EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr L Wilson	**v**	Chapman Steelworks Fabrications Limited

Heard at: Reading **On:** 31 July 2019

Before: Employment Judge Anstis

Appearances:
For the Claimant: Mr A Bachu (of FRU)
For the Respondent: Mr J Wilkinson (counsel)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. The respondent must pay compensation of £1,100.25 to the claimant.

3. The recoupment regulations do not apply.

REASONS

A. INTRODUCTION AND PRELIMINARY MATTERS

Introduction

1. The claimant was employed by the respondent as a fabricator welder from 26 April 2014 until his dismissal with immediate effect on 9 March 2018.

2. The claimant claims that he was unfairly dismissed.

3. It is not in dispute that the claimant was an employee, was dismissed and has sufficient length of service to claim unfair dismissal.

4. The respondent says that the claimant's dismissal was for a reason related to conduct. This conduct relates to the carrying out by the claimant of what has been termed 'private work'. While the claimant admits (at least to some extent) that he had been carrying out private work, he disputes that this is the reason for his dismissal and says that even if it was the reason for his dismissal his dismissal is unfair.

5. It is not suggested by the respondent that the claimant's claim is brought outside the applicable time limit.

6. Accordingly, the only question for me is whether the claimant's dismissal was unfair within the meaning of section 98 of the Employment Rights Act 1996 and, if so, what remedy should be awarded.

7. The full claim (including the preliminary matters referred to below, and any matters in relation to remedy) was heard on 31 July 2019. The claimant was represented by Mr Bachu and the respondent by Mr Wilkinson. I heard evidence from Mr Tom Chubb (the respondent's managing director) and the claimant, and was also provided with an agreed bundle of 167 pages. The hearing concluded at around 17:00 and so I reserved my decision. This is the resulting reserved judgment and the reasons for it.

Preliminary matters

8. On 3 July 2019 the tribunal sent to the parties a notice saying that the claimant's claim for compensation for unfair dismissal was stuck out as a result of his failure to comply with an unless order (without affecting his claim for a declaration that he had been unfairly dismissed). On 16 July 2019 the claimant's new representatives sent an application to set aside that order under rule 32(2). This was opposed by the respondent.

9. The claimant's application to set aside the order was dealt with as the first matter at the hearing. I granted that application, with the result that the claimant could continue to pursue a claim for compensation for unfair dismissal.

10. Mr Bachu then made an application to amend the claimant's claim to include a claim of unauthorised deductions from wages for the period of his unpaid suspension prior to his dismissal. I refused this application.

11. Reasons for both decisions were given orally at the hearing and so will not be provided in writing unless either party requests them in writing within 14 days of the sending of this written record of the decision.

B. THE LEGAL FRAMEWORK

12. Section 98 of the Employment Rights Act 1996 reads as follows:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as*

to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it:

…

(b) relates to the conduct of the employee,

…

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

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

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

13. Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

"In any proceedings before an employment tribunal … any Code of Practice issued … by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

14. In this case the relevant Code of Practice is the Code of Practice on Disciplinary and Grievance Procedures (2015).

15. In British Home Stores v Burchell [1978] IRLR 379 it was said that:

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question … entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time … 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 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 …

It is not relevant … that the tribunal would itself have shared that view in those circumstances."

16. Subsequent changes to the law have meant that it is no longer for the employer to satisfy the tribunal of the second and third elements of the test (as to which the burden of proof is neutral).

17. The dismissal is only unfair if the respondent's decision falls outside the range of responses which a reasonable employer could have adopted in these circumstances. This "range of reasonable responses" test applies equally to the scope of the investigation (see, for instance, Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588).

18. Accordingly, as I explained to the parties, it is not for me in this case to determine whether the claimant committed the misconduct alleged. I am limited to considering what the employer did, and whether that amounted to action that a reasonable employer could have taken in the circumstances of this case.

19. Neither party suggested that anything other than these well-established principles of unfair dismissal law were necessary to determine this case.

C. THE FACTS

Background

20. The respondent is a small employer, employing around ten people. Its business is in metal fabrication, working on a bespoke basis for construction or other engineering projects. Staff work both at its workshop and on site. The fact that people may work on site means that there are not always many people in the workshop, but a minimum of two at any one time is needed as a precaution against the risks associated with lone working.

21. The business appears to have been through a number of different owners in recent years, with Mr Chubb having been managing director since January 2017. At the relevant time the claimant was the only welder who worked with aluminium.

22. A business such as the respondent's, employing skilled tradespeople, is vulnerable to its staff using their skills and/or its equipment and premises to carry out work on their own account. This can take many forms, from outright competition and undercutting of the employer's rates, through to doing 'favours' for friends and family, for which payment (or some other benefit) may or may not be received.

23. In this case, the respondent attempted to guard against this risk by the following terms in the employee handbook:

"Other interests

No employee whilst in the full-time employment of the company may be employed or otherwise engaged in any other business, without the prior written consent of the company. This will only be given in exceptional circumstances, and then only when it is not likely to impair the efficiency of the employee in the performance of their work with the company.

No employee, whilst in the employment of the company, may have an interest directly or indirectly in any business that is in competition with the business or trade carried out by the company.

Use of company facilities

The company's property, facilities or resources may not be used for any purpose other than that of the company."

The disciplinary issue and investigation

24. On 2 February 2018, a project manager working for the respondent raised two concerns about the claimant's work with Mr Chubb. These were that he was taking too long to do a job (11 hours against an estimate of six hours) and also (as he referred to in a later email) "*I discovered that* [the claimant] *has been doing a private project for someone using our tools and consumables for personal gain as verified by the customer who I came to collect the item this morning. I believe this contributed to the delays on the project …*". This delay had caused the respondent's difficulties with its most important customer.

25. The claimant was suspended from work and sent home (without pay) that same day. He was given a letter saying that there was to be an "*investigation into inefficient working … other behavioural concerns and private working during company hours*". He was called to an investigation meeting which eventually took place on 8 February 2018.

26. The respondent has provided brief notes of this investigatory meeting, from which it is clear that the claimant admitted to carrying out work that was not being done for the respondent, and using its tools, electricity and gas in order to do so. However, he says that he provided his own aluminium welding rods and also that the work was carried out in his own break time, not during working time.

27. During the course of the hearing, it emerged that the claimant had been keeping his own diary notes of events and of these meetings, which he wrote up on his return from work every day. Those had not been disclosed, and there was no explanation for this nondisclosure. I accept in those circumstances the submission from Mr Wilkinson that I should regard the respondent's notes as being an accurate description of events – albeit that the notes on each occasion are quite limited and may be open to different interpretations.

28. At the end of the meeting on 8 February 2018, Mr Chubb prepared a typewritten summary of the meeting for signature by the claimant. In his application to the tribunal, the claimant suggests that he contested what was in that summary and "*hand wrote personal comments which capture my disapproval of these allegations*". He says "*this was a predetermined attempt to intimidate me, to get me to accept … false* [allegations]".

29. What was added to the typewritten notes, in handwriting, at the claimant's insistence, was "*Lenny denies theft*". A later note, also handwritten by the respondent, has "*constituting theft*" by "*Lenny admits using our tools, electricity and gas but says he provided his own aluminium wire.*"

30. It was evident from his demeanour during the hearing that the claimant strongly rejected any allegation that what he had done constituted theft. This was why he had insisted on the addition of "*Lenny denies theft*". However, I do not accept (if it is alleged) that there was any element of coercion in the construction and signature of this note. It is clear that there was not from the fact that the respondent was willing to make the addition required by the claimant, and also from the fact that two people noted as "friends" of the claimant have also countersigned the note.

31. The next day, the claimant wrote saying "*I deny all allegations made against me and am seeking advice and union representation.*"

32. On 16 February 2018, the respondent wrote to the claimant asking for more information on the materials used, when he had carried out the work, and who the work was for. Subsequently, Mr Chubb had discussed the matter with a colleague of the claimant – the only other person who was in the workshop on the day of the incident – who provided a note dated 22 February 2018 saying that the claimant had volunteered to undertake the work for a visitor to the workshop the previous day, and was finishing it around 11 am. He says that the claimant was using the "MIG welding unit". The claimant used two different types of welding equipment for his work. These were known as "TIG" and "MIG" units. The significance of this for the purposes of the case were that if the claimant was using the "TIG" unit then he may have been using welding rods that were his own personal property, but if he was using the "MIG" unit then the welding wire he was using was the respondent's property.

33. A further investigator meeting took place on 23 February 2018 between Mr Chubb, the claimant and his trade union representative. It appears from the minutes of the meeting that during this meeting Mr Chubb raised some other issues of the claimant doing private work, and also pointed out that the respondent had not received the information requested from the claimant on 16 February 2018.

34. Later that day, the respondent's operations manager emailed Mr Chubb to say that he had carried out some further investigations into whether

the TIG or MIG unit had been used, and had spoken to the claimant's colleague. He had concluded by looking at a photograph of the work that "*I am 95% sure that the weld can only be MIG welded*" and also that "[the claimant's colleague] *is … adamant that* [the claimant] *was working on* [the private work] *for a long period*".

The disciplinary hearing

35. A disciplinary hearing was convened by Mr Chubb, which eventually took place on 9 March 2018 (when the claimant's trade union representative was available). The letter inviting the claimant to the hearing said that "*the question of disciplinary action against you … will be considered with regard to the alleged theft. The possible consequences arising from this meeting might be dismissal.*"

36. As with the previous meetings, the notes of the disciplinary hearing are brief. It is accepted by the respondent that the meeting only lasted 10-20 minutes. It is clear from the notes that there was discussion of the claimant's colleague's evidence that he had been carrying out the work over two days, and that the claimant did not accept that. They contain the following:

> "[the claimant] *thinks that it should have been "give and take" and that he was doing work for that reason admitting to doing private work.*
>
> *However* [the operations manager] *has directly told him that no private work can be done.*
>
> *…*
>
> *Caught welding some motorbike frames a while ago also.* [The operations manager] *said seven weeks ago this ends today and nothing shall be done.*"

37. Mr Chubb says of that meeting, "*I was satisfied that the Claimant had committed theft and as a result was dismissed with immediate effect*".

38. This decision was communicated in a letter of 9 March 2018 which reads:

> *"after careful consideration of the evidence, it was decided that your conduct was still unsatisfactory and that you will be dismissed.*
>
> *The reason for your dismissal is: theft.*
>
> *…*
>
> *In relation to this decision we would like to place emphasis on the following conditions within the terms and conditions of your employment and contained in the staff handbook:"*

The letter goes on to cite the sections headed “other interests” and “use of company facilities” that I have referred to above.

39. Mr Chubb says: “*I believed that he had been using our materials but also, he admitted to using our tools, gas and electricity. For some reason, the claimant does not believe that this constitutes theft but we as a business have to pay the cost of gas and electricity as well as the cost of tools and their maintenance.*”

40. The claimant appealed this decision (albeit outside the time allowed for an appeal). His appeal was heard and dismissed by Mr Chubb on 18 May 2018, but nothing of significance turns on the appeal for the purposes of this case.

Other matters

41. The start of the claimant’s statement was taken up with descriptions of previous incidents which he said demonstrated hostility on the part of management within the business towards him. In his evidence he said that this hostility was from Mr Chubb, the operations manager and the project manager who had originally reported him. He could not give a reason for this hostility.

42. I do not accept what the claimant says about these individuals being hostile to him. I accept Mr Wilkinson’s submission that large parts of this evidence had first arisen in the claimant’s witness statement, exchanged only very shortly before the hearing, so that the respondent could not properly respond. To the extent that the respondent was able to respond (such as Mr Chubb saying that the claimant had been sent home after an alleged assault as a compassionate rather than disciplinary measure) I accept that response. I also take note of a number of ways in which Mr Chubb treated the claimant more generously than may have been necessary during the course of the disciplinary process – for instance, in postponements to accommodate his trade union representative, in considering his appeal despite it not being brought within time and in not following up on certain matters which emerged during the investigation and which may have discredited the claimant further, such as an allegation of sabotage. Those are not the actions of someone who is hostile to a person, and the submission that Mr Chubb seized upon this incident as an excuse to dismiss the claimant is not made out by the claimant.

43. Further parts of the claimant’s witness statement dealt with previous incidents in which he carried out private work. However, I accept Mr Wilkinson’s submissions that (i) these were largely historic (dating from 2016-2017), (ii) in each case the claimant had sought and received permission, and (iii) they related only to the claimant and not others doing private work.

44. The claimant has also described being cut off by the respondent when he sought to defend himself in the investigatory and disciplinary

hearings. To the extent that this is because the claimant was raising matters not directly relevant to the disciplinary issue I accept this. Indeed, the respondent has documented that the claimant is free to raise these matters as separate grievances (although he did not do so). To the extent that they were material to the alleged disciplinary offence, I do not accept this. I note in particular that the respondent took on board the claimant's suggested amendment to the note of the investigation hearing, and that in all but one of the meetings he had the support of his trade union representative, who would have been more than capable of standing up for the claimant's rights if there had been a refusal to listen to his explanations.

45. In a number of respects the claimant in his statement gives explanations of events or refers to material which he did not give or refer to at the time. For instance, he suggests that the work was carried out by him because his colleague had sent the individual to him. If that is intended to suggest that he thought it was authorised by the respondent, that must be wrong because the claimant's colleague was not his manager or supervisor. They were peers. In any event, he did not give this explanation at the time. There was also a letter from a former customer describing private work done in 2016. Although the claimant had this at the time of the disciplinary hearing he did not produce it to Mr Chubb at any time.

Events after termination of employment

46. After leaving the respondent, the claimant remained without work (but did not claim benefits) until 18 September 2018, a period of around six months. The job he obtained on 18 September he essentially "walked in to", turning up at a welding workshop and asking if they had any jobs, following which he was asked to start the next day. Unfortunately he then suffered an accident which resulted in him being off work, but there is no claim for any losses beyond the start of this new job.

47. A letter from the claimant's GP dated 5 March 2019 describes the position in those six months as follows:

> "[the claimant] *informed me that he was dismissed from his job in March 2018; however he was not able to actively look for work until September 2018. This was a result of being stressed and not being in the right frame of mind to be able to look for work because of* [particular medical investigations]
>
> *Given* [his medical concerns] *it is understandable that he would not have been in the right frame of mind to have been actively looking for work in the period noted above.*"

48. Given that these reasons will be a matter of public record I have not been specific about the medical condition, but it is not one which bears any obvious connection to the events surrounding the loss of his job,

and the claimant's evidence was that he had concerns around that condition prior to his dismissal.

49. In his statement the claimant puts matters differently: "*I tried to look for work, but I got very upset when I thought about being accused of being a thief.*"

50. It is clear from the doctor's evidence that the reason why the claimant was not able to find work in the six months following his dismissal was his medical concerns (which are unconnected with the loss of his job) rather than anything which is the fault of the respondent. This is what I find to be the reason for the claimant being without work for six months.

D. DISCUSSION AND CONCLUSIONS

51. The claimant admitted carrying out private work – to the extent of using the respondent's tools, gas, electricity and premises during his break time. Following its investigation there was ample evidence from which the respondent could conclude that the claimant went further than that by using the MIG welder (and hence the respondent's welding wire) and by having done this to a greater extent than simply during his break times.

52. As set out above I do not accept that Mr Chubb was motivated by hostility towards the claimant. The respondent has shown that the reason for dismissal was a reason relating to the claimant's conduct, and Mr Chubb had a genuine belief that the claimant was guilty of misconduct.

53. I also accept that the respondent carried out a sufficient investigation in the circumstances of this case. It has not been suggested by the claimant what more should have been done, and I do not see what more could have been done. Mr Bachu suggested that the respondent had breached the ACAS Code of Practice by Mr Chubb acting as investigator, disciplinary officer and appeal officer. The Code of Practice requires these roles to be kept separate "where practicable". I accept in an employer of this size it may not be practicable to keep these roles separate, and in any event I do not find that this affected the fairness of the dismissal.

54. What has given me greater cause for concern throughout this case, and I think what may be at the root of the claimant's dissatisfaction with the situation, is the characterisation of what happened as being "theft".

55. Mr Chubb seemed to take it to be self-evident that what occurred amounted to theft. As he described it, it was theft of company gas, electricity, welding wire and time. There may at most be some technical sense in which part of that could be described as theft, but it was not the appropriate disciplinary charge to be brought against the claimant.

56. In order to understand Mr Chubb's approach to this better I asked him some questions of my own. He said that he would not regard an employee plugging in their own mobile phone to charge at work as being theft (of electricity) nor would he regard an employee taking a personal phone call outside the workshop during working hours as theft (of company time). He said that the welding wire was not particularly valuable (perhaps a few pounds at most). I am not sure from that where Mr Chubb would draw the line as to what was and was not theft in the disciplinary sense.

57. Plainly Mr Chubb has a right to protect his business from employees carrying out private work during company time. He is entitled to view this as a serious matter, but an appropriate disciplinary charge ought to follow, not one which puts the matter at the highest conceivable level. Industrial discipline is to be approached on a common sense basis, with the disciplinary charge to be the one that best fits the facts, not the most extreme one that could possibly technically fit the facts alleged.

58. Mr Bachu points to this emphasis on theft (as opposed to misuse of company property) as being evidence of hostility to the claimant on Mr Chubb's part. I have considered this. I have set out above the ways in which Mr Chubb was more generous than necessary to the claimant. I do not take this one point as an example of hostility. It is, instead, an matter of Mr Chubb being over-protective towards the business.

59. The respondent's emphasis throughout this process has been that the claimant has been guilty of theft – a concept that the claimant takes great offence at. The dismissal letter says that the reason for dismissal is theft (although incidentally it mentions the other two sections of the company handbook). I do not consider that a reasonable employer would have put this as a disciplinary charge of theft or have found theft proven in these circumstances when the misuse of company property (or perhaps breach of the restrictions on business activity) would have been the much more appropriate charge.

60. I find that this is an unfair dismissal because no reasonable employer would have charged the claimant with theft or concluded that the claimant was guilty of theft when more appropriate charges were available.

61. That is far from the end of the matter. The claimant had committed misconduct in carrying out private work. This was at least misuse of company property. If it had been charged as such Mr Chubb would have been fully entitled to find that charge proven. This is something that is prohibited by the company handbook.

62. I had some concerns as to whether it was made sufficiently clear in the handbook that dismissal was a possible consequence of misuse of company property (see para 23 of the Code of Practice). More could be done by the respondent on this, but I accept Mr Wilkinson's submission that this was incorporated by reference to the general provision in

relation to failure to follow the company's procedures in the disciplinary procedure.

63. While the choice of the wrong disciplinary charge had made the dismissal unfair, if the correct disciplinary charge had been put a reasonable employer could have properly made the decision to dismiss (and Mr Chubb would have done so). Hence under the Polkey principle the claimant is not entitled to a compensatory award for unfair dismissal. This does not affect his entitlement to a basic award for unfair dismissal.

64. Under section 122(2) of the Employment Rights Act 1996, "*where the tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce … the amount of the basic award … the tribunal shall reduce … that amount accordingly.*"

65. I have found that the claimant's actions did amount to misconduct, and were ultimately the cause of his dismissal, so there must be at least some reduction of the basic award. I assess an appropriate reduction in this case to be 50%. It was not disputed by the respondent that the amount set out by the claimant on his schedule of loss as being the basic award was correct (£2,200.50). Hence the claimant is entitled to a declaration that his dismissal was unfair and a basic award of £2,200.50 x 50% = £1,100.25 by way of compensation.

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Employment Judge Anstis
1 August 2019

Sent to the parties on: .....

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For the Tribunals Office

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