EMPLOYMENT TRIBUNALS

Claimant: Mr R Bagry

Respondent: Department for Work and Pensions

FINAL HEARING

Heard at: Birmingham (in public) **On:** 29 to 30 November & (deliberations in private) 3 December 2018

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: Miss K White, counsel
For the respondent: Mr J Feeny, counsel

JUDGMENT BY CONSENT

The claimant's claim for compensation for accrued but untaken holiday was dismissed upon withdrawal on 29 November 2018.

RESERVED JUDGMENT

(1) The claimant was not dismissed in breach of contract and his wrongful dismissal claim fails.

(2) The claimant was unfairly dismissed.

(3) If, pursuant to section 112 of the Employment Rights Act 1996 ("ERA"), the remedy for unfair dismissal is an award of compensation:

   a. the claimant's basic award shall be reduced by 70 percent pursuant to ERA section 122(2);

   b. there will be no compensatory award, pursuant to the so-called 'Polkey principle': see Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825.

(4) **CASE MANAGEMENT ORDER** Within 21 days of the date this decision is sent to them, the parties must either: confirm the amount to be awarded in compensation in accordance with the above Judgment *or*; if they cannot agree remedy in light of the above Judgment, explain the nature of their disagreement and submit their proposals, agreed if possible, for case

management orders for a remedy hearing, including a realistic time estimate and their dates of unavailability.

REASONS

Introduction

1. The claimant was employed by the respondent from 30 October 2000, latterly as an Assisted Services Manager, at Executive Officer grade, at the Sutton Coldfield Jobcentreplus, until his summary dismissal with effect on 8 February 2017. The given reason for dismissal was gross misconduct, namely dishonestly – quite possibly fraudulently – submitting competencies for a job role in HMRC that were not his own on 24 July 2016. He went through early conciliation from 3 to 24 May 2017 and submitted his claim form on 23 June 2017, claiming unfair and wrongful dismissal and compensation for accrued but untaken annual leave.

2. The annual leave claim was compromised and withdrawn part-way through the hearing.

Issues & the law

3. What follows is my self-direction on the issues and the law, which was provided in writing to the parties before closing submissions. Neither counsel took issue with it to any extent.

4. There is an agreed list of issues in volume 1 of the trial bundles, at pages 42 to 45, specifically geared to this particular case, to which I refer. What follows in relation to the issues is more generic.

5. In relation to whether the claimant was unfairly dismissed, there are two main issues to decide.

   - What was the principal reason for dismissal and was it a reason relating to the claimant's conduct?
   - Was the dismissal fair or unfair in all the circumstances, in accordance with equity and the substantial merits of the case, pursuant to section 98(4) of the Employment Rights Act 1996 ("ERA")?

6. The following subsidiary issues potentially arise:

   6.1 did the respondent genuinely believe the claimant guilty of the misconduct alleged?

   6.2 did the respondent have reasonable grounds on which to sustain that belief?

   6.3 had the respondent carried out as much investigation into the matter as was reasonable in the circumstances at the final stage at which it formed that belief?

   6.4 did the respondent, in deciding that dismissal was the appropriate sanction and in relation to all other matters, including the procedure followed, act as a reasonable employer might have done, i.e. within the so-called 'band of reasonable responses'?

7. The claimant concedes the first main issue and the first subsidiary issue: it is accepted on his behalf that the reason for dismissal in the respondent's decision makers' minds was a genuine belief that the claimant was guilty of gross misconduct.

8. It was agreed at the start of the hearing that if I took the view that the claimant was unfairly dismissed, I would decide the following issues at the same time as deciding liability for unfair dismissal: if the remedy is compensation –

   8.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825. This is the "Polkey issue";

   8.2 would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

   8.3 did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

9. As I understand it, the one and only live issue in relation to the wrongful dismissal complaint is: did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed gross misconduct.

10. The relevant law appears substantially in the issues as set out above. My starting point is the wording of ERA section 98 itself. I also have in mind the well-known 'Burchell test', originally expounded in British Home Stores Limited v Burchell [1978] IRLR 379. I note that the burden of proving 'general reasonableness' under ERA section 98(4) is not on the employer as it was when Burchell was decided.

11. In relation to ERA section 98(4), I consider the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test applies in all circumstances, to both procedural and substantive questions.

12. Hand in hand with the fact that the band of reasonableness test applies is the fact that I may not substitute my view of what should have been done for that of the reasonable employer. I have to guard myself against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and to remind myself that only if the respondent acted as no reasonable employer could have done was the dismissal unfair. Nevertheless (see Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677): the 'band of reasonable responses' test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the tribunal's consideration simply to be a matter of procedural box-ticking.

13. In A v B , the EAT stated, when considering the standard of reasonableness in a 'gross misconduct' case, at para 62 that: "*the relevant circumstances do in fact include a consideration of the gravity of the charges and their potential effect upon the employee*". The judgment continued at paragraph 64: "*Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.*"

14. On the issue of fairness under ERA section 98(4), I also take into account the ACAS Code of Practice on disciplinary and grievance procedures, at the same time bearing in mind that compliance or non-compliance with the Code is not determinative of that issue.

15. In relation to ERA sections 122(2) and 123(6), I seek to apply the law as set out in paragraphs 8 to 12 of the decision of the EAT (HH Judge Eady QC) in Jinadu v Docklands Buses Ltd [2016] UKEAT 0166_16_3110.

16. Turning to the wrongful dismissal complaint, there is no particular magic in the words, "gross misconduct". They are just a convenient shorthand for [something like]: conduct of the employee so serious it constitutes a fundamental or repudiatory breach of the contract of employment. A fundamental or repudiatory breach is one going to the root of the contract; one (to use the language of some of the cases) evincing an intention on the part of the contract-breaker no longer to be bound by the contract's terms. I find it helpful to think of it as conduct on the part of the employee that breaches the so-called trust and confidence term, i.e. conduct without reasonable and proper cause that is calculated or likely to destroy or seriously to damage the relationship of trust and confidence between employer and employee.

17. In considering whether there was a fundamental breach of contract, I am not concerned, as I am in relation to unfair dismissal, with what the respondent believed, reasonably or otherwise, nor with whether the respondent acted within the 'band of reasonable responses'; I am conscious of the different approaches that I need to take to, on the one hand, determining liability for unfair dismissal and, on the other, the wrongful dismissal complaint.

The facts

18. Some of my findings of fact are not set out in this section of these Reasons but are instead set out in the section headed "*Decision on the issues*". In neither section of the Reasons am I proposing to mention or address every factual allegation and argument relied on by the parties. If I don't mention or address something the claimant and/or the respondent thinks is important, it is because it is unnecessary to do so and because I do not attach the same importance to it that they do.

19. The witnesses who gave evidence before me were:

    19.1 on the claimant's side – the claimant himself; Miss A Rochester, the claimant's trade union representative at his disciplinary hearing; Mr S Smith, the claimant's trade union representative at his appeal hearing;

    19.2 on the respondent's side – Mrs E Ordidge, the claimant's line manager for a 6 to 9 month period in 2015; Mr G Bowers, the manager of Ms Millross, the woman who undertook the investigation into the claimant in 2016 to 2017 that led to his dismissal; Miss A Atkins, the Decision Maker / dismissing officer; Mrs A Stone, who dealt with the claimant's appeal against dismissal.

20. Within the civil service, when a member of staff applies for a new job, they complete an application form that requires them to explain how they satisfy particular 'competencies', including "*Making effective decisions*" and "*Collaborating and partnering*", using examples from their own work history. (This is something familiar to me, because it is similar to how one applies for a judicial office).

21. On 3 July 2015, the claimant applied for a job at HMRC. Someone else within the respondent, who is referred to as member of staff "A", also applied. In their application forms, the claimant and A used essentially the same examples in relation to three of the competencies. The similarities between the relevant parts of their application forms were such that one must have copied from the other or they must both have copied from a third party. In addition, this was not just a case of one person borrowing someone else's wording. Either the claimant, or A, or both of them, were in their applications falsely claiming to have carried out work they had not done. It was a serious, indeed potentially criminal, matter.

22. The similarities between the applications were picked up. Both A's and the claimant's applications were withdrawn by Civil Service Jobs. The claimant was sent an email along these lines: "*Your application has been withdrawn. This is due to similarities between applications. Your line manager has been informed and any queries you have should be directed to them in the first instance.*" Presumably, A received a similar email.

23. A was subjected to a disciplinary process. She admitted to using somebody else's competency examples, which she said she had obtained from someone she was unwilling to name. She was given an informal warning. The evidence is silent as to why the disciplinary sanction was not more severe. At the time, the claimant was completely unaware of A or what was happening to her.

24. Nothing happened to the claimant at the time. There was a brief conversation between him and his acting line manager, Mrs Ordidge, the contents of which are in dispute, but no one is suggesting he was investigated or taken to task, let alone disciplined, formally or informally. It is unclear why not, but there is no evidence that anyone in management positively took a decision not to take the matter further. The most likely explanation for this omission is administrative oversight. On both parties' versions of events, Mrs Ordidge made the claimant aware that his application had been withdrawn because another applicant had used some of the same competency examples. The claimant did not seek to

appeal the decision to withdraw his application, nor was he told how to appeal it.

25. Around February / March 2016, the claimant applied for another job in HMRC. He did not use any contentious competency examples in this application. He was told in May 2016 that, provisionally, the job was his, subject to the usual checks. An issue then arose as to whether the claimant had sufficient qualifications for the job. Ultimately, it was decided that he didn't and he was notified on 17 August 2016 that the provisional offer was withdrawn because he had failed pre-employment checks. I'll call this the March 2016 application, the application mentioned above the 2015 application, and the subsequent application that led to his dismissal the July 2016 application.

26. At some stage in September 2016, the claimant told one of his managers that one of his job applications had been unsuccessful because of a problem with points on his driving licence. This was not true. His case is that he was referring to the March 2016 application and that the reason he did not tell the truth was embarrassment about his lack of academic qualifications.

27. The July 2016 application, made on the 24th of the month, was for another job within HMRC. The claimant used some of the same competency examples in his application form as he had used in relation to the 2015 application, including some that A had used. A member of staff, referred to as "B", also applied around July 2016 for the same job using substantially the same competency examples as the claimant in relation to the competencies "*Making effective decisions*" and "*Collaborating and partnering*". As with A and the 2015 application, this was not just a case of someone copying someone else's wording but of someone claiming to have done things they hadn't.

28. The thing that both the claimant and B used as a "*Making effective decisions*" example was them: becoming concerned about potentially fraudulent applications for payments; devising a spreadsheet to monitor each application, which detected specified "*suspicious activity*"; liaising with the fraud department; devising a more stringent identity checking regime; and implementing a new policy for stricter vetting of applications leading to a reduction in fraudulent claims and an increase in successful prosecutions. I'll call this the "fraudulent claims example".

29. The shared "*Collaborating and partnering*" example related to them, following an interview with a homeless customer: contacting a housing association called "*Midland Housing*" to ask about housing for homeless people; liaising with a Support Worker [presumably from Midland Housing] and gaining information from them as to how they could work together with the respondent; inviting that Support Worker to an office meeting at which the Support Worker delivered "*an inspiring / encouraging presentation*"; becoming the "*Liaison Officer*" and monitoring all referrals; and instigating a formal data sharing agreement. I'll call this the "homelessness example".

30. The similarities between the applications was again spotted and again, on 26 August 2016, Civil Service Jobs notified the claimant of this in an email with the same or similar wording to the equivalent August 2015 email. The claimant did not seek to appeal against the withdrawal of the application.

31. Around 26/27 September 2016, both the claimant's and B's cases were referred to the Government Internal Audit Agency ("GIAA"). They were investigated by the same investigator – a Ms A Millross. She interviewed B on 18 November 2016 and the claimant on 28 November 2016. Both maintained their innocence. She and others on her behalf carried out other investigations as well. Amongst other things, she made decisions about whether to contact particular individuals B and the claimant had named as potentially being able to support them and what to ask those who were contacted. In an email of 15 December 2016, the claimant named a Mr Lewis as his manager at the time of the homelessness example, who "*may recall the work I carried out*" and a Mr Lyng as his line manager, and someone who "*may recall the work*", at the time of the fraudulent claims example.

32. Because the investigator did not give evidence to me, I am not sure why she decided not to interview Mr Lyng and why she decided – as she did – to have someone else speak to Mr Lewis, and speak to him only about something other than whether he recalled the claimant carrying out the work in the homelessness example. However, there is a note in the GIAA's "field record" – internal notes – made on 7 February 2017 stating it was felt that it was not "*cost effective to pursue interviews with previous managers as that would still not confirm that he wrote the competency examples, so wouldn't have added value to the investigation*". This fits reasonably comfortably with the account given in Miss Atkins's witness statement of a conversation with the investigator in early February 2017: apparently, the investigator did not speak to Mr Lewis, "*as the claimant may have done similar work, however she was looking for him to be able to confirm this was his competency and not someone else's*".

33. The investigations looked at the 2015 application, and A's case, as well. A was spoken to and, as she had done in 2015, admitted that the relevant competency examples were not hers. There was no formal GIAA investigation into A because her case had – for better or for worse – been dealt with in 2015.

34. The claimant's case was and is that: the first time he had used either homelessness example or the fraudulent claims example was in the 2015 application; the homelessness example dated from around 2012 and the fraudulent claims example from between 2007 and 2012. The claimant was not and is not able to show that he had or used either example before the 2015 application.

35. B was able to show that he had the wording of a version of the fraudulent claims example in June 2015 – he emailed it to someone on 2 June 2015 for them to critique. His case was that the fraudulent claims example dated from around 2006 to 2008, when he worked at Sandwell Council, and the homelessness example from 2009, by which time he was with the respondent.

36. The GIAA investigation report on B is dated 9 January 2017 and the one on the claimant is dated 10 January 2017. I refer to those reports, which largely speak for themselves. It is not the investigator's job to decide whether – or even, as such, to make recommendations as to whether – a case should go forward to a disciplinary hearing. However, the investigator sets out in the report what they think probably happened and whether they believe there is a case to answer. In relation to the claimant, the investigator concluded that, "*the examples were written by another member of staff and* [the claimant] *improvised events from his own work experience to fit the scenarios … he has attempted to obtain*

positions in other Government Departments by deception. He has a disciplinary case to answer …". In relation to B, the conclusion was that, "*he did write the … competency examples. There is no disciplinary case for him to answer.*"

37. To my mind, the investigation report into B is not particularly compelling. He seems to have been believed mainly because of three things: first, as above, he could prove he had one of the competency examples in his possession a month or so before the claimant could prove he had it in his possession; secondly, he was able to name the homeless person mentioned in the homelessness example – or, at least, was able to name a 'customer' of the relevant office of the respondent at the relevant time who was homeless; thirdly, a local authority officer "*confirmed the broad descriptions in the*" fraudulent claims example "*did fit with work done in Council offices*". The second and third points were, objectively, of almost no significance. All the second point showed was that B could remember the name of one homeless customer. All the third point showed was that council offices deal with crisis payments (and, possibly, have concerns about fraudulent payments).

38. I note, in passing as it were, that one of the things the claimant alleges is unfair is that the investigator, in the investigator's words in the report on B, "*attempted to verify* [B's] *competency examples*" but did not do the same for the claimant. In the absence of evidence directly from the investigator, I can only speculate as to why this was. Speculating, based on the fact that the investigator seems to have attempted to verify only one of B's examples and to have done so only in a general way, I think that she probably wanted to check the one example that allegedly came from work done for an employer other than the DWP, on the basis that she would be familiar with the kind of work done by staff at the DWP but less so with the kinds of work done elsewhere.

39. The impression I get is that the most significant factor was the first one: that on the documentary evidence, B had one of the competency examples first. For me, that would be a valid basis for the respondent to think the claimant was more likely to be the guilty party than B, albeit if it were up to me – and for the purposes of the unfair dismissal claim it isn't – I would not have found it determinative as the investigator did.

40. The next step in the respondent's process was for both the claimant's and B's cases to be put before a Decision Maker, to decide whether or not there was a case to answer and therefore whether they should go forward to a disciplinary hearing and, if they decided that there was a case to answer, to conduct that disciplinary hearing. The Decision Maker in both cases was Miss Atkins. On or before 24 January 2017, she made decisions in both the claimant's and B's cases in accordance with the conclusions of the GIAA reports. In her witness statement, she confirmed that she "*was satisfied on the balance of probabilities* [B] *had used his own examples for his competencies*", whereas in relation to the claimant, she decided he had a case to answer and before the disciplinary meeting, she "*had already formed a provisional view that the claimant had used* [B's] *examples*", i.e. was guilty.

41. I can't find the letter to B confirming the decision that he had no case to answer, but I assume it was sent shortly after 24 January 2017 – there was a discussion on 24 January 2017 between Miss Atkins and someone from HR about what that letter should say.

42. Pausing there, if B was innocent, the claimant had to be guilty. If Miss Atkins had finally decided – as she had – that B was innocent, it necessarily follows she had at the same time decided the claimant was guilty. Her assertion that she had only formed a "*provisional*" view as to the claimant's guilt is not sustainable.

43. B's investigation report, which was a central part of the case against the claimant and was heavily relied on by Miss Atkins and, to a lesser extent, by Mrs Stone, was not provided to the claimant until shortly before this final hearing.

44. The disciplinary hearing between the claimant and Miss Atkins was on 3 February 2017. The claimant was accompanied by a trade union representative, Miss Rochester. The notes of the meeting provide considerable additional support for the claimant's and Miss Rochester's allegation, which I accept, that Miss Atkins had decided, before the meeting even started, that the claimant was guilty. Miss Atkins's first question of the claimant is recorded as, "*Can I ask you why you have submitted someone else's competencies as your own?*" and her second as, "*What is your mitigation?*". Both of those questions assume guilt. The questions she subsequently asked which don't assume guilt were her simply going through the motions.

45. The accuracy of the notes of the meeting is not in dispute and I refer to them. They speak for themselves, but I highlight the following:

    45.1 in relation to the fraudulent claims example, the claimant admitted that the following things he wrote about what he had done were exaggerations, i.e. were not true –

        45.1.1 that the policy he introduced was a new policy. In the meeting he said he had in fact just (in his words, as recorded in the notes) "*re-issued existing process*";

        45.1.2 that he shared information nationally resulting in a change of policy / procedure for all offices. According to him, he actually just shared practice with his 'cluster' only and there was no change in policy at all, let alone nationally – there was simply a re-iteration of an existing policy;

    45.2 in relation to the homelessness example, the claimant similarly admitted the following were 'exaggerations' –

        45.2.1 that he instigated a formal information sharing agreement. In the meeting he did not explain how it was an exaggeration and what part of what he had written, if any, he was maintaining was true. My understanding of his oral evidence at this final hearing was that there was no formal agreement of any kind for him or anyone else to instigate;

        45.2.2 that he had communicated "*across region, sharing my contact with other offices*". In fact, it was – according to him – just with a couple of other offices in the cluster;

    45.3 in relation to the fraudulent claims example, the claimant suggested he had no corroborative evidence;

45.4 in relation to the homelessness example, he stated that Mr Lewis, "*could corroborate, but he was not questioned*".

46. On or before 6 February 2017, Miss Atkins formally made up her mind that the claimant should be dismissed. She telephoned HR for advice and I refer to the transcript of that call. The most significant thing to come out of it was advice, which Miss Atkins took, that what had happened in 2015 should not be taken into account in deciding what the penalty should be.

47. The claimant was dismissed by a letter dated 6 February 2017, his last day of employment being 8 February 2017. He was not paid in lieu of notice.

48. Between 8 and 12 February 2017, the claimant was in communication with Mr Lewis asking for help. On 9 February 2017, he sent Mr Lewis a WhatsApp message including the following, "*Need you to verify a competency w*[h]*en you wer*[e] *my manager.* [A named individual] *had stopped someone's benefit leading to them being evicted.* [A Ms Scrivens] *from housing called Sutton to discuss issues. Managed to help the customer & I got on* [so] *well with* [Ms Scrivens] *that I managed to get a car parking space for me on their car park. I used that example for collaborating & partnering*".

49. Pausing there, it seems to me that had Mr Lewis done the statement the claimant was asking him to, confirming that everything in the claimant's message was accurate, this would not really have helped the claimant. Such a statement would not have corroborated anything in the homelessness example that was potentially significant and would, to an extent, have contradicted it: in the example, the claimant suggested that it was he who had instigated contact with "*Midland Housing*", for whom the "*Support Worker*" (presumably Ms Scrivens) worked whereas in his message, he stated that she had contacted the respondent's offices.

50. On 12 February 2017, Mr Lewis messaged the claimant stating, "*Not quite sure how to say this but I've been advised to not get involved at this point unless I'm contacted internally as part of the appeal/tribunal process … Really sorry that I'm not in a position to do what you need at this moment …*". The claimant invites me to find that someone within the respondent of relative seniority has been improperly preventing him from obtaining evidence to support his case by telling staff such as Mr Lewis not to help him. I accept that invitation – based on the evidence before me, I think that is exactly what was going on in February 2017. I do, however, note that there does not seem to have been anything to stop the claimant obtaining evidence from the likes of Mr Lewis before he was dismissed.

51. The claimant tried to obtain a statement and/or information from Mr Lyng at around the same time. On 9 and 10 February 2017, he messaged Mr Lyng several times asking him to call him back and Mr Lyng twice replied saying he would do so. The only message containing details of what the claimant wanted from Mr Lyng was sent on 9 February 2017 and contained this, "*… if you could pls check if you've got anything about my work wen I was enquiry team leader. If not cud you do me a statement which I could take to my appeal hearing.*" What I take from this is that the claimant was not expecting Mr Lyng to be able to corroborate any of the significant details in the fraudulent claims example, but merely, potentially, to be able to say something general about the types of work the claimant did and about how well he did it.

52. Despite messages and telephone calls from the claimant, Mr Lyng never got back to him with anything of substance. It is likely that, similarly to Mr Lewis, he had been improperly told by more senior management that he should not help the claimant.

53. The claimant appealed against dismissal on 15 February 2017, using an appeal form. There were never any written grounds of appeal.

54. At some stage before the decision on the appeal, the claimant and his trade union representative provided the respondent with a letter dated 15 February 2016, but clearly dating from 15 February 2017, from Ms Scrivens. At the time she wrote the letter, she appears to have been working for one of the housing teams within Birmingham City Council rather than for a housing association. In summary, the letter is to the effect that in 2012 she and the claimant had some telephone conversations of a general nature discussing what the Council could do to support clients with issues regarding housing or rent and what the role of the respondent was. It corroborates the homelessness example only to a very limited extent and, in my view (although this doesn't seem to have been the respondent's view), to an extent undermines it.

55. The appeal hearing, chaired by Mrs Stone, took place on 22 March 2017. Again, the claimant had a trade union representative, this time Mr Smith. There are hearing notes, to which I refer. It was not a full re-hearing, merely (in Mrs Stone's words, from her statement), a meeting to ensure, "*that the Decision Maker had taken all relevant information into account and … that policy and procedures had been followed correctly* [and] *that the Decision Maker's rationale was sound*".

56. One of the things discussed during the hearing was the fact that the claimant had attended development workshops during which people's competencies were left lying around. He seemed to be suggesting that his competency examples could have been picked up by other participants and then used by them. In fact, this is a 'red herring' because the only relevant workshop took place in 2016, after B had could prove he had possession of the same examples as the claimant, and the claimant did not use either the fraudulent claims example or the homelessness example at that workshop.

57. The claimant provided some additional documentary evidence during the appeal hearing and after it. Suffice it to say that Mrs Stone decided it took the matter no further. I think it was reasonable for her to decide this, and I don't think that evidence helps the claimant's case now to any significant extent either.

58. Mrs Stone did a very small amount of further investigating of her own. In particular, she spoke to Mr Hickman on 6 April 2017 about what the claimant had been told in 2015 by Mrs Ordidge and she spoke with Miss Atkins about her rationale for her decision.

59. Mrs Stone wrote to the claimant on 7 April 2017, informing him that his appeal had not been upheld, that she felt that the decision to dismiss, "*was consistent with similar cases but has taken into account your individual circumstances and was founded on good reason, was fair and rational*", and that her decision was final.

Decision on the issues – wrongful dismissal

60. If the claimant was indeed guilty of using someone else's competencies when applying for jobs, that would be a fundamental breach of his contract of employment. In the particular circumstances of this case, it would not just be a question of him using someone else's wording to describe work that both he and that someone else had done but of him lying about what work he had done and of him taking credit for someone else's work. This would be dishonest, potentially criminal behaviour.

61. The first question for me is, then: am I satisfied of the claimant's guilt in this respect? My short answer is: no, I am not.

62. As I have already to an extent explained, I can understand why the respondent concluded that the claimant was the guilty party and that B was not. For me, however, the only things of any potential substance that support this conclusion are: the fact that B could prove he had used one of the two relevant competency examples earlier than the claimant could prove he had used either of them; the claimant's admission that he had embellished his competency examples, i.e. had made some things up and told some lies.

63. I don't give very much weight at all to the first of those two things. If B had been able to show that he had used one of the competency examples in 2014 or earlier, that would be powerful evidence against the claimant, but all he could show was that he had it a matter of weeks before the claimant first used it. Whichever of B or the claimant took it from the other must have acquired it at least some time before he first used it – days or, more likely, weeks beforehand.

64. The claimant's embellishment of his competency examples is, to my mind, stronger evidence. It showed that the claimant had a propensity for lying in job applications.[1] But the fact that the claimant had this propensity does not prove, even on the balance of probabilities, that he and not B was the guilty party here – that he told these particular lies in this particular job application. This is particularly so when, judging from the notes of the investigation into him, B was given a relatively 'easy ride' by the investigator. There is not enough material before me for me reasonably to compare B and the claimant.

65. I also note that the claimant had suggested to the respondent that Mr Lewis and Mr Lyng be contacted. If the given competency examples were not his own, this was a potentially risky suggestion to make, as they might have confirmed to the respondent that they were not the claimant's.

66. In summary, the burden of proof is on the respondent and it has not discharged that burden in relation to this first question.

67. This does not, however, mean that the claimant necessarily wins on wrongful dismissal. The claimant's 'exaggerations' were, in my view, dishonest. The second question relevant to the wrongful dismissal claim is: did they amount to gross misconduct? It's a very finely balanced question, but I have to answer it and, unfortunately for the claimant, my answer is: yes.

[1] I am deliberately not mincing my words here; what the claimant euphemistically referred to as exaggerations were lies and there were several of them.

68. Taken by itself, making up the things he made up in the homelessness example was, I think, serious rather than gross misconduct. What for me pushes it into the gross misconduct category is his false suggestion in the fraudulent claims example that he had come up with a new policy, which had been adopted nationally, when, even on his own case, he hadn't come up with a new policy and nothing he did went beyond a few local offices. If what he had written was true, it would have been an impressive bit of work that would make him stand out as a candidate for any post where this competency was deemed particularly important. The truth – or, at least, the claimant's version of it presented at the disciplinary hearing and at this tribunal hearing – is unremarkable: simply reminding people in the local area to apply an existing policy. To put it another way: it is quite a big lie.

69. Telling a relatively big lie, together with a number of smaller ones, to one's employer (or, in the present case, a related employer) with a view to securing a better job is, in my view, conduct for which there is no reasonable and proper cause that is likely to destroy or seriously to damage the relationship of trust and confidence between employer and employee. The respondent was therefore entitled to dismiss him without notice and his wrongful dismissal claim fails.

Unfair dismissal - liability

70. It is, I think, neither helpful nor necessary for me to go through each stage of the Burchell test mechanically, or for me to set out and address all of the arguments and counterarguments that were put forward by counsel in relation to whether the claimant was unfairly dismissed. Instead, what I am going to do, in the main, is simply explain why I think this was an unfair dismissal under ERA section 98(4). It can safely be assumed that I have rejected the claimant's other arguments on fairness.

71. The principal reason why I think I would, or almost would, be making an error of law if I decided this was a fair dismissal is the fact that Miss Atkins predetermined the claimant's guilt. By "*predetermined*" I don't just mean the normal and almost inevitable forming of a strong provisional view, I mean, as explained above, that she had firmly and finally decided that B was innocent and therefore that the claimant was guilty a week or so before the disciplinary hearing took place. The appeal that was conducted did not 'cure'[2] this defect. Conceivably, a complete rehearing, starting from scratch, could have done so, but the exercise that was conducted by Mrs Stone was not close to being that.

72. Secondly, given that one of the main reasons why it was decided the claimant was guilty was the decision that B was innocent, I think it was unfair not to provide the claimant with the evidence that persuaded Ms Millross and Miss Atkins (and, to an extent, Mrs Stone) of B's innocence, i.e. the material produced in the investigation of B. It was eminently possible there was something in that material not apparent to the respondent but which the claimant could have used to help prove his innocence. (In fact, there wasn't, but that is something it is only possible to say now in hindsight, with the

[2] I appreciate that, strictly speaking, one should not talk about defects being cured by an appeal. As I'm sure is well understood by the parties and their representatives, what I mean is that this defect made this an unfair dismissal in accordance with ERA section 98(4) even taking the whole dismissal process, including the appeal, into account.

knowledge that having that material at this hearing hasn't really helped the claimant). The failure to provide the material to the claimant before the decision to dismiss him was taken has not been substantially explained and certainly not satisfactorily so. I don't think that at the time it even occurred to the respondent that this evidence ought, in fairness to the claimant, to be provided to him. But if there was genuinely a concern about providing the claimant with B's data, that concern could have been dealt with by redacting documents.

73. The third reason why this was an unfair dismissal was the failure to ask Mr Lewis whether he could corroborate the claimant's homelessness example.

74. I accept that the respondent acted – just – within the band of reasonable responses in not asking Mr Lyng for his input. Mr Lyng was only mentioned once by the claimant – in his email of 15 December 2016 – and only as someone who might recall the work the claimant did. In those circumstances, for the respondent to assume that Mr Lyng would not be able to corroborate the fraudulent claims example was a reasonable one for the respondent to make. (Based on the findings I have made, above, it was also a correct assumption).

75. What makes the position different in relation to Mr Lewis is two things. The first is the fact that the claimant said during the disciplinary hearing that Mr Lewis could provide corroboration. Even though the claimant admitted to 'exaggerations' during the disciplinary hearing, that did not mean there was nothing worth corroborating in relation to the homelessness example. The second is the fact that Mr Lewis was spoken to during the investigation. It would have been the simplest thing for someone to send Mr Lewis a copy of the claimant's homelessness example and ask him whether he could confirm or deny any of it. I think any reasonable employer in the respondent's position would have done this as part of its investigation, given that Mr Lewis was already being asked to provide information.

76. Had he been asked by the respondent, I don't think Mr Lewis would have provided corroboration of any of the important detailed information set out in the claimant's homelessness example. But the respondent couldn't know that at the time. It is also legitimate for the respondent to highlight the fact that by the time of the claimant's appeal, it had Ms Scrivens's letter. I agree Mrs Stone was entitled to assume that what the claimant had obtained from Ms Scrivens was the best corroborative evidence he could get from her. It would also be fair to say that if one was looking to get evidence from someone to answer the question of whether the claimant's homelessness example was accurate and had to choose one of Mr Lewis and Ms Scrivens to get it from, one would pick Ms Scrivens. However, the claimant had already been sacked by the time Ms Scrivens's evidence emerged and the respondent did not have to choose between Mr Lewis and Ms Scrivens. It could and should have asked the question of Mr Lewis before Miss Atkins decided to dismiss.

77. The failure to seek corroboration from Mr Lewis was particularly unfair given the steps the respondent took to block the claimant from obtaining evidence from him. I can think of no good reason for the respondent discouraging Mr Lewis and Mr Lyng from helping the claimant. It was an unreasonable and manifestly unfair thing to do, and is the fourth and final reason why this dismissal was unfair.

Unfair dismissal - remedy

78. I start with the Polkey issue. If the respondent had not acted unfairly in the four ways identified above, is it at all likely this would have changed whether and/or when the claimant was dismissed? I don't think it is.

79. It has already been explained that, in my view, having additional information from Mr Lewis and knowledge of the details of the investigation into B would not, in fact, have assisted the claimant to any significant extent. Consequently, it would not have made any difference at all to the respondent's decision.

80. I am unavoidably well within the realms of speculation when asking what would have happened had Miss Atkins not pre-judged the claimant's case. Nevertheless, I think my guess that nothing would have turned out differently is a well-educated and reliable one.

    80.1 The investigator's conclusions would not have been any different and Miss Atkins's (in this scenario provisional) view would still have been that the claimant was probably guilty. Although their reasons for coming to that conclusion and forming that view don't persuade me of the claimant's guilt, I can understand why they would have come to it and formed it. I think it would have been within the band of reasonable responses for them to have done so. It is not inherently unreasonable or unfair for the decision-maker to think that the employee is probably guilty before the disciplinary hearing takes place, so long as they are genuinely open to the possibility that they might be wrong about this.

    80.2 Had Miss Atkins come into the disciplinary hearing with a reasonably – but not completely – open mind, the claimant's 'exaggerations' would have been even more important than they in fact were. What she would have been doing at the disciplinary hearing (rather than before it) was comparing the claimant and B and deciding which of them was more likely to be telling the truth. She would have been faced with the claimant effectively admitting that he had told at least some lies. Almost certainly, her provisional view that he was guilty would have been confirmed in her mind on the basis that if he was prepared to tell lies in one way in a job application, it was probable that he was the one who had told lies in another way, by using someone else's competency examples.

    80.3 The claimant's 'exaggerations' might have been important for another reason. If Miss Atkins was still entertaining the possibility that the claimant had not copied B's competency examples, I think she could reasonably, and would, have decided that even if B was the guilty party, the claimant should nevertheless be dismissed for gross misconduct because of those 'exaggerations'.

81. For these reasons, I think this is one of those rare cases where the compensatory award that would be "*just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*", in accordance with ERA section 123(1), is a £nil award.

82. The last issue is the extent of any reduction to a basic award under ERA section 122(2).

83. I have already made clear my view that for the claimant to have told lies in a job application was seriously blameworthy conduct for which he could legitimately have been dismissed. Because of this, I think the percentage reduction should be towards the top end of the scale. However, I don't think it should be as much as 100 percent because:

    83.1 this was not a merely technically unfair dismissal. The respondent, despite its size, considerable administrative resources, and ready access to expert HR and legal advice, made some fundamental errors in the way it went about disciplining and dismissing the claimant;

    83.2 the claimant was not dismissed for his 'exaggerations' but for doing something I am not satisfied he did do, namely copying someone else's competency examples;

    83.3 despite being part of an award of "*compensation*", a basic award does not compensate a claimant for losses they have suffered. It is quasi-punitive in nature – a kind of statutory civil fine for unfairly dismissing an employee. In the present case, making a finding of unfair dismissal but awarding no money at all would not adequately reflect the extent of the unfairness of this dismissal and would not fairly balance that against the fact that the claimant was guilty of gross misconduct, albeit not the gross misconduct of which he was accused.

84. Taking everything into account, it would be just and equitable to reduce the amount of the basic award by 70 percent.

Postscript

85. This case was originally listed to be heard in March 2018 but was postponed at the respondent's request, for reasons given at the time. On 29 November 2018 – day 1 of the postponed final hearing – the tribunal was presented with witness statements from 7 people, all of whom were giving oral evidence, and hearing bundles running to nearly 800 pages. The two-day time estimate – which the tribunal had made on the assumption that this was a run-of-the-mill misconduct case with perhaps 3 witnesses and 100 to 200 pages of documents – was inadequate, particularly bearing in mind it was intended that the tribunal would give a decision on liability and, if necessary, deal with remedy within the two days. If the case hadn't already been postponed once, and/or had I thought the claimant was personally at fault in relation to the time estimate, I would have postponed it and had it re-listed for 4 days on the first available dates, which would probably have been in late 2019 or early 2020.

86. It is, to say the least, unsatisfactory that the respondent's legal team, at least, gave no apparent thought to the time estimate when applying to postpone the March 2018 hearing. As it was, there was no option other than reserving my decision, at the end of what was for me an unsatisfactorily rushed hearing, during which I consistently felt handicapped by not having read as much of the bundles as I should like to have done. I can only hope I have been taken, during cross-examination and submissions, to the relevant parts of all of the relevant documents. If I haven't, although I spent some time reading over-night between days 1 and 2 of trial, any mistakes in this decision made as a result stem from the parties' – and in particular the respondent's – representatives'

failure to think about the impracticability of squeezing a quart of a case into a pint pot of a time estimate.

Signed by Employment Judge Camp

Date: 31 January 2019