EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Teli	**v**	**David Lloyd Leisure Limited**

Heard at: Watford **On**: 25 and 26 July 2019

Before: Employment Judge R Lewis (sitting alone)

Appearances

For the Claimant: Mr Watson, Counsel
For the Respondent: Mr Sonnaike, Counsel

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal succeeds.

2. The claimant's claim for breach of contract (wrongful dismissal) is adjourned to be heard with the remedy hearing.

CASE MANAGEMENT ORDERS

1. Remedy to which the claimant is entitled will be determined at a hearing at the Watford tribunals on **11 and 12 November 2019**, starting at **10am** on the first day.

2. It is confirmed for avoidance of doubt that matters for determination at the remedy hearing include any reduction for contribution and/or Polkey principles.

3. Evidence and submissions having been concluded, the claimant's claim for breach of contract (wrongful dismissal) is to be determined at that hearing.

4. No later than **7 days from the date on which this judgment is sent out** the respondent is to send to the claimant and the tribunal by letter, all information to complete the blanks left in its forms ET3, including in particular, its case as to the claimant's weekly pay.

5. The parties are reminded of continuing disclosure obligations.

6. No later than **14 October 2019**, the claimant is to send to the respondent his updated schedule of loss.

7. The claimant is at liberty to serve a supplemental statement dealing with remedy, provided he does so no later than **14 October 2019**.

8. The respondent is at liberty if so advised, to call evidence and rely on witness statements on remedy, and/or a counter-schedule, provided they are sent to the claimant's solicitors no later than **28 October 2019**.

9. The parties are jointly responsible for preparation of any supplemental bundle required at the remedy hearing, which in accordance with usual practice is to be agreed so far as practicable, indexed, paginated and available in sufficient copies for the remedy hearing. Each party is responsible for bringing at least three additional copies of its own witness statements to the remedy hearing.

10. The parties are reminded that the option of resolving this dispute remains open to them.

REASONS

1. This was the hearing of a claim for unfair dismissal and notice pay.

Procedural background

2. The claimant, who was born in 1992, had joined the employment of Northwood Virgin Active as a Personal Trainer on 26 August 2013. His employment transferred to the respondent on 1 June 2017. He was dismissed with effect from 16 March 2018.

3. Day A was 15 May, and Day B was 15 June. The claim was received on 13 July at the tribunal, and the response was received on 7 September. On review of the file, the present Judge directed that the original listed one day hearing be postponed and the allocation of time extended to two days. The original two day listing was postponed due to witness unavailability. Notice of the present hearing was given on 18 December 2018. Both sides were professionally represented throughout.

4. I was grateful to counsel for their professionalism in achieving conclusion of the liability hearing within two full days, but without leaving time for deliberation or judgment. The tribunal had not been told by either solicitor that the two day allocation of time might be insufficient.

5. There was insufficient time to address remedy, not least because a remedy hearing had not been prepared. The respondent had left blank significant portions of the ET3, such that at this hearing there was no identified issue as to the claimant's weekly pay, even though he was plainly a person of variable earnings. His schedule of loss remained incomplete, and although

mitigation cut off after some months, his schedule on paper appeared uncapped. Disclosure issues remained unresolved even at the start of this hearing.

6. While I was reading, counsel discussed a further disclosure issue, in light of which I was asked to rule on whether an e-mail of 1 May 2018 from Peninsula (180b), should be disclosed; the respondent submitted that it enjoyed litigation privilege. Having read the document and heard submissions, it seemed to me that Peninsula's advice to the appeal hearer was not given for the predominant purpose of litigation and therefore did not enjoy privilege.

7. Further issues arose from late disclosure by the claimant of bank statements after his dismissal. Although this was not the remedy hearing, it seemed to me right that Mr Watson should have the opportunity to speak to the claimant about them, and Mr Sonnaike to take instructions, which enabled Mr Sonnaike to put to the claimant a number of questions on general credibility. The point was that the claimant's witness statement, in which he asserted that he had no paid work in 2018 after dismissal, was at odds with the receipts shown in his bank statement for that period.

8. It was agreed, in light of my concerns about the time allocation, and the state of readiness of a remedy hearing, that the tribunal would, at this stage, deal with liability including the principles but not any calculation on contribution and Polkey. As matters developed, it seemed to me right to adjourn both contribution and Polkey to the remedy stage. Although I heard all evidence and submission on wrongful dismissal, it seemed to me, in deliberation and when writing this judgment, to reserve judgment until the remedy stage. A reason for doing so was that it seemed right to hear submissions on contribution, given the logical and factual overlap which might present between assertions of contribution and the wrongful dismissal claim. The listing of two days for remedy is a matter of perhaps extreme abundance of caution and I record my expectation that the public hearing will be completed on the first allocated day.

9. The respondent was heard first. They called four witnesses:

    9.1 Ms Genevieve McNamara, Club Administrator, gave evidence that there was no record of a written request from the claimant to take holiday in December 2017;

    9.2 Ms Victoria Eyre, Regional Commercial Manager, gave evidence that following the TUPE transfer she trained the management of the Northwood club in the respondent's policies and procedures, including its voucher payment system;

    9.3 Mr Gavin Street, Acting General Manager at Heston, had investigated the disciplinary allegation against the claimant; and

    9.4 Mr Linden Henson, General Manager, Raines Park, had heard and rejected the claimant's appeal against dismissal.

10. The claimant was the only witness on his own behalf. All witnesses adopted their statements on oath and were cross examined. The dismissing officer, Mr Gary Adcock, was not called and did not produce a written statement. I was told that he had left the employment of the respondent.

The legal framework

11. This was primarily a case of unfair dismissal, brought under the provisions of Part 10 of the Employment Rights Act 1996 ('ERA'). The first task of the tribunal is to find the reason for dismissal, in the sense of the operative consideration in the mind of the person making the decision to dismiss.

12. The reason advanced by the respondent for dismissal was that the claimant conduct. I find that the reason for dismissal, in the sense stated above, was the matters set out in the dismissal letter. That was a reason which related to the conduct of the claimant. It was therefore a potentially fair reason for dismissal, in accordance with section 98(2) of ERA.

13. I next had to consider it through the provisions of section 98(4) of the 1996 Act, which provides,

> "[T]he 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."

14. I then had to have regard to the guidance given in authorities, notably <u>British Home Stores v Burchell</u> 1978 IRLR 379 (always bearing in mind that that case was decided under a burden of proof which differs from that now in force) and <u>Sainsburys Supermarkets Ltd v Hitt</u> 2003 IRLR 23. I must take care not to substitute my own view for that of the employer at any stage, and to bear in mind that at each stage where the employer exercises discretion, the question is whether its decision or conclusion has been within the range of reasonable responses: that range includes the range of reasonable inquiries open to the reasonable employer investigating the allegation. An employer is not duty bound to pursue every line of inquiry. In setting penalty, the question is not whether the tribunal considers the sanction of dismissal to be harsh or excessive, but whether it is within the range of reasonable responses.

15. The questions to be answered by the tribunal are whether in dismissing the employee, the respondent had a genuine belief, based on a reasonable inquiry and on reasonable evidence, that the claimant had committed the misconduct alleged; and if it did, was dismissal within the range of reasonable responses.

16. If the tribunal finds that the dismissal was unfair, but that the conduct of the

claimant was such that it would be just and equitable to reduce the basic award to any extent, it must reduce the basic award to that extent. If it finds that the claimant's actions caused or contributed to his dismissal, it shall reduce the compensatory award by such proportion as it considers just and equitable. The reduction need not be the same in both instances, bearing in mind in particular that the basic award represents accrued service before the dismissal event.

17. By virtue of section 123(1) of the ERA, the compensatory award is

> 'such amount as the tribunal considers 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 an appropriate case, the Tribunal must have regard to a Polkey reduction, by considering what might have happened if an element of unfairness had been avoided.

18. Before the short adjournment on the second day, I drew counsels' attention to Strouthos v London Underground 2004 IRLR 636, in case it was of assistance. Counsel agreed, having reviewed the authority, that it was not of assistance.

19. There was no submission on whether the findings which I have made, namely that the procedure until dismissal has not been found to be unfair, but that the appeal procedure was unfair, fell within the framework of section 98 (4).

20. I have taken it to be established authority (eg First Hampshire v Parhar UKEAT 0643/11) that fairness must be considered as a whole, including taking account of events after the effective date of termination. Accordingly, it follows that unfairness in appeal, some two months after dismissal, renders the dismissal unfair.

21. The approach to a claim for wrongful dismissal (breach of contract) is different. The question for the tribunal is whether it has been shown in the triubnal on evidence that the claimant committed conduct such as to entitle the respondent to withhold the notice pay to which he would otherwise be entitled.

Findings of fact

22. The claimant joined the employment of Virgin Active and worked as a Personal Trainer at Northwood from August 2013 until 31 May 2017 when his employment transferred to the present respondent. I heard no evidence to suggest that he was anything other than a competent and respected colleague. The claimant said that Virgin Active's recording and payment systems were all computerised, and therefore no issues arose during that employment which would be relevant to this case.

23. The bundle contained a standard letter (42) from the respondent to the claimant, informing him of the transfer.

24. On 5 June, the claimant's then Line Manager, Ms Pendergast, and the claimant signed the claimant's David Lloyd Terms and Conditions (45-55). The introductory paragraph to the terms and conditions referred to the Handbook and to policies available on the Intranet.

25. The terms as to pay quoted an hourly rate described "as per Virgin Active Tier System". The claimant's hours of work were stated to be "minimum 20 hours per week" although the parties appear to have understood the contract to be zero hours. The holiday provision was 30 days per year and stated "You must obtain the prior approval of your Line Manager before taking a holiday." (46) The contract included non-solicitation and non-competition clauses, and referred to a disciplinary procedure "set out in David Lloyd Clubs policies".

26. The claimant in evidence professed ignorance of policies and procedures, and stated that he had not had access to an Intranet or Handbook. I accept that the claimant had been made aware that company paperwork was available on the Intranet and in Handbooks and that he had the opportunity to read them. I also accept that he did not take the opportunity to read them beyond finding out about any immediate practical implications.

27. The bundle contained a disciplinary policy (81-86). It set out standards and expectations. A long list of forms of gross misconduct included as the second item "Deliberate or negligent falsification of records". Mr Watson's submission that "negligent falsification" was a logical nonsense because falsification must be a deliberate act, and the word 'negligent' implies an inadvertent act, is one which I accept as linguistically good but industriously less good. In the work place setting, I accept that the words "deliberate falsification" mean what they say. I find that the phrase "negligent falsification", however infelicitous, means careless inaccuracy.

28. The disciplinary policy sets the outline of a procedure to be followed (83). It states almost nothing about how an appeal is to be conducted, and it does not state whether the appeal hearer is reopening the matter afresh; or considering whether due process has been followed; or confining himself or herself to addressing the points of appeal raised by the dismissed employee.

29. Although I accept that the claimant did not undertake a detailed reading of his new employer's policies and procedures, I am confident that like any employee after a TUPE transfer, he informed himself of the new employer's systems for recording time and for payment. I make this finding because as a matter of general experience, the one question that most employees ask about at TUPE transfer is how they individually will be affected, and most specifically in working time or systems and pay. I find that that is what the this claimant did, because with immediate effect he was able to operate the new systems effectively.

The respondent's systems

30. Virgin Active had operated a fully computerised time recording and pay system. When the respondent took over Northwood they operated a paper voucher system in its place (which I understand has subsequently been computerised).

31. So far as material, the paper voucher system was that club members bought personal training vouchers on line. They paid on line, and bought a pack of a number of vouchers. The vouchers stated date of purchase, and stated that they expired 14 weeks after purchase. The paper vouchers were issued by the respondent to the trainer. The trainer was required to fill them in. The lower half of the voucher was headed (bold in original) "**To be completed at point of redemption**". The information to be completed was date of session, member signature and trainer name. It was agreed at this hearing that the word redemption in context meant the date on which the voucher was used for a training session.

32. My understanding was that in practice the system was quite simple. The member attended the club, having prepaid for the session through the online payment system. The trainer presented the voucher at the end of the session. The trainer completed the date, his / her name and the member signed. The trainer then retained the completed vouchers in order to claim payment.

33. The payment system was based on periods which did not quite align to the calendar month. They were completed tranches of four or five weeks, running from a Friday to a Thursday. It was common ground for example that the December 2017 pay period concluded on Thursday 4 January 2018. It was therefore a five week period.

34. Trainers completed a timesheet for the pay period, broken down by week, attached vouchers to it, and submitted it to the line manager. The bundle contained a number of examples (115-122). It is clear that they are tedious to complete but equally clear that the form is relatively straight forward. On a day by day basis, the claimant has to complete three columns which are headed, Date Redeemed; Voucher Number; and Members Name. An instruction column on the right of the page reminds the trainer of procedural steps, including attaching vouchers and making sure that the claim is handed in by 10am on a Friday.

35. The line manager submitted the claims to payroll, who by mid-month returned to the line manager a pay preview, which was a draft calculation of pay. Trainers were given a short time in which to check this, after which pay went through. Therefore, a claim for the pay period of say April, would be submitted early in May, the payslip previewed in the middle of May, and payment made at the end of May and recorded in a payslip dated the end of May, which by definition paid for work done in April.

36. One feature of the pay system was critical to this case. The trainers were hourly paid according to the sessions delivered. The sessional rates were

in five hourly Tier rates (133), which increased according to the number of sessions delivered in the pay period. In the claimant's case, the hourly Tier rates ran from £10.93 to £26.23. The highest figure of £26.23 was available if the claimant delivered 125 sessions in a five week period, or 100 in a four week period.

37. The critical point was that in each pay period, the highest Tier rate which was achieved was applied (in effect retrospectively) to all sessions carried out in the pay period. A trainer who say delivered 102 sessions in a 4 week period would find that when he delivered his 100th session, he achieved a higher rate of pay for the previous 99.

38. Ms Eyre's evidence was that after the TUPE transfer, she delivered training to Ms Pendergast, to be cascaded by Ms Pendergast to the Northwood trainers, about how the new system was to operate. It seemed to me that paragraph 6 of Ms Eyre's statement was significant:

> "I verbally explained all of the content on the voucher with her, including ….. what to watch out for in terms of team members being able to "play the system", for example handing in vouchers that were about to expire without actually delivering the session".

39. I accept that the voucher system which I have just described gave rise to opportunities for "gaming".

40. There was no recorded evidence that Ms Pendergast delivered formal training in the new payment system to the claimant or colleagues after 1 June 2017. I nevertheless find that she did so for the following reasons:

    40.1 First, that it stands to reason that immediately after a transfer, staff on variable earnings want to understand how they are going to be paid.

    40.2 Secondly, I agree with Mr Sonnaike that a point on which he placed great weight was well made:

    > "With effect from 1 June onwards and until the end of November 2017, the claimant operated the new system without problem, question or issue arising".

    That is compelling evidence that he knew what to do and how to do it.

    40.3 On that point, I attach weight to the claimant's payslips for the pay periods June to November 2017 (59-64). The variability in hours worked and earnings is notable, and forms some evidence that making pay claims was a process which required time, care and thought. The claimant achieved it without question for each of the first six working months after the TUPE transfer. In that period, he claimed for over 400 sessions, with periodic totals ranging from 35 to 118.

40.4 The claimant's trainer colleagues confirmed having an accurate understanding of the respondent's systems. Two colleagues who were not suspected of wrong doing confirmed to that effect on 27 February (143-144). When, as part of the same process which ended with the claimant's dismissal, two of them were investigated about apparent discrepancies, their discrepancies were considered to be genuine and honest mistakes.

41. I also heard evidence about the physical layout of the Northwood premises and how the premises were entered. I accept that there was a main entrance at the front of the premises, used by members and staff. Members and staff had swipe cards for entry, and the swipe card was the commonest means of entry, and was recorded on a database. I accept that there was a second entry point, which was sliding doors at the rear of the premises, which only staff, including the claimant, could use, and which opened in response to the swipe card, which created the same record.

42. It was common ground that a third method of entry was with the help of reception staff, (if for example a member or employee forgot a swipe card), and that reception staff would key in the details of the person coming in, which also created a record on the database. A fourth and final method of entry was the disabled entrance at the front of the building, which did not create a swipe record. I accept that reception staff may on occasion have used that to facilitate entrance by a person known to them, such as the claimant. That system operated on a buzzer operated by reception staff, and did not create a database entry.

43. I therefore find that the swipe entry records are accurate so far as they go but that they may be incomplete. I also find that the extent of their being incomplete is likely to be limited, and more likely to apply to staff than to club members.

44. The claimant's payslips show that in October 2017, he worked just under 60 sessions (63) and in November 2017 only 38 (64).

45. In that setting, an issue arose in February 2018 about the claimant's working pattern in December 2017 and January 2018.

46. The claimant's payslip for December 2017 showed that he had worked eight sessions in that month (65). His swipe record showed that he had been at the gym more frequently. He attributed this to carrying out his own personal training, which he was entitled to do.

47. The claimant asserted that he had personal reasons for wishing to reduce his attendance at work in December 2017, and that he had agreed with Ms Pendergast that he could have unpaid leave for much of that month, during which he was free, if he wished, to use the gym for his own training. In an e-mail sent in the last half hour of her employment in April 2018, Ms Pendergast confirmed that there was an understanding between her and the claimant that his attendance in December 2017 would be limited for personal reasons (179H).

48. There were difficulties with this evidence. First, the respondent's procedures did not appear to include provision for unpaid leave. That seemed to me a less important point than the respondent thought, as I would take it to be implicit in the contract that parties may agree that the work/pay bargain may be suspended. More problematic was that the respondent's contract provided that "other than in exceptional circumstances and with the agreement of your Line Manager, you will not be permitted to take more than two weeks leave at any time …." (46). Ms Pendergast was Line Manager at the time but made no note or record of her understanding with the claimant, and did not seek the guidance of any higher manager or of HR. Fourthly, the reason given by the claimant and hinted at by Ms Pendergast, that the claimant had issues with a colleague seemed incompatible with his choosing to attend for personal training. Finally, Ms Pendergast's email would have carried more weight if it had been sent earlier than the last half hour of her notice period.

49. It was common ground that in the pay period January 2018 the claimant claimed for 120 sessions, of which all but two were at Tier 4 payment rate (£16.39) (151); and that in the first 3 weeks of February (payslip of 31 March 167), he claimed only 20 sessions. The December pay period included the first three days of January after re-opening. I accept what was very close to common ground, namely that the period immediately after the New Year is one when new memberships and more active gym memberships lead to a surge of business. In that context, I note that the wording of the respondent's holiday procedure (46) discourages holiday during January, February and September.

50. At the end of December, Ms Pendergast "stood down" from her managerial role at Northwood although she remained there as a trainer until the end of April 2018, when she resigned. Mr Street was seconded as manager to Northwood in January for three months. Whether these events imply criticism of any aspect of Ms Pendergast's management was not made clear.

The disciplinary matters

51. As stated above, the trainers' line manager was tasked with checking the previous month's pay preview around the middle of the following month. At a point which must have been on or about 16 February 2018 (when management saw the claimant's pay preview for January 2018) Mr Street noticed trainers' pay discrepancies. He noticed that there was significant peak and trough fluctuation between the claimant's hours and pay in December 2017, and January (and possibly early February 2018). Mr Street investigated further. He found discrepancies between the January pay claim and entry records. He summarised the point succinctly (WS 30):

> 'A large number of the dates on the vouchers didn't match either the electronic records of members' swipes into the Club, or those when [the claimant] had swiped into the Club either.'

52. Mr Street's immediate concern must be read with the awareness shown the previous June by Ms Eyre that the respondent's systems contained the risk of playing the system. In this instance, the nature of the game was that a trainer might reduce the number of sessions claimed in a quiet month with the view to claiming for them in a following, busy month (it being common knowledge in the business that December was relatively quiet and January relatively busy), so that sessions carried out in a low Tier month would be invoiced and paid in a higher Tier month.

53. Mr Street was also asked to investigate discrepancies in the records and claims of two other trainers, Mr Burrows and Mr Malcolm. He interviewed them on 20 February (separately) and matters went no further, as Mr Street accepted their explanations of apparent discrepancies (200-237). In oral evidence he explained briefly that he accepted that neither had made an excessive claim, that any mistakes in their claims were genuine matters of chance and mistake. In particular, his evidence was that neither had claimed or been paid above Tier 1 for work in January 2018.

54. The claimant was asked to come to an investigation meeting with Mr Street on 20 February (74) and to a second meeting on 22 February (101). Ms McNamara was present at the 20 February meeting. On 21 February Mr Street informed the claimant that he was suspended on full pay (79).

55. The meeting on 20 February broadly looked into the claimant's understanding of the systems in question. The meeting on 22 February went in greater depth into the way in which the claimant was completing records and claiming for his sessions, and into the mismatch between claimed session dates and swiped attendances.

56. On 26 February Mr Street e-mailed the claimant a letter from Mr Adcock (misdated 25 February), and attaching a selection of relevant documents (111-113). I accept that the claimant was, in that letter, told that he was to face a disciplinary allegation which could lead to his dismissal; that he was informed of his right of accompaniment; and that he was provided with the relevant documentation underpinned the allegation.

57. The claimant's disciplinary meeting took place on 6 March. The claimant was accompanied by a colleague, Ms Braybrook. Mr Adcock was supported by a note taker. I accept that the notes are a broadly accurate summary (154-157). As a matter of good practice, the notes were sent to the claimant shortly after the meeting and he commented that he had one matter of detail in reply (158-159), but that otherwise the notes were accurate.

58. The claimant and Ms Braybrook said that the system had changed 'massively' since the transfer. They said that training had been inadequate, and that the vouchers appeared to say that they were valid for 14 weeks. There was discussion of a particular member, where swipe records were particularly inconsistent with the voucher claims. The claimant denied any wrong doing.

59. By letter of 15 March, the claimant was dismissed (160). There was no evidence of how Mr Adcock had approached the matter since the disciplinary meeting. Mr Adcock said that he had heard the claimant's response and rejected it. He reached the conclusion that the claimant had held back vouchers from November and December and submitted them for higher pay rates in January. He found that this was gross misconduct, and wrote that the reason for dismissal was described as:

> "Changing the way you claimed your PT vouchers for the purposes of your own financial gain.
>
> Having carefully reviewed the circumstances and considered your responses, I have decided that your conducted has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship, to which summary dismissal is the appropriate sanction." (161)

60. The claimant appealed by letter dated 20 March (164) evidently written with the benefit of some legal input. He raised a number of points, not all of which Mr Watson pursued. However, it is to be noted that he raised in the letter the following points:

    5.1 That the allegation for which he was dismissed (relating to the November vouchers) was not the same as the allegation set out in the disciplinary invitation;

    5.2 That the members whose swipe entries were in question had not been interviewed;

    5.3 That he had not received all the evidence on which his dismissal was based, including interview statements, and CCTV footage (which might show swipe entry);

    5.3 That there had been inadequate training and lack of clarity in the voucher system.

61. There were delays in arranging the hearing of the claimant's appeal and in its determination. It was heard on 26 April. The claimant attended alone. Mr Henson was supported by a note taker (not the same who had supported Mr Henson). The meeting lasted a fraction under 90 minutes. It took place on the same day when Ms Pendergast's notice expired. Shortly before the end of the day she e-mailed Mr Henson (179H) with what she described as "a formal statement" confirming that the claimant had been away from work in December 2017 with her understanding. The appeal was noted (175) and the outcome letter sent on 14 May (181). Mr Henson upheld five bullet point conclusions of fact, and upheld the decision to dismiss.

62. In skilled and patient cross-examination, Mr Watson elicited from Mr Henson the following points:

62.1 That the dismissal had been for voucher discrepancies in November (160); where the invitation letter had not mentioned November (112);

62.2 That he had had an undocumented meeting with Mr Adcock after the claimant's appeal, at which Mr Adcock had clarified having come to the right decision, and reassured Mr Henson that the dismissal process had been conducted thoroughly;

62.3 That he had considered, in the evidence, a spreadsheet created by Mr Street at Mr Henson's request (187) showing the mismatch between dates claimed and the claimant's attendance recorded on swipe; but that this had never been shown to or sent to the claimant;

62.4 That he had not interviewed members about their attendance, or investigated the point that unrecorded entry could be gained through a side gate;

62.5 That he had not shown the claimant statements obtained from other trainers; or a statement referred to in his witness statement, (WS31), which has since been lost.

63. Mr Henson fundamentally formed the view that the claimant and Ms Pendergast had been untruthful in what they had said to Mr Adcock and in what they had said to him.

64. In closing submission Mr Watson stated that the claimant does not admit the reason for dismissal but put the respondent to proof. That may have been an opportunistic submission in light of Mr Adcock's absence. Absence of the dismissing officer cannot be made automatically fatal to a respondent's case. Mr Adcock is to be criticised for the lack of reasoning set out in the dismissal letter. It need not be set out at length as a judicial assessment, but some form of analysis which goes beyond an assertion of accepting one side of the case, rejecting the other, and referring to the loss of trust and confidence would have been of great assistance.

65. Mr Watson criticised Mr Street's failure to analyse the stage to which he had taken the case and failed to state why he found that there was a case to answer. I agree in principal. As was obvious from Mr Street's thoughtful witness statement, a short explanation of first of all his remit, and then his reasoning process and conclusion, would have assisted at the time and in the tribunal.

66. Turning to Mr Adcock, Mr Watson submitted, as was conceded by Mr Henson, that Mr Adcock had reached a conclusion (the November vouchers) which differed from the invitation letter.

67. Mr Watson went onto submit that the investigation by the respondent in to the swipe records was incomplete; there was no evidence of Mr Adcock having investigated of his own initiative; there was no evidence of actual

practice of Northwood, which may not have been in accordance with desired practice; and there was inadequate investigation into the claimant's assertion that he had been on holiday in December, or into a member's assertion of having been trained specific times.

68. So far as the appeal process went, Mr Watson submitted that Mr Henson had failed to show evidence which he found material to the claimant (187); had obtained a statement from the experienced manager but had failed to give it to the claimant; and had not discussed with Ms Pendergast his scepticism about her evidence.

69. SHIFT THIS: It was the evidence that throughout this process, the respondent had taken advice from Peninsula. The document which I declined to exclude at the start of the hearing was an e-mail sent on 1 May by Ms Chalker of Peninsula to Mr Henson, advising that the claimant's appeal should be allowed. Mr Chalker's reasoning appeared to be that evidence had emerged (in the form of statements from the claimant and Ms Pendegast) that he was on holiday for three weeks out of four in December; that explained why vouchers signed in January "couldn't be from December which he cannot disprove, casting doubt on our reasonable belief". (18b – 18c). Mr Chalker suggested today warning, and Mr Henson in evidence stated that he disagreed with Mr Chalker's analysis and could see no reason not to. He confirmed that the respondent was entitled to disagree with Peninsula.

70. Mr Sonnaike in closing, submitted that there was a massive and meaningful difference between the December and January claims. That could not be disputed, the ratio was 8:120.

71. Mr Sonnaike submitted forcefully that the claimant's approach to the case had been permeated with inviting the tribunal to substitute its own views.

72. He pointed out that the respondent could only rely on the material which it had at the time. It had heard a case on inadvertence and ignorance, but had attached weight to the extent of successful compliance in the previous six months. He had relied on the inaccuracy of the swipe system, but the respondent was entitled to reject that as implausible. He referred in that context to the record set out at 126, showing that there was no correlation at all for dates over a period of time between records of a particular member having swiped in and the same member having had classes claimed by the claimant.

73. Mr Sonnaike reminded me that the correct test is not a test of perfection, but that the claimant had reasonable opportunity of access to appropriate documentation. He submitted that the November voucher point made no change or difference, it was giving the claimant no more than a specific instance of general issues.

74. In reply to my having put to Mr Henson that as a form of fraud, the claimant's actions were too obvious to have constituted fraud, he reminded

me that there were not obvious until looked at with an enquiry in mind and with hindsight.

Discussion

75. This was a difficult balancing case. It seemed to me that Mr Sonnaike's cautions were well made, and that this was a particularly easy case in which to substitute the judges own view, for two reasons. The first was the absence of the decision maker (or for example of a discussion in evidence by a note taker or HR advisor about the process of analysis); and the second was the matters which came out in Mr Henson's cross-examination, which taken together amounted to a dismissal which was in part based on material matters which were not put to the claimant. In particular, if Mr Adcock was able to give Mr Henson reassurance about what he had done and why before dismissal, it is difficult to understand why that analysis was not in his dismissal letter, or recorded afterwards and available to the claimant to answer at his appeal.

76. Taking the matter stage by stage, I find as follows:-

77. I accept that the reason for dismissal was that set out in Mr Adcock's letter, even in the absence of Mr Adcock personally to give evidence to that effect.

78. I accept that it was a genuine belief, based on Mr Street's enquiry.

79. At all stages of this matter, I accept that the enquiry was to be within the range of reasonable responses (as in Hitt). Mr Sonnaike submitted that a respondent is not duty bound to chase down every straw of evidence. I agree in principal. Where the respondent relies broadly on its own IT system such as swipe card entries, I do not believe that it can be faulted for failing to introduce members or failing to interview users in relation to a staff matter.

80. I accept also that dismissal was within the range of reasonable responses, having regard to the autonomy with which trainers worked, there role as representatives of the respondent, and the acknowledged to gain the system within which they were working.

81. I also acknowledge the possibility, which is present in a vast number of virtual cases, that the test as it presents contains the seed of a significant injustice, namely that it is possible to be fairly dismissed for something one has not done and unfairly dismissed for something one has done. However, the circumstantial factors in this case pointed powerfully and consistently against the claimant. The respondent weighed up and noted that the claimant had operated the new system successfully for six months, and therefore he was not believed when he raised a knowledge or training issue. There was no evidence that the vouchers had changed in any way in that time. The respondent understood how the premises worked, and was entitled to disregard evidence that the swipe system was generally unreliable or unused. The respondent was entitled to disbelieve the claimant's explanation for the fluctuation between December, January and

February. The respondent was entitled to rely on the statements of four other trainers, none of whom reported any difficulty in operating the David Lloyd systems compared with the Virgin systems. I accept Mr Sonnaike's point, that the claimant's witness evidence about loss was inaccurate, but attach very little weight to it.

82. If the matter had ended with Mr Adcock's involvement, the claim of unfair dismissal would fail. The question which I have is whether Mr Henson's actions render the dismissal unfair, having regard to the authority quoted above about the totality of the dismissal process.

83. Not without misgivings I find that it does. The claim succeeds on the basis only that the appeal hearer had in his mind, material considerations which had not been shared with the claimant, who had not been given the opportunity to answer them. I do not say this as an invariable proposition, as there will be many cases where an investigation after an appeal hearing may produce a result which is so minor as to be immaterial. That was not the case in this instance.

84. I think it right to record that in light of my findings so far, consideration of remedy will inevitably involve consideration of issues of contribution and Polkey. I say this in particular, because a Polkey issue is very likely to arise in the situation where the findings of unfairness are procedural only. There may also be issues as to contribution, which for reasons already stated are not dealt with here.

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Employment Judge R Lewis

Date: ……14.08.19…………………..

Sent to the parties on: ......14.08.19....

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For the Tribunal Office