



## EMPLOYMENT TRIBUNALS

### ***Claimant***

Mr A Pompa

### ***Respondents***

**AND**

Metro Remittance (UK) Ltd

**Heard at:** London Central

**On:** 12,13 and 14 August 2019

**Before:** Employment Judge Davidson (Sitting alone)

### **Representation**

**For the Claimant:** Ms A Johns of Counsel

**For the Respondent:** Mr W Rees of Counsel

## RESERVED DECISION - JUDGMENT

**It is the decision of the tribunal that the claimant's claim for unfair dismissal succeeds. A Remedy Hearing will take place on 23 September 2019 to deal with remedy.**

## REASONS

### Issues

1. The claimant claims unfair dismissal. The issues for the hearing were as follows:
  - 1.1. What was the reason for dismissal? The respondent asserts the reason was related to the claimant's conduct. The claimant asserts it was because he refused to accept the first written warning issued on 22 September 2017 and because he refused to resign when pressured to do so in a meeting on 13 October 2017.
  - 1.2. If conduct is the reason, did the respondent have a genuine belief in the claimant's guilt?

- 1.3. If so, were there reasonable grounds on which to base that belief?
- 1.4. Did the respondent carry out a reasonable investigation?
- 1.5. Was the decision to dismiss within the range of reasonable responses? In particular:
  - 1.5.1. Did the respondent consider alternatives to dismissal?
  - 1.5.2. Did the respondent consider the claimant's length of service and previous disciplinary record?
  - 1.5.3. Did the respondent treat the claimant similarly to how others have been treated in analogous situations?
- 1.6. Did the respondent follow a fair procedure when dismissing the claimant? In particular,
  - 1.6.1. Was the respondent aware of the circumstances in relation to the 2014 incident at the time? If so, was it fair that it did not take steps to disciplinary the claimant at that stage?
  - 1.6.2. Was the first written warning issued on 22 September 2017 without the respondent having investigated the incident or discussed it with the claimant?
  - 1.6.3. Was the 2014 incident raised by the respondent on 13 October 2017 as a result of the claimant failing to sign and accept the written warning?
  - 1.6.4. Was there an unreasonable delay between the disciplinary hearing and the decision to dismiss?
- 1.7. If the dismissal was procedurally unfair, would following a fair procedure have resulted in the same outcome? (*Polkey*)
- 1.8. If the dismissal was unfair, did the claimant's conduct amount to contributory conduct? Should a deduction be made to any basic and/or compensatory award?
- 1.9. Did the respondent unreasonably fail to follow the ACAS Code and, if so, would it be just and equitable to increase any award by up to 25%?

### Evidence

2. The tribunal heard evidence from Mr Walter Lim (Europe Head), Mr Henry Natividad (General Manager), Mr Arsie Guenzon (Compliance Officer), Mrs Emily Divina Co (Operations Officer) and Mrs Mary Alonso (Remittance Processor) on behalf of the respondent. The claimant gave evidence on his

own behalf. The tribunal also had a witness statement from Mr Vicente Liwanag (the respondent's Accountant) but he did not attend the tribunal due to ill-health. The tribunal also had a bundle of documents running to some 480 pages.

### Facts

3. The tribunal found the following facts on the balance of probabilities:

- 3.1. The respondent is a UK bank whose parent company is one of the largest banks in the Philippines. It provides remittance services from customers in the United Kingdom to recipients in the Philippines and China.
- 3.2. The claimant commenced employment with the respondent in June 2003 and was Operations Officer at the time of his dismissal in January 2018.

#### *2014 China Bound transaction*

- 3.3. In March 2014, the claimant processed a request to transfer £2,000 to a beneficiary in China. By mistake, he sent the money to the wrong beneficiary, who refused to return the money. The respondent therefore had to pay the correct beneficiary from its own funds. As the mistake could be attributed to the claimant, he was asked by his manager, Maria Victoria Rocha, and her manager, Mr Lim, to refund the respondent the sum of £2,000. He did not object at the time and made arrangements for the money to be paid from his personal credit card in July 2014. At this time, Mrs Rocha was the General Manager, Accountant and Compliance Manager and she reported to Mr Lim, Europe Head.
- 3.4. The respondent now states that the claimant should have filled out a report, following which management would decide whether he should repay the money. As the claimant paid back the money, no report was filed and no investigation was carried out. This was confirmed by Mr Lim. I find that the respondent was aware of the incident and requested the repayment from the claimant in lieu of completing a report. The usual procedure is for a report to be made and then management would decide whether the employee should pay back the shortfall. In this case, the repayment decision appears to have been taken without the step of a report being filed.
- 3.5. Although this was not directly an issue before me, I am surprised that the respondent considered it appropriate to request the sum of £2,000 from an employee, justifying the deduction on the grounds that he receives £30 a month additional payment in case such an event takes place. It was apparent from the policy documentation before the tribunal that the expectation is that the shortages will be in the region of £50 or less and the tellers receive an extra monthly payment of £30

to cover this risk, not the more substantial amount involved in this case of £2,000.

- 3.6. It was suggested in submissions that the claimant was issued with a disciplinary warning in relation to this transaction. I find no evidence that a warning was issued and I reject that submission.

*September 2014 Transfer of £2000 to the claimant's mother*

- 3.7. Later, in September 2014, the claimant found himself in financial difficulties when he had to settle his credit card debt after the China Bound transaction. The claimant told Mr Lim that he was in financial difficulties and Mr Lim gave him £400 to help him out. The claimant also spoke to his manager, Mrs Rocha, who suggested to him that he could take £2,000 from an account where the account holder could not be contacted and this would be by way of a temporary loan to him which would have to be repaid as soon as the customer resurfaced. The money could not be transferred to the claimant direct as the respondent only deals with remittances abroad, so it was suggested that the money be transferred to the claimant's mother, who lives in the Philippines.
- 3.8. Some days after this was initially discussed, the claimant telephoned Mrs Rocha on Sunday 28 September 2014. She was not at work on that day and he asked for her approval to process the transaction. She gave approval over the telephone. The claimant then asked Emily Co to process the payment to his mother. He told her that he had the manager's approval for the transaction. On that basis, she processed it although she thought it was unusual because there seemed to be no apparent relationship between the remitter and the recipient. She told the tribunal that the claimant had told her that Mrs Rocha and Mr Lim had approved it. On the basis of the claimant's evidence I find the more plausible explanation is that he told her that he had manager's approval. From this, she understood that both senior managers, Mrs Rocha and Mr Lim had approved it. She heard "managers' approval". She did not challenge the instruction because it had come from a more senior member of staff.
- 3.9. The claimant's evidence was that he needed to get his manager's approval and it was up to her to get her manager's approval. He assumed that she had although he did not ask her. In the context of an extremely hierarchical organisation where instructions from managers are not questioned, I accept that it was not for the claimant to approach Mr Lim separately for approval other than through Mrs Rocha. It is probable that he gave no thought to Mr Lim's knowledge and relied solely on Mrs Rocha's approval.
- 3.10. I note that Mr Natividad, Mrs Co and Mr Liwanag, all of whom knew about the transaction in 2014, were of the view that there was no

reason to challenge it because they thought that Mrs Rocha and Mr Lim were aware of it, suggesting that even a transaction which might otherwise arouse suspicion is acceptable if it has management approval.

- 3.11. Mr Lim's evidence was that he could not have approved the transaction as only the client can authorise the use of his funds. If Mrs Rocha had still been employed when this matter came to light, she would also have been dismissed.
- 3.12. The respondent alleges that there was deception because the paperwork showed the claimant as the remitter, not the client, although the client's name is recorded on the instruction form. It was also alleged that the claimant chose for the receipt not to be sent to his home address. The claimant provided explanations for these matters before the tribunal. It does not appear that this particular allegation was part of the disciplinary process or that the claimant had an opportunity to provide any explanations as part of that process.
- 3.13. At the time of this transaction, Mr Natividad was on sabbatical and away from the office. On his return in November 2014, Mrs Co informed him what had happened and that she was uncomfortable because the payment had been made to the claimant's mother. Mr Natividad did nothing as he understood the transaction had been approved by the managers.
- 3.14. The remittance documents were before the tribunal. These include the daily journal of transactions which is checked each day by the Operations Manager (the claimant) and the General Manager, Accountant and Compliance Officer (Mrs Rocha). This shows that Mrs Rocha signed off on the transaction. Mrs Co suggested that this was just a routine task and her signature does not signify anything. The claimant relies on this as an additional layer of evidence that Mrs Rocha approved the transaction. The claimant's position is that the Accountant would also have been aware of the transaction from his review of the journal and surrounding documents.

*September 2017 incident*

- 3.15. On 8 September 2017, there was a client request for the sum of £32,000 to be sent to the Philippines. Mr Guanzon and the claimant verified the client's documents and Mr Lim approved the transaction. On 9 September 2017, the claimant gave the appropriate instruction to Mary Alonso, the remittance processor. Unfortunately, there were duplicate accounts in the client's name and she processed the remittance from the wrong account. Although the name and PIN were the same, the addresses were different and she failed to check the correct details. The claimant's job was to check Mrs Alonso's work and he also failed to notice the mistake. The sum of £32,000 is

considered by the respondent to be a large transaction and additional care would normally be expected to be taken.

- 3.16. In the event, there was no issue because the correct recipient received the money and it was paid by the correct person, albeit from an account which should have been dormant.
- 3.17. The error came to light when Mr Guanzon was checking through the transaction paperwork. He sent an email to the team, reminding them of their responsibilities to follow Know Your Client procedures. He also followed up with IT about deleting or deactivating duplicate accounts.
- 3.18. Mr Guanzon told Mr Natividad about the matter on Mr Natividad's return to work from annual leave. There is a conflict of evidence whether there was a meeting on 20 September 2017 called by Mr Natividad with the claimant and Mrs Alonso. The claimant denies that a meeting took place. Mrs Alonso confirms that a meeting took place and Mr Natividad's evidence was that there was a meeting. I note that Mr Natividad does not refer to the meeting in his first witness statement, only in his supplemental witness statement. In the light of the time that has elapsed since then, it is possible that memories have faded. The most likely explanation is that a conversation took place, rather than a formal meeting. However, in my view, nothing turns on whether this meeting took place and I make no finding in relation to it. To the extent that the respondent relies on this meeting as an investigation into the incident prior to issuing a warning, I find that there was no such investigation or fact finding on this day.
- 3.19. On 22 September 2017, Mr Natividad issued the claimant and Mrs Alonso with a first written warning in relation to the incident. Mrs Alonso immediately signed her warning letter. The claimant objected to the warning and refused to sign it on the grounds that no process had been followed prior to the warning being issued. Mr Natividad replied to the claimant by letter dated 1 October justifying and repeating the decision to issue a warning and reminding him that he could have imposed a much higher sanction.
- 3.20. Mr Natividad spoke to Mr Lim about the claimant's response to the warning. During the conversation, Mr Lim expressed surprise at the claimant's attitude since Mr Lim and given him £400 cash to help him pay back the £2,000 arising from the China Bound incident. Mr Natividad then asked Mr Lim whether he was aware of the £2,000 transaction to the claimant's mother. Mr Lim said he was not aware. Mr Lim decided he needed to look into that transaction.
- 3.21. On 13 October 2017 Mr Lim was visiting the London office, as he did from time to time. He was sitting in Mr Natividad's office and called in the claimant. Mr Natividad was in the room throughout although

he was doing other work on his computer. The claimant was asked by Mr Lim why he refused to sign the warning letter. The claimant said he acknowledged the warning although he said he did not agree with it. Mr Lim then raised the issue of the transfer of funds in 2014 to the claimant's mother. The claimant replied that the manager had approved the transaction. He was asked whether he had written proof of this, which he did not have.

- 3.22. He was told to go home and consider his future, with the warning that the head office would not need to get involved with an investigation if he handed in his notice. He was told that his act was criminal in nature, his credit rating would be affected and his assets would be frozen. He was then given 48 hours to decide whether to resign. Mr Natividad's account records that the claimant asked for another chance and was told that Mr Natividad and Mr Lim would conduct a thorough investigation and make the necessary recommendation to the parent company. The respondent relies on this meeting as the investigatory meeting with the claimant as the first step in the disciplinary process which resulted in dismissal.
- 3.23. At the end of the meeting, the claimant was told he was suspended indefinitely and asked to return his keys.
- 3.24. The suspension was then confirmed in writing by letter dated 16 October 2017 stating the claimant was on indefinite leave on full pay pending an investigation into fraud.
- 3.25. While the claimant was on suspension, his colleague, Mrs Co rang him at home to see how he was. He suggests that she encouraged him to resign. She denies this. I find that Mrs Co called the claimant and attempted to give him advice for his own benefit, as a friend rather than at the behest of the respondent. He stated that, although he and Mrs Co were friends, he was uncomfortable about the breach of confidentiality by the respondent.
- 3.26. On 19 October 2017, the claimant raised a grievance complaining that he had been bullied by Mr Natividad and Mr Lim at the meeting on 13 October. He said he was given no warning of the meeting and was coerced to resign. On receipt of the grievance, the respondent decided that it would not be appropriate for either Mr Natividad or Mr Lim to be involved with the disciplinary process.

#### *Disciplinary hearing*

- 3.27. On 25 October, the respondent's solicitors, Dias Solicitors, wrote to the claimant on behalf of their client inviting him to a disciplinary hearing at their offices on 1 November 2017, to be conducted by one of the partners, Mr Christopher Dias. The allegation was that the claimant had committed Asset Misappropriation of company funds by transferring £2,000 to a family member abroad. This was

categorised as 'dishonesty' and 'action likely to bring the company into disrepute'. The allegation did not expressly include the use of deception or an allegation that the claimant had covered up the transaction.

- 3.28. The claimant presented a sick-note and said he could not attend the hearing on that date due to his ill health.
- 3.29. The disciplinary hearing was adjourned and took place on 13 November 2017 at the solicitors' office, conducted by Mr Guanzon with a minute taker. The claimant was represented by a trade union representative. The meeting opened with Mr Guanzon explaining that the purpose of the meeting was to discuss the allegations of theft, meaning the use of company funds for his own purpose. Mr Guanzon confirmed that the final decision would be taken by the Board of Directors, in particular Mr Richard So (Chairman), who was not present at the hearing.
- 3.30. At the hearing, Mr Guanzon presented the paperwork from the 2014 transactions and the 'Timeline' (which was Mr Natividad's notes of the investigatory meeting on 13 October 2017). The claimant maintained throughout that he had authority from his manager, Mrs Rocha.
- 3.31. The claimant approached Mrs Rocha for a statement and she sent him a signed statement dated 10 November 2017 confirming that she had given approval for a temporary loan, repayable when the customer resurfaced. She also confirmed that she had not told Mr Lim about the transaction because she considered it was not company money, but the client's money and did not require his approval. The claimant forwarded this statement to the respondent on 20 November 2017. The statement included Mrs Rocha's home address.
- 3.32. In his witness statement, Mr Guanzon does not mention the claimant's position that Mrs Rocha approved the payment nor does he mention his attempt to get hold of her by Whatsapp. He confirmed in evidence that he did send her a Whatsapp message but did not follow up. He accepted that the statement from Mrs Rocha was genuine.

#### *Investigations*

- 3.33. There is an investigation report from Mr Natividad concluding that the claimant had violated company policy and UK regulations for his personal benefit and that the approval of his manager made no difference. The disciplinary rules he relied on were Accountability, Theft and Dishonesty. It is not clear what the purpose of this investigation was and who saw the report.



- 3.34. On 20 October, Vicente Liwanag looked into the paperwork of the September 2014 remittance and confirmed the details of the transaction.
- 3.35. According to Mr Lim's statement, he thoroughly checked the necessary documents and came to the conclusion that 'without a doubt the claimant used client money for his personal benefit'. It is not clear what the purpose of his investigation was and who saw his written report.
- 3.36. Mr Natividad's evidence was that Mr Guanzon emailed a letter to Mrs Rocha but received no reply. Part-way through the tribunal hearing the respondent produced a screenshot of a Whatsapp conversation between Mr Guanzon and Mrs Rocha on 10 November 2017 in which he asks to speak to her about an 'important matter'. She suggests that he should email her but she does not reply when he asks for her email address. There is no other attempt to contact Mrs Rocha by the respondent.

*Grievance process*

- 3.37. The respondent elected to deal with the grievance before processing with the decision on the disciplinary issue.
- 3.38. There was a meeting held on 22 November 2017 conducted by telephone with Mr Allen Alcantara (Head of Remittance Marketing Division) in the Philippines (with others sitting in on the call) and the claimant in London. The claimant was accompanied by his trade union representative. The claimant presented his grievance regarding the way the meeting on 13 October 2017 had been conducted, in particular that he was pressured to resign and that he was put on indefinite suspension.
- 3.39. The grievance outcome letter dated 15 December 2017 records the grievance as being about the claimant's verbal suspension with immediate effect on 13 October 2017 without any forewarning and with no agreement as to how many days it would last and whether it would be paid or not and that he was coerced to hand in his resignation within 48 hours. Mr Alcantara's outcome letter notifies the claimant that Mr Natividad and Mr Lim will receive disciplinary warnings because they showed a lack of tact and circumspection on their observance of disciplinary procedures at the meeting on 13 October. He did not say to the claimant that part of the grievance was upheld and part was rejected. I therefore find that the claimant was entitled to regard this outcome as upholding his grievance in its entirety, including the allegation that he was coerced to resign.
- 3.40. On 15 December 2017, Mr Alcantara then issued Mr Natividad and Mr Lim with a written warning for their lapse in judgment in failing to comply with guidelines for disciplinary issues, particularly in relation to

the imposition of the suspension on the claimant. The letters also mention that Mr Alcantara found merit in their actions in using an informal meeting to establish the facts in hand. The claimant was not shown these warning letters.

*Dismissal*

- 3.41. Following the conclusion of the grievance process, the respondent considered the disciplinary matter and reached a decision to dismiss the claimant. The decision was taken by Mr So and set out in a letter dated 5 January 2018. There was no evidence before the tribunal of what information Mr So had been given in order to reach his decision. Mr So did not appear before the tribunal and there was no witness statement from him, nor any explanation for this omission.
- 3.42. The dismissal letter states that all evidence as well as the claimant's responses have been independently considered. The letter does not refer to Mrs Rocha's statement, either to record that it had been disregarded or to record that it was not regarded of any assistance to the claimant's case. The recorded allegation is that he misappropriated company funds, which was regarded as sufficiently serious to warrant dismissal. Mr So does not state whether he was aware of any other disciplinary allegations, such as deception, or whether he took into account any mitigating factors and, if he did, what conclusion he reached.

*Appeal*

- 3.43. The claimant appealed against the dismissal on the following grounds:
  - 3.43.1. He had a long unblemished disciplinary record
  - 3.43.2. The allegations came after a remittance error and resulted from the claimant refusing to accept an unfair warning
  - 3.43.3. The investigation was flawed
  - 3.43.4. Delay
  - 3.43.5. Evidence submitted on behalf of the claimant (Mrs Rocha's statement) was not taken into account
  - 3.43.6. No explanation was given why her approval was not sufficient to permit the transaction
  - 3.43.7. Failure to consider mitigating factors such as length of service, transparency during the process
  - 3.43.8. Failure to consider alternatives to dismissal
  - 3.43.9. Failure to conduct a fair procedure.
- 3.44. An appeal hearing was conducted by telephone link on 23 January 2018 with Mr Alcantara and others attending in the Philippines and the claimant with his trade union representative and the note-taker in London.

- 3.45. On 30 January 2018, Mr Alcantara wrote to Mr Natividad informing him that the appeal panel had decided to uphold the dismissal on the basis that there was no new evidence presented by the claimant to explain that he did not commit the misappropriation of client funds. (This letter was produced to the tribunal part way through the hearing and was not referred to in either of Mr Natividad's witness statements.) The tribunal did not hear from Mr Alcantara and he did not submit a witness statement.
- 3.46. On 30 January 2018, Mr Natividad wrote to the claimant informing him that his appeal had been rejected by Mr Alcantara. Mr Natividad's initial evidence was that this letter was received from Mr Alcantara and had just been signed by him for administrative reasons. The letter includes more detail than is contained within Mr Alcantara's letter to Mr Natividad. Mr Natividad was recalled to give further evidence regarding this new document and he confirmed that he had no communication from Mr Alcantara other than the letter dated 30 January 2018 and the other content of his grievance outcome letter sent to the claimant included his own thoughts, which were not those of Mr Alcantara. These included Mr Natividad's conclusion that the claimant had used his knowledge of the respondent's systems to avoid detection

#### Law

4. The relevant law is set out in section 98 of the Employment Rights Act 1996. As this is a dismissal on the grounds of alleged misconduct, the test in *BHS v Burchell [1978] IRLR 379 EAT* applies, namely, in order for the dismissal to be fair:
- 4.1. the Respondent must have a genuine belief that the Claimant committed the misconduct;
- 4.2. there must be reasonable grounds for that belief;
- 4.3. the Respondent must have conducted a reasonable investigation into the allegation.
- 4.4. In addition, the Respondent must act reasonably in all the circumstances by following a fair procedure and the sanction must be within the range of reasonable responses.
- 4.5. It is not for the tribunal to form its own view whether the Claimant committed the alleged misconduct, only to assess whether the Respondent reached its decision fairly.

#### Determination of the Issues

5. I determine the issues on the balance of probabilities as follows:

- 5.1. I find that the reason for the dismissal was the respondent's view that the claimant had committed an act of misconduct, namely the transfer of £2,000 to his mother from a client account in September 2014.
- 5.2. Although I agree with the claimant's submission that the process which led to his dismissal began with the error in September 2017 and his reaction to the subsequent warning, I do not find that his employment would have been terminated on those grounds alone and he would not have been dismissed if the respondent had not become aware of the 2014 transaction.
- 5.3. I find that the way Mr Lim and Mr Natividad conducted the meeting on 13 October 2017 was aggressive and bullying with a view to manipulating the claimant into resigning. If he had resigned, he would have a strong argument that he was forced to resign but, in the event, he did not resign. However, I do not accept the claimant's submission that the respondent then followed a disciplinary procedure as a penalty for him not resigning. I find that the disciplinary investigation was a legitimate means of dealing with the misconduct allegation.
- 5.4. I am unable to determine whether the decision maker, Mr Richard So, had a genuine belief in the claimant's misconduct. I have heard no evidence from him and the only documentary evidence regarding the decision to dismiss is the dismissal letter. His letter sets out the accusation and states that the misconduct is categorised as gross misconduct. He goes on to assume that the claimant has committed the misconduct and concludes that dismissal is an appropriate outcome. However, there is no evidence of Mr So's thought process in making the decision and there are no findings of fact.
- 5.5. On this evidence, it is hard to conclude what Mr So's actual belief was. However, I will give him the benefit of the doubt on the basis that there was evidence of a transaction which, on the face of it, was suspicious. I have no reason to believe he took any other factors into consideration in reaching his decision.
- 5.6. I must go on to consider whether he had reasonable grounds for this belief. To the extent that there was evidence that the transaction had taken place (not disputed by the claimant), he had grounds to conclude that there had been an act of serious misconduct.
- 5.7. Turning to the respondent's investigation, it is hard to work out which investigation was used by Mr So in making his decision. There are no findings of fact within the decision letter. It simply records his decision as accepting the allegation as fact without any discussion of how he reached that decision, what he took into account and what evidence (if any) he disregarded or gave little weight to.

- 5.8. The meeting on 13 October 2017 is described by the respondent as the Investigatory Meeting. It is recorded in a document entitled 'Timeline' drafted by Mr Natividad and this was part of the evidence sent to Mr So. There is no other meeting at which the allegations were put to the claimant prior to the disciplinary hearing. Mr Alcantara upheld the claimant's grievance regarding the conduct of that meeting and it appears that the grievance finding in relation to that meeting did not impact on the weight given to the 'Timeline' document in reaching the disciplinary decision, although this is not expressly addressed by Mr So.
- 5.9. Given that the disciplinary decision had been delayed for the specific reason of allowing the grievance to be heard first, it is surprising that there is no evidence that the outcome of the grievance was communicated to Mr So or, if it was, that he took it into account.
- 5.10. To the extent that the 13 October investigatory meeting is part of the investigation, the respondent disputed the claimant's position that he had Mrs Rocha's approval and relied on his inability to produce paperwork at the meeting as evidence of that approval. In the circumstances where he was given no advance notice of the meeting, and did not become aware of the subject matter of the meeting until part way through, it is wholly unreasonable for the respondent to expect the claimant to be able to produce evidence there and then in relation to a transaction over three years earlier. Again, there is no way of knowing what view Mr So took about this matter.
- 5.11. There also appears to have been an independent investigation by Mr Lim (who was not involved in the formal disciplinary process due to the grievance against him). He decided conclusively that the claimant had committed an act of gross misconduct on the basis of the documentation. He stated that this was his own investigation and not shared with anyone else, but he has not provided an explanation why he should have conducted an investigation at all. This investigation is flawed because it failed to take into account any input from the claimant or to seek to find out from Mrs Rocha whether she had given permission.
- 5.12. Mr Natividad asked Mr Liwanag to investigate the 2014 transaction but his report does not seem to have added anything to what was known from the documents. Mr Liwanag did not speak to the claimant yet reached a finding that he did not intend to repay the money. It is not clear whether this document was before Mr So when he made his decision.
- 5.13. The person who appears to have been tasked with the investigation by Head Office in the Philippines is Mr Guanzon, who was the person who approached Mrs Rocha and who conducted the disciplinary hearing. I find that his investigation was flawed in relation to following

up with Mrs Rocha. He was aware that the claimant alleged that she had authorised the transaction. He had a brief Whatsapp conversation with her on 10 November 2017, in which he said he wanted to take to her about a 'serious' but did not tell her what it was about. He did not indicate that it related to the claimant. It is possible that her attitude may have been different if she had known that. In any event, Mr Guanzon had other means of communicating with her – he had her phone number and her home address – but he made no further efforts to contact her. Given that the claimant's explanation for the transaction was almost entirely based on her role in the remittance process, it is a glaring omission of any investigation not to make a proper attempt to check this up.

- 5.14. It might be said that it is for the claimant to produce evidence to the respondent of the matter on which he wants to rely in his defence. The claimant did obtain a signed statement from Mrs Rocha which he gave to the respondent on 20 November 2017. The respondent cast doubt on it as being 'unverified' but nobody appears to have followed up with her in order to verify it, if they were not satisfied with the document as it stood. It is accepted by the respondent that the signature is the Mrs Rocha's signature. The content of her statement is consistent with the other evidence available to the respondent, such as the transaction documents and Mr Lim's statement that she did not seek his approval. If the respondent had doubts about the genuineness of the statement (although Mr Guanzon said he accepted it was genuine), these doubts should have been brought to the claimant's attention so that he could address them. Alternatively, the respondent could have satisfied itself as to the genuineness of the document and verified it themselves. Counsel for the respondent blamed Mrs Rocha for not being more proactive in coming forward to verify her statement. I accept the claimant's submission that it is not Mrs Rocha's obligation to carry out the respondent's investigation.
- 5.15. I am asked by the respondent to give little weight to this document. My view is that the issue for me is what weight the respondent gave to the document in reaching its decision. If it was taken into account but not given much weight as unverified or, alternatively, not considered relevant, no explanation has been given for that reasoning; if it was not taken into account, no explanation has been given for the omission.
- 5.16. The culture of the organisation is that instructions or orders from those more senior are followed. The misapprehension that Mr Lim had given approval for the transaction is the reason given for Mrs Co and Mr Natividad not raising the issue in 2014. There is no evidence that Mrs Rocha's approval alone would not have been considered sufficient at the time or that Mr Lim would have to have given approval for the transaction not to have been problematic.

- 5.17. I therefore conclude that there was not a reasonable investigation on which Mr So could reliably form the belief that the claimant had committed gross misconduct.
- 5.18. I must also consider the fairness of the disciplinary procedure, including the reasonableness of the sanction to dismiss.
- 5.19. I do not find that there was procedural flaw by virtue of the fact that the investigation related to a matter which had taken place three years earlier, in 2014. Although Mr Natividad was aware of the transaction from late 2014 and the respondent had all the relevant paperwork, it was not until 2017 that Mr Lim was aware of the transaction. This is consistent with Mrs Rocha's evidence and I accept that Mr Lim's new awareness of the matter was a valid reason for him to open up the investigation three years later.
- 5.20. The respondent accepts that the procedure in relation to the way the suspension was communicated did not comply with the ACAS procedure. In addition to this, the respondent gave no real thought as to whether suspension was necessary. The claimant had been working without any suggestion of misconduct for three years since the transaction under investigation took place. Senior individuals within the respondent (other than Mr Lim) were aware of the transaction and did not see a reason even to investigate it at the time. The respondent does not appear to have taken this into account when deciding to suspend.
- 5.21. I find that the warning letter on 22 September 2017 was issued without any investigation or without the claimant having an opportunity to make representations. As such, it was an unfair warning. However, I find that the warning itself formed no part of the decision to dismiss, nor did the claimant's refusal to accept the warning.
- 5.22. The claimant contends that the delay of 53 days between the disciplinary hearing and the dismissal decision was unreasonable. The respondent's explanation is that it was a combination of having to deal with the grievance before the disciplinary decision could be taken, and the challenges of the matter being dealt with in the Philippines. I accept that the respondent was entitled to put the disciplinary on hold pending the grievance outcome. However, the total period of time which this process took is longer than ideal although it is not, in my view, sufficiently long or unreasonable to constitute a fundamental unfairness.
- 5.23. I find that the respondent did not address the question of whether the transfer of £2,000 would still constitute gross misconduct if it was done with the approval of his manager. The respondent's position as stated now is that they would have dismissed Mrs Rocha if the matter had come to light when she was still employed. However, the respondent

has not shown evidence that it considered whether the manager's approval would have been a mitigating factor and, if so, to what extent. There was evidence from a number of the respondent's witnesses which showed that the workplace culture was to accept what someone higher up in the organisation said, without challenge and that all transactions were reviewed by the person next up in the chain of command. I accept the respondent's submission that Mrs Rocha agreed to the claimant's request rather than the claimant 'following her instructions' but, if the correct process is for him to obtain her approval and this is what he did, the respondent has not engaged with impact of that approval on the allegation of his misconduct.

- 5.24. It was not explained whether the claimant was blamed for Mrs Rocha's failure to notify Mr Lim and the respondent made no finding of whether the claimant was even aware of this.
- 5.25. The respondent's submissions regarding the claimant's disciplinary record were confusing. The claimant contended that there was an unfairness because Mr So did not take into account his clean disciplinary record. The respondent challenged the assertion that the claimant had a clean disciplinary record, alleging that he had received two warnings. I have found that there was no warning issued in 2014 and that the warning issued in 2017 was flawed. It was not clear whether Mr So had taken into account the claimant's disciplinary record. We do not know if he did consider it, but this factor went against the claimant on the basis that he had received two prior disciplinary warnings, or whether he did not take it into account at all. It was not submitted that he had taken the claimant's clean disciplinary record into account. On the balance of probabilities, I find that Mr So gave no thought to the claimant's disciplinary record, and it was neither a mitigating factor or an aggravating factor.
- 5.26. The disciplinary hearing was conducted by Mr Guanzon, who is more junior than Mr Lim and Mr Natividad. He sent the notes of the meeting to Mr So who apparently used these in reaching his decision. The respondent did not explain why it was necessary for Mr Guanzon to hold the disciplinary hearing and not Mr So, other than Mr So was in the Philippines. I find it would have been better practice for the decision maker to have been present at the disciplinary hearing, even if over a telephone link. In this regard, I note that Mr Alcantara in dealing with the grievance and with the appeal, was able to conduct the meeting himself on a telephone conference facility and there seems to be no reason Mr So could not do the same.
- 5.27. When Mr So reached his decision, he did so without the claimant having had an opportunity to address him directly. He was not able to form his own view of the claimant's representations and was entirely dependent on Mr Guanzon's notes.



- 5.28. In addition, Mr Guanzon stated he carried out some additional investigation after the disciplinary hearing but accepted that the claimant was not aware of this and had no opportunity to comment.
- 5.29. Given that Mr So did not attend the disciplinary hearing, it was even more important for him to set out the evidence he relied on in reaching his decision and the factors he took into account. I find that his failure to do this constitutes a fundamental unfairness.
- 5.30. As regards the appeal, the outcome letter records that it reflects the decision of Mr Alcantara not to uphold the appeal. However, the letter contains additional reasons for this decision which were added by Mr Natividad, without the knowledge of Mr Alcantara (although attributed to him). These include conclusions in relation to allegations which were never put to the claimant, such as that he had used his knowledge of the respondent's system to cover up his actions. This is unsupported by evidence and had not been part of the respondent's disciplinary case. Mr Natividad had not been present at the appeal hearing and had not been asked to make his own findings. I find that this taints the appeal outcome. I also find that the way in which Mr Natividad dealt with this evidence affects his credibility.
- 5.31. If I disregard the additional content added by Mr Natividad to the appeal outcome letter and concentrate on Mr Alcantara's decision, I find that he did not remedy the faults of the earlier disciplinary decision. He, too, failed to engage with any evidence or to reach findings or explain his decision. He simply relied on the claimant's failure to produce new evidence. He did not address the criticisms of the earlier decision or the process followed by Mr So.
- 5.32. I find that the respondent's attitude towards the disciplinary process as a whole (also borne out by its attitude in respect to of the 2017 incident) is that it expects to be able to make decisions without challenge and without a rigorous process. By way of example, the way the allegations against the claimant were formulated changed throughout the process. Although the underlying factual background was consistent, the categorization as 'misuse of company funds', 'fraud', 'theft' was inconsistent and during the hearing, it was put to the claimant that he had used deception and covered up his misconduct. Further, the dismissal letter and the appeal letter simply record an outcome without any reasoning. This ties in with the culture of an organisation where a manager makes a decision and does not expect to have to give any justification or explanation.
- 5.33. Taking all of the factors into account, I conclude that the claimant was unfairly dismissed.
- 5.34. The respondent submits that a *Polkey* reduction is appropriate. I find that the flaws in the dismissal process and decision are substantive as

well as procedural and I do not have any evidence that dismissal would have been the outcome if Mr So had the information he should have had before him.

5.35. The respondent also submits that a reduction for contributory fault is appropriate. I find that the claimant has admitted to wrongdoing, albeit in the context of having had approval from his manager. I find that the claimant contributed to his dismissal in the following ways:

5.35.1. He acknowledged he received £400 from Mr Lim yet still asked Mrs Rocha for £2,000 to put him back in funds from the £2,000 he had to pay for the China Bound incident. This meant he ended up receiving £2400 to compensate for having to pay out £2,000.

5.35.2. He acknowledged that he was aware of the reasons why the transaction was not compliant with company and regulatory rules and, although his position is that Mrs Rocha allowed it, he must take an element of responsibility himself.

5.36. I put the amount of contributory fault at 30% and any award will be reduced by this amount.

5.37. The claimant submits that there should be an uplift on any award to reflect the respondent's failure to follow the ACAS disciplinary code. The main failings were the way in which the suspension was handled and the fact that the claimant did not have the opportunity to make representations direct to the decision maker. I find it would be appropriate to increase any award by 10% to take into account these failures.

6. A Remedy Hearing will take place on 23 September to address issues relating to remedy. If the parties agree terms relating to remedy, they should notify the tribunal.

Employment Judge Davidson

Dated: 29 August 2019

Judgment and Reasons sent to the parties on:

30/08/2019

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For the Tribunal Office