to note that the directors adopted Mr Brain's findings in full, even those which favoured the claimant. It can therefore be said that this injected the necessary element of objectivity into the decision making process.

69. Taking the procedure as a whole I consider that it fell within the reasonable range. I do have some concerns about the respondent's failure to delegate the investigation of the appeal to an outside consultant before the directors made the decision. However, on balance I consider that, taking the procedure as a whole and the involvement of Mr Brain together with the size of the company and the claimant's seniority, this is one of those more unusual cases where Mr Rowe and Mr Palmer's involvement at more than one stage of the procedure does not, despite the criticisms that can be made of it, render the dismissal unfair.
70. Having determined that there were reasonable grounds to find the charges proven and that the procedure adopted was fair was the sanction to dismiss within the band of reasonable responses? I conclude that it was. There is no legal requirement to fit the charges within the specific nonexhaustive examples of gross misconduct within the respondent's disciplinary procedure. On any view the proven conduct involved misrepresenting the true position to the company about the hours worked. It meant that contractors were being paid for hours which they had not worked without the respondent's informed consent and without any clear and good justification. Whilst the claimant did have a significant degree of discretion as a director he also carried corresponding responsibilities. He had to act in the best interests of the company and should not treat the company's money as his own. Whilst clients were paying a fixed price for the jobs, the contractors were paid on an hourly rate. Artificially inflating the hours worked impacted adversely upon the respondent's profit margins on any given job and could not be deemed to be in the respondent's best interests. I do not consider that an experienced employee would need a specific warning to this effect or to have it spelt out to him in a written procedure. There is an element of deception present which should be obvious to all concerned. The fact that he largely worked remotely from the office meant that a lesser degree of oversight was present and so a greater degree of trust was required. The claimant's actions seriously undermined the relationship of trust and confidence between the parties.
71. The claimant did have discretion to allow "job and knock" in certain circumstances but not just on a whim and not on a repeated basis. There had to be a good reason to do this. The claimant's discretion was not unlimited and had to be exercised in the respondent's best interests. Furthermore, there is a qualitative difference between 'job and knock' at the end of job or a few minutes before the end of the normal shift when it is not feasible to start a new task, and signing off hours before the end of the shift. In the former example there is no misrepresentation because there is either no more work to be done or the amount of time involved is de minimis. It could not be said that on the dates in question there was no more work to be done or that the extra time claimed for was de minimis.
72. It was alleged that the claimant's conduct risked bringing the respondent into disrepute. Whilst possibly not the strongest of the respondent's justifications it was a legitimate consideration. There was a risk that the respondent's contractors would get a reputation as 'work shy' or otherwise shirking their responsibilities if they finished work early without clear and legitimate justification and by a matter of hours rather than minutes. This would be compounded if it became known they

were socializing at the bar instead. Even if this added detail (about going to the pub) were not known to the client, the contractors' absence from the site could reasonably be expected to be noted and in itself could cause reputational damage (see, for example, Mr Buckley's email).

73. It was suggested that the words "fraud" and "dishonesty" were not specifically put to the claimant at the hearing. However, the substance of the allegations was clearly put to him and the issue of dishonesty or misrepresentation was clearly implicit in the discussions. The claimant cannot have been surprised by this and had adequate opportunity to deal with this issue and make appropriate representations. Both disciplinary and appeal hearings were lengthy affairs and the claimant was represented at both.
74. It was suggested that the other directors were not looking for exculpatory evidence but focused only on evidence of the claimant's guilt. However, this does not take account of the fact, for example, that after the claimant indicated that weather conditions had caused him to leave site early on the Slane job the two remaining directors considered the weather reports for the relevant dates in order to see if the weather could have been a reasonable explanation for the claimant's actions. At the time that they decided to make those enquiries they could not have known that the evidence found would not be sufficient to support the claimant's explanation. As far as they were aware it could have helped to exonerate him. This demonstrates that they were prepared to look at exculpatory evidence and that they had not closed their minds to the possibility of overturning the decision to dismiss.
75. I do not accept that the allegations which were found 'not proved' (allegations 1 and 3 and 2(a)) unfairly contaminated the decision makers' minds as was argued by the claimant. There was a prima facie case in respect of those allegations which merited further investigation. Once it was investigated and found not to be properly substantiated they were dropped. This is not improper. The respondent was entitled to look at all allegations at the outset and drop any which could not be sustained by the time the disciplinary decision was made.
76. The claimant pointed out that the letter of instruction to Mr Brain as far back as 11th December 2017 states "Generally, Steve and David feel as though Alex's heart isn't in it anymore and feel that the trust and confidence has gone". It was suggested that the directors' decision to dismiss was predetermined even before disciplinary report had been compiled by Mr Brain. Mr Rowe's evidence was that the trust and confidence had been undermined when they looked at the paper work underlying the disciplinary charges but there was no decision made at that stage that the claimant would be dismissed. I accept his evidence on this point.
77. It was argued that the sanction was effectively predetermined and that no alternatives were really considered. I do not accept this. As I have noted the relationship between the parties had indeed started to deteriorate. By the time that Mr Brain was commissioned to complete his report the relationship was not as strong as it previously had been and the instructions to him indicate that trust had been undermined. However, this is a long way from saying that the outcome of

dismissal had been predetermined. If Mr Brain had not found the allegations proven or had not considered that they constituted gross misconduct I am satisfied that the claimant would not have been dismissed. I also conclude that had the claimant conducted himself in a different manner during the disciplinary process this might also have avoided dismissal. The reality is that he was combative throughout and refused to make appropriate concessions. He did not seem to accept that his authority and discretion might have limitations. This exacerbated the problem. There could be no confidence on the respondent's part that a lesser sanction would avoid a similar problem arising in future. There was no indication that the claimant had learnt from his mistakes or would amend his practices.

78. On that basis I conclude that the decision to dismiss was within the band of reasonable responses and fair. Had I been persuaded that there were procedural flaws in the case rendering it procedurally unfair I would have concluded that a fair dismissal would have taken place following a flawless procedure in any event. It cannot be said that any procedural flaws were so 'core' as to render this exercise speculative. An independent person (Mr Brain) had already reviewed the evidence and found sufficient grounds to recommend dismissal as an appropriate potential outcome. If he had had delegated authority to make the disciplinary decision himself there is nothing before me to suggest that he too would not have decided to dismiss the claimant. Likewise, if an independent third party had been commissioned to deal with the appeal there is nothing in the evidence to suggest that that person would not also have concluded that dismissal was the appropriate sanction. Furthermore, the claimant's conduct in terms of the disciplinary charges was culpable conduct which contributed to his dismissal and would have warranted a reduction in both the basic and compensatory award.

Employment Judge Eeley
Date: 12th November 2018