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EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4103187/2018

Held in Glasgow on 1, 2 and 3 October 2018

Employment Judge: Sally Cowen

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Mr E Hughes

**Claimant
Represented by:-
Ms L Neil –
Solicitor**

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Costco Wholesale UK Limited

**Respondent
Represented by:-
Miss D Inghan –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Tribunal finds that the Claimant was unfairly dismissed and the Respondent is ordered to pay **Six Thousand, Four Hundred and Fifty Nine Pounds and Forty Pence (£6,459.40)** in compensation.

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REASONS

E.T. Z4 (WR)

- 1 The Tribunal heard from Mr Sam Fenn, dismissing officer and Mrs Susan Knowles, appeal officer, on behalf of the Respondent and the Claimant, Sharon McKenzie, Front End Supervisor (Claimant's partner) and Steven Forbes, (witness to the disciplinary hearing for Respondent).
- 5 Both parties made closing submissions.
- 2 The issues in the case were:-
- i. Was the Claimant dismissed for a reason within s.98(2) Employment Rights Act 1996 (ERA)
 - ii. Was the dismissal a fair dismissal within s.98(4) ERA
 - 10 iii. Did the decision to dismiss fall within a band of reasonable responses

Findings of Fact

- 3 The Tribunal makes the following findings of fact
- 4 The Claimant commenced employment with the Respondent wholesale warehouse company on 18/9/2004 as a sales advisor. He was dismissed on 15 5/11/2017 after a disciplinary hearing. His appeal against dismissal was not upheld on 11/12/2017.
- 5 The Claimant's role involved making price comparison checks in other wholesale and retail stores. He was the only employee whose role involved going out and researching the price of a specific item at the premises of various local competitor companies. He would then return to the Respondent's warehouse and submit this information via the computer system to the Head Office. Whilst this could be in relation to any item, it was regularly undertaken in relation to local petrol prices.
- 20 His role also involved undertaking maintenance and other ad hoc purchases for the warehouse.
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- 6 The parties agreed that the Claimant was dismissed following an investigation and a disciplinary hearing. The Claimant was dismissed on the basis that he

had a) falsified an expenses claim form and b) falsified company records (ATS sheets). Two other allegations were not upheld at the disciplinary hearing. His appeal against dismissal was not upheld.

7 On 2 October 2017 the Claimant was given approximately two hours' notice
5 of a disciplinary interview. The meeting was held by the Assistant Warehouse
Manager, William Nevitt. The Claimant was accompanied by his partner
Sharon MacKenzie who is also an employee of the Respondent. He was told
of four allegations against him and asked questions about his response to the
allegations. Mr Nevitt was agitated, abrupt and aggressive towards the
10 Claimant in this meeting. Towards the start of the meeting Mr Nevitt told the
Claimant, " I don't want your bullshit". Mr Nevitt refused to tell the Claimant
which manager had highlighted the expense form and ATS sheet to Mr Nevitt.
The Claimant found the meeting difficult and could not answer Mr Nevitt's
questions immediately. Mr Nevitt moved on to the next topic without allowing
15 the Claimant sufficient time to consider his answers. The Claimant found it
difficult to immediately recall the detail of his work from three weeks prior. He
requested a break in the meeting on three occasions, but Mr Nevitt refused to
allow such a break, but allowed it on the fourth request.

8 As a result of the meeting with Mr Nevitt, the Claimant was required to attend
20 a disciplinary hearing. The Claimant was given less than 24 hours notice of
the hearing and provided with the documents. The chairman of the hearing
was Mr Sam Fenn, an Assistant General Manager of the Glasgow branch of
the Respondent. Mr Fenn had been given the documents arising from the
investigation of Mr Nevitt. Mr Fenn did not look at the CCTV prior to making
25 his decision. Mr Fenn was not aware of any reason which had prompted Mr
Nevitt to commence the investigation of the Claimant.

9 The Claimant was aware that Mr Nevitt and Angela Goodman had both driven
the route which the Claimant had set out in his expenses claim form. The time
and mileage was provided to Mr Fenn.

- 10 The Claimant was asked for his explanation of the Automatic Time Sheets which had been manually completed. The Claimant told Mr Fenn that he had been out 'comping' and had therefore had to fill in the sheet manually.
- 11 Mr Fenn adjourned the disciplinary hearing in order to carry out further
5 investigation. He spoke to other members of staff who confirmed the Claimant's version of events in relation to two other allegations, which Mr Fenn was then content to dismiss.
- 12 The hearing was reconvened on 2 November 2017 and the Claimant was told that Mr Fenn was prepared to dismiss two of the allegations against the
10 Claimant. The Claimant was asked to explain once again, his entries on the expenses form. The Claimant admitted that he had made a mistake, but said that he thought it was correct when he submitted it.
- 13 Mr Fenn considered that the Claimant was blasé about entering inaccurate expenses forms and suggesting it was a mistake, only when he was
15 questioned about it. Mr Fenn disbelieved the Claimant's explanation and considered that if this form was inaccurate, there may also be others. Mr Fenn indicated to the Claimant that he could not be confident that the Claimant had not done the same thing previously.
- 14 In relation to the second allegation about the ATS form, Mr Fenn found that
20 the Claimant had been present at the warehouse from 5.30 am. He had been in the office between 9.50 and 10.40am and should have taken his lunch break before he had worked for 5 hours, as company rules require. Instead the Claimant later submitted an ATS sheet, claiming a 30 minute lunch break. Mr Fenn concluded that the Claimant had not been out comping that morning
25 and could therefore have swiped out for his lunch break, but failed to do so. There was no financial gain to the Claimant as a result of these actions.
- 15 Mr Fenn concluded that as a result of these two allegations the Claimant should be dismissed summarily. He considered that the Claimant had purposefully falsified the expenses claim form and that this was a serious
30 breach of the company guidelines. He also considered the error on the ATS

5 sheets to be a deliberate attempt to cover up the Claimant's failure to abide by company rules. Mr Fenn considered these amounted to a serious breach of trust in the Claimant. He said he had considered the Claimant's mitigation, including his length of service, but concluded that the only possible response was dismissal. However, as Mr Fenn did not make reference to the Claimant's mother being ill and the Claimant also having problems with his son around this time, he did not take into account the mitigation raised by the Claimant.

16 The Claimant appealed his dismissal by way of an email on 13 November 2017. This was heard by Ms Susan Knowles after the Claimant objected to another manager being appointed to hear the appeal. The hearing was held
10 in Glasgow on 27 November 2017 at which the Claimant raised four points of appeal; namely, that he was treated unfairly by William Nevitt in not being given fair warning of the meeting; That Costco process was not followed with regard to his suspension and notice of disciplinary hearing; That William Nevitt
15 had not been truthful with the Claimant in respect of the allegations and fourthly, that William Nevitt had acted in a bullying manner at the investigatory meeting placing the Claimant at a disadvantage and not giving him a reasonable opportunity to respond to the allegations.

17 Ms Knowles spoke to Mr Nevitt and Mr Fenn in relation to the appeal. Ms
20 Knowles accepted Mr Nevitt's apology for being aggressive and his explanation of being nervous. Ms Knowles did not speak to Mr Forbes who had been the Claimant's accompanying witness at the interview. She concluded that there was no evidence that Mr Nevitt had failed to allow breaks in the meeting, or been 'unduly aggressive'. She believed that whether or not
25 Mr Nevitt was aggressive did not influence the outcome of Mr Fenn's disciplinary hearing.

18 Ms Knowles rejected the Claimant's appeal, finding that Mr Nevitt was not aggressive throughout the whole meeting and that the Claimant was not prevented from putting his points across by Mr Nevitt's aggression. Ms
30 Knowles concluded that the Claimant was not truthful in relation to the

expenses claim, but that in relation to the ATS sheets she did not consider it was a reason for the Claimant to lose his job.

19 Ms Knowles considered that Mr Fenn had carried out a fair process and that dismissal was appropriate where there was trust placed in the Claimant which he had betrayed. Ms Knowles considered imposing a final written warning in substitution but concluded that the Claimant had been given a fair process and that he “knew what was coming”.

20 No letter explaining the reasons for dismissal was sent to the Claimant. A leavers form was completed for use within the Respondent’s business.

10 21 The Claimant found new employment with DFS starting on 6 November 2017. His new net weekly pay is £362.02. No evidence was provided as to the Claimant’s prospects or the nature of his new work.

The Law

15 22 In order to claim unfair dismissal, an employee must first establish that he/she has been dismissed. Having done so, it is for the Tribunal to decide in accordance with s.98 Employment Rights Act 1996 (‘ERA’), whether that dismissal is fair or unfair.

23 The Tribunal must consider whether the reason given by the Respondent was a fair reason within s.98, which includes conduct s.98(2)(b)ERA.

20 24 The Tribunal must also consider the fairness of that dismissal, for which the burden of proof is neutral. That fairness is considered under s.98(4) ERA, together with the test in BHS v Burchell [1978] IRLR 379 and the ACAS Code of Practice on Disciplinary & Grievance Procedures (‘ACAS Code’).

25 25 The Tribunal must not substitute its own view of the facts, but test to see whether in all the circumstances including the size and resources of the employer, the employer acted reasonably in treating the reason as sufficient to dismiss the Claimant.

26 BHS v Burchell, outlines that the Tribunal should consider “*First of all, there
must be established by the employer the fact of that belief; that the employer
did believe it. Secondly, that the employer had in his mind reasonable grounds
upon which to sustain that belief. And thirdly, we think, that the employer, at
5 the stage at which he formed that belief on those grounds, at any rate at the
final stage at which he formed that belief on those grounds, had carried out
as much investigation into the matter as was reasonable in all the
circumstances of the case.*” Finally a consideration must be made as to
whether the decision is within a band of reasonable responses.

10 27 The Tribunal is aware that the burden of proof lies on the employer to satisfy
the Tribunal that they had a genuine belief in the misconduct on a balance of
probabilities.

15 28 The Tribunal also notes *Graham v Secretary of State for Work and Pensions
(Jobcentre Plus) [2012] EWCA Civ 903*, stating that the Tribunal must
consider, “by the objective standards of the hypothetical reasonable
employer, rather than by reference to the ET's own subjective views, whether
the employer has acted within a “band or range of reasonable responses” to
the particular misconduct found of the particular employee. If the employer
has so acted, then the employer's decision to dismiss will be reasonable.”

20 29 The Tribunal is aware that whilst a breach of the ACAS Code does not warrant
an automatic finding of unfair dismissal, the Tribunal will take into account any
failure to follow the guidelines contained within it.

Decision

Potentially Fair Reason

25 30 It is agreed by the parties that the Claimant was dismissed. The Tribunal finds
that the reason for dismissal was misconduct, i.e. the falsification of expenses
and ATS forms, and is therefore a potentially fair reason.

Genuine Belief

31 In considering whether the dismissal was fair, the Tribunal considers that Mr
Fenn accepted the evidence of Mr Nevitt, that there had been a false
recording of the mileage claimed on 18/9/17. The disciplinary meeting with Mr
5 Fenn relied upon the evidence provided by Mr Nevitt and the fact that the
Claimant had not provided any detailed response to the allegations. This was
taken by Mr Nevitt and Mr Fenn to mean that they were not mistakes on the
part of the Claimant. The Tribunal finds that Mr Fenn had a genuine belief that
the Claimant had in fact overclaimed on his expenses and provided an
10 inaccurate ATS sheet. He based this upon the report of Mr Nevitt and the
evidence outlined above.

Reasonable belief

32 The evidence shown to Mr Fenn indicated that the Claimant had claimed for
more mileage than he had actually driven that day. The expenses claim was
15 thought to be to the Claimant's benefit by £8.50. The ATS sheets showed that
the Claimant had marked himself as out comping at a time when the CCTV
showed that he was in the warehouse. The Claimant could not offer a full
explanation for this, other than that he may have been helping a customer at
the time and therefore needed to claim back his break time. There was no
20 suggestion that the Claimant had received any additional pay in respect of the
times he wrote on the ATS sheets. Mr Fenn had grounds on which to base
his belief in the Claimant's misconduct.

Adequacy of Investigation

33 However, the Tribunal finds that Mr Fenn based his conclusion on the
25 investigation of Mr Nevitt, which had not been conducted in an open and fair
manner. The Claimant had been given only two hours' notice of a meeting to
discuss the allegations against him. He was not given sufficient notice of the
allegations in order to be able to consider and prepare the full explanations
which Mr Nevitt requested at that meeting. The Claimant was therefore placed
30 at a disadvantage by being requested to give an immediate response to
detailed allegations.

34 No further investigatory meeting was held by the Respondent to allow the Claimant to put forward his views, prior to the disciplinary hearing itself. The Tribunal therefore finds that the investigation was not a reasonable one in all the circumstances.

5 Fairness of Procedure

35 The Tribunal further considered the procedure followed by the Respondent and the impact this had on whether the conduct could be considered a sufficient reason to dismiss. There was no explanation as to how or why Mr Nevitt had come to investigate these matters. He gave no explanation to the Claimant as to how he had been alerted to these matters. The Tribunal finds, on balance of probabilities that Mr Nevitt had no complaint about the Claimant and rather had chosen to scrutinise the Claimant's expenses and ATS sheets himself.

36 The Tribunal finds that on balance, Mr Nevitt was agitated and aggressive during the meeting and that the Claimant felt intimidated by his behaviour. His first comment to the Claimant indicated that he did not believe the Claimant was likely to be honest. This shows a considerable lack of open mindedness by Mr Nevitt as an investigator. The aggressive stance of Mr Nevitt and refusal to allow the Claimant a break in the meeting, also indicate a lack of patience and professionalism by Mr Nevitt. This prevented the Claimant from being able to fully consider or express his views on the allegations. Mr Nevitt did not give the Claimant a reasonable opportunity to provide his response.

37 The Tribunal also finds that Mr Fenn did not maintain an open mind about the matters he was considering. He told the Claimant that he could not be sure that the Claimant had not inappropriately claimed expenses on other occasions. There was no evidence of this before Mr Fenn and the Tribunal finds that Mr Fenn was therefore taking into account matters which he should not have relied upon.

38 Ms Knowles' appeal did not rectify the errors of procedure which had arisen. She failed to investigate the issue of the aggression of Mr Nevitt at the investigation meeting. She could and should have spoken to Mr Forbes who

was also present. She therefore could not fairly consider whether Mr Nevitt's behaviour had influenced the outcome of the investigation. She therefore failed to consider the appeal in sufficient detail and instead upheld the dismissal inappropriately.

5 39 The Tribunal also notes that the Respondent failed to provide the Claimant with a letter of dismissal explaining the reasons for his termination on grounds of gross misconduct. Whilst this does not contribute to the dismissal itself, it is indicative of an employer who has not followed a fully transparent procedure.

10 Range of reasonable responses

40 Furthermore, the Tribunal must consider whether dismissal is a sanction which lies within a band of reasonable responses. The Tribunal notes that it must consider the decision to dismiss in an objective manner and not substitute its own view for that of the employer. The Tribunal further notes that
15 there is a band of reasonable responses and must consider whether the decision to dismiss falls anywhere within that band.

41 The Tribunal takes into account that these two matters fall within the examples of gross misconduct in the Respondent's staff handbook. It also notes that Mr Fenn was aware that they were not of high monetary value. The Claimant
20 overclaimed on his expenses by around £8.50 and claimed it was a genuine mistake. Mr Fenn was also aware of the Claimant's long service and previously unblemished record with the Respondent. In all these circumstances, the Tribunal considers that a reasonable employer would not conclude that the inappropriate claiming of £8.50 should warrant summary
25 dismissal. The Tribunal considers that a reasonable employer in this circumstance would not have dismissed.

42 Likewise for the matter of the ATS sheets. The Tribunal notes that Ms Knowles acknowledged that she would not have considered that dismissal was appropriate for the error on the ATS sheets. Nevertheless, she
30 concluded that the dismissal should be upheld. This decision is inconsistent with the views which she held on the seriousness of the matters before her.

The Tribunal considers that a reasonable employer taking into account the circumstances, including the fact that Claimant did not gain financially from this matter and that it did not cause any substantial difficulty to the records of the company or any statutory obligations which they hold, would not therefore have considered dismissal as an appropriate sanction. The Tribunal finds that a reasonable employer in this circumstance would not have dismissed.

43 The Tribunal therefore considers that dismissal did not fall within the band of reasonable responses and therefore the dismissal was unfair.

Contribution

10 44 The Respondent asked the Tribunal to consider, in the situation where an unfair dismissal was found, whether the actions of the Claimant contributed to his dismissal. The Claimant in this matter claimed that he made genuine mistakes in the errors on the expenses claim and the recording of the ATS sheets. A long serving, trusted employee should have been careful to ensure that the expenses claimed were accurate and the time sheets appropriate.

15 45 The Tribunal considers that a 50% reduction to both the basic and compensatory awards should follow.

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20 46 The Tribunal does not consider that the errors in procedure here could ensure that a dismissal would have occurred in any event. Had a fair and open procedure been followed, on the balance of probabilities, this matter would not have resulted in dismissal.

Compensation

Basic Award

25 47 The Tribunal finds that the basic award should be $1 \times 4 \times £454$ (years worked below the age of 41 years) plus $1.5 \times 4 \times £454$ (years worked above the age of 41 years). A total of £7,945. A 50% reduction entitles the Claimant to £3,972.50.

Compensatory Award

48 The Claimant earned £370 net pw. His loss to trial (47 weeks) was £17,390.
His lost contractual bonus of £4,250 and loss of pension benefit of £347.80
are also applied. A total loss of £21,987.80. The amount earned since the
5 dismissal was £17,014. The Claimant therefore has a loss of £4,973.80.

49 A 50% reduction entitles the Claimant to £2,486.90.

50 No evidence was provided by the Claimant to support a claim for future loss
of earnings. The differential between the previous earnings and the new
earnings was £8 per week. The Tribunal considers that this is not sufficient to
10 warrant further compensation and is *de minimus*.

51 No evidence was provided of any benefits being received by the Claimant and
therefore no consideration of the recoupment provisions is require

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20 **Employment Judge: Sally Cowen**
Date of Judgment: 29 December 2018
Entered in register: 04 January 2019
and copied to parties

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