EMPLOYMENT TRIBUNALS

Claimant: Mr W Mather

Respondent: Vision Security Group Limited t/a VSG

Heard at: Liverpool **On:** DATES 18, 19, 20 and 21 February 2020

Before: Employment Judge Benson

REPRESENTATION:

Claimant: In person
Respondent: Ms K White, Counsel

JUDGMENT having been sent to the parties on 20 March 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant, Mr Mather brings claims of unfair dismissal and for unlawful deductions from his pay. At the outset of the hearing we agreed the List of Issues as provided by the respondent and the claimant confirmed he was happy with these. These were:

2. Unfair Dismissal:

   Fairness

   a. Did the respondent conduct a reasonable investigation (including the date that the investigation began)?

   b. Did the respondent have reasonable grounds to believe the claimant was guilty of gross misconduct, in that:

(i) It was a conflict of interest for the claimant to have a business in competition with the claimant;

(ii) The claimant contacted the respondent's clients and offered the services of his business to those clients in breach of the terms of his employment and/or creating a conflict of interest; and

(iii) The claimant utilised customer reviews obtained whilst under the respondent's employment on his own company website.

c. Did the Respondent believe that he was guilty of the above-mentioned misconduct?

d. Was dismissal within the range of reasonable responses open to the respondent?

e. Did the respondent and claimant comply with the ACAS Code of Practice?

f. If there was any defect within the disciplinary process was that capable of remedy by an appeal and if so did the appeal remedy such defect?

Remedy

a. If the claimant's claim of unfair dismissal is upheld:

b. What level of compensation is appropriate in all the circumstances?

c. Should any compensation awarded be reduced in terms of Polkey v A E Dayton Services Limited [1987] ICR 142 to reflect that the claimant would have been dismissed in any event had a fair procedure been followed, and if so what reduction is appropriate?

d. Should any compensation awarded be reduced on the grounds that the claimant's actions caused or contributed to his dismissal and if so what reduction is appropriate

e. Has the claimant mitigated his loss?

3. Unlawful Deductions from Wages

a. Is the claimant a worker?

b. Does the relevant payment, being the claimant's suspension pay for a period of 11 days come within the definition of wages?

c. Was the claimant entitled to pay at the rate of £8.00 per hour for 12 hour shifts over a period of 11 days? If not, what is the appropriate rate of suspension pay?

d. Is the sum of £146 properly payable to the claimant as alleged or at all?

e. If the sum is properly payable to the claimant, was the deduction valid or legitimate by means of the claimant's contract of employment or legislation?

4. I also confirmed with claimant that the matters set out in paragraph 1.2 to 1.9 of the note of the Preliminary Hearing conducted by Employment Judge Shotter dated 21 October 2019 at page 185b of the Bundle were the factual issues upon which Mr Mather was relying. He agreed with these but also relied upon additional issues he wanted to raise about the investigation, which he did during the course of the hearing.

Preliminary Issue

5. At the outset of the hearing, the claimant confirmed that he did not wish to pursue the application for costs which he had made to the Tribunal as he had misunderstood the basis upon which costs might be awarded.

Evidence and Submissions

6. I heard evidence from the claimant and from the respondent's three witnesses; Mr P Thomson (Depot Loss Prevention Manager), the investigating officer, Mr D Follows (Regional Account Manager) who conducted the disciplinary hearing and from Mr G Ward (Head of Sector of Retail and Shopping Centres) who conducted the appeal. I have also considered the submissions made Miss White of behalf of the respondent and Mr Mather. Both provided written and oral submissions. I was provided with an agreed bundle comprising two lever arch files and a further bundle from the claimant with supplemental documents. During the course of the hearing it was apparent that some of the key documents were difficult to read and at my request clearer copies and a transcript were produced which assisted all parties.

7. I made my findings of fact based upon the evidence I heard and the documents to which I was referred. I have not explained my reasoning where the facts are not in dispute or where there has been no credible challenge.

Findings of Fact

8. The claimant worked for the respondent as a Relief Security Officer between 28 August 2012 and 9 April 2018. The respondent provides contract security and other support services to businesses and other organisations and employs 5,000 employees across the country.

9. The respondent's policies include a Code of Conduct which sets out various expectations of its employees. These included:

> *'Additional Employment:*
>
> *Employees are required to devote all their time and energies to their work and not engage directly or indirectly in any other employment or business interest without consent in writing from their manager.*

The company will not unreasonably withhold such consent. Should you be in employment with another company, this should not conflict with the interests of Compass Group. We would also encourage employees not to exceed the limits set out by the Working Time Regulations.

Please inform your manager of any other employment you have and if you are concerned that you or a colleague may have a conflict of interest, you must disclose this to your manager. Failure to disclose a conflict of interest may lead to disciplinary action.

10. The respondent's disciplinary policy includes examples of gross misconduct and they include misuse of company information, serious breach of trust and confidence, carrying out work for a third party in competition with the company and any act which goes against the interests of the company, any action which jeopardises the company's relationship with its clients or is likely to bring the company into disrepute with its clients and /or customers…

11. The disciplinary policy also confirms at page 190 that any suspensions will be on full pay. The claimant's terms of employment were contained in his contract which was signed on 23 August 2012 and he had guaranteed hours of 120 per month.

12. In January 2018, the claimant's Area Manager Mr Alan Robinson raised with HR an email which he had received from the claimant which appeared to be from a company email address 'Frontline Operations and Personnel'. This was logged with HR and there was an intention to commence an investigation but that appeared to have been overlooked by Mr Robinson when the claimant raised a grievance on an unrelated matter.

13. On or around 7 March 2018, Mr Ward met with Carol Kay who was the Health and Safety and Divisional Leader from Argos (one of the respondent's clients). She advised him that on 14 February 2019, Dawn Walker, (the H&S and Divisional Business Continuity Coordinator) and one of her colleagues had received an email from the claimant. In her email of 9 March at 18:06 she refers to it as the tender email. Carol Kay had been on holiday and this meeting was the first time she had seen Mr Ward since the email was received. That email is at page 261. It was from the claimant's Frontline Operations email address and there was a link to the company's website. It said:

'Hi Dawn,

I've just covered your premises tonight and one of the cleaners mentioned that she thinks the security contract is due for renewal.

I work for the VSG but also have my own security company mainly to deliver training, but I now look after John Lewis Liverpool on an Ad Hoc basis.

I have qualifications in policing, teaching, investigations as well as security and door supervision related qualification.

Contacting VSG clients is not something I would morally do, but if the contract is due to expire I won't be stepping on anyone's toes.

Can I ask if you will be putting out an invitation to tender, or plan to renew with VSG?

If you wouldn't mind keeping my communication with you confidential as I don't want your core security officers mentioning anything to VSG.

Kind regards

Eddie Mather

Operations

www.frontline-operations.co.uk

14. Mr Ward brought it to the attention of Paul Owen (Employee Operations Manager), HR and Paul Thomson (Profit Protection Manager) and asked them to investigate.

15. Mr Ward was initially involved to the extent that he was copied in on emails on 8 March at 16.39 and 9 March at 6.34 from Mr Paul Owen which contained Mr Owen's views of the evidence. Mr Thomson was also copied in on the email of 9 March from Mr Owen. It is clear that Mr Owen had a view upon the evidence and expressed it in these emails. Mr Ward then stepped away from the investigation and only became involved again at the later appeal and Mr Thomson was instructed to take the investigation forward.

16. As part of his investigation, he discovered that Frontline Operations had a website and he accessed that website taking a screen shot of part of it. The website had a list of testimonials purportedly from clients of Frontline giving positive comments. Those testimonials headed 'Customer Testimonials' are set out in full at page 283 of the bundle and included the following:

Sainsbury's - We used Frontline Operations for expert advice and one of the security Consultants identified several compliance issues at our stores and distribution warehouse. Frontline Operations and Personnel are very good at what they do and even found problems that our SHE Health and Safety Manager had missed.

CPUK - We would like to thank Frontline Operations for identifying failures at our premises and we are grateful that they have protected us from liability.

17. Mr Thomson proceeded to make enquiries of several of the businesses listed on the Frontline website. He did this by emailing contacts at those companies. He had replies from Sainsburys, CPUK and Merseytravel. Sainsburys and CPUK were both clients of the respondent as were some of the other companies listed. The response from Sainsbury's was from the respondent's manager at the site where the claimant had worked, who had spoken to the Sainsbury's manager. They confirmed that Sainsbury's had not used Frontline and had not provided the testimonials, as did other companies on the website.

18. The claimant had previously been invited to attend a meeting with Mr Thomson to discuss a grievance which he had raised concerning other issues. At that meeting in addition to discussing the grievance issues briefly, the claimant was asked questions concerning the email of 14 February, his business Frontline, and the testimonials on the company's website. Minutes were taken.

19. There is a dispute about the accuracy of these minutes. The claimant refused to sign them after the meeting as he had not read them. He was suspicious of Mr Thomson and the notetaker. They were not verbatim notes but I accept that they are a reasonable summary of what the claimant said at the time. The notes which were produced were the handwritten notes made by the notetaker. The questions and answers flow from each other and the claimant appears to be answering honestly and openly. After the meeting the claimant sent a document to the respondent in which he set out matters where he felt that the notes were inaccurate. On the key issues, they essentially reflect what the handwritten notes say. For instance, the handwritten notes relate that in relation to his managers being aware of him starting a business, that the claimant told his managers that it would be for training for SIA licences. He confirms this in his own notes and states that Frontline is not a security company.

20. In that meeting the claimant confirmed that:

    a. He had his own business which provided SIA training and that he had told his managers David Lea, Alan Robinson, Charlotte Brown and another manager whose name he could not recall, though he had not told them name of the company.

    b. He had sent the email of 14 February and he was asking when the contract was up for renewal. He did not consider that he had done anything wrong as Paul Woodward who was a core security officer at the Argos site, and a cleaner had told him that the contract was up for tender and they did not think Argos were happy with the respondent.

    c. Paul Woodward had suggested to the claimant that he leave a business card for them but the claimant did not think that was the right thing to do as it was a VSG site.

    d. The comments on the testimonial page of his company's website were comments made to him as an individual, some of which (CPUK, Golden Square, Sainsburys) were when he was working as a VSG employee for those clients, not on behalf of Frontline. He did not consider that this was a conflict as he did not believe it would be a conflict of interest unless he was seeking to take work from VSG. He confirmed that the Sainsbury's testimonial was from the Haydock depot.

    e. He had passed potential leads for work on to his managers at VSG in the past.

    f. He didn't feel that his business was a threat to VSG.

g. He considered that Alan Robinson had decided to bring up the claimant's company now, rather than when he first received the email because he thought the claimant was going to bring a grievance against him which he wasn't.

21. At the end of the meeting, Mr Thomson considered that there was a case to answer and the claimant was suspended on full pay. A letter confirming the position was sent to him on 21 March.

22. The claimant was due to work over the following week and had been given his shifts. I have been provided with screen shots of the respondent's rota and time system for the claimant which has eight shifts confirmed. I have considered whether as the claimant suggests, he was due to work for 11 shifts over the period of his suspension. Eleven shifts were discussed in emails between him and Mr Thomson and 11 shifts appears to have been authorised by Mr Ward. However, having however seen on the claimant's documents the way he calculated those 11 shifts, it is my view that he has made a mistake in the calculation and in fact he was due to work 8 shifts as set out on the screen shots. I consider it likely that the approval of those 11 shifts by Mr Ward is on the basis of the mistaken information provided by the claimant and as such it was 8 shifts that the claimant was due to work and which he lost as a result of the suspension.

23. Following the investigatory meeting, Mr Thomson made contact with some of the managers mentioned by the claimant as people he had told about his business. He obtained emails from Mr Robinson who denied any knowledge of the claimant's business and Charlotte Brown who recalled the claimant advising her that he was thinking of starting a training business but she did not know whether that had been taken forward. Mr Thomson did not speak to the claimant's immediate manager Dave Lea whom the claimant named and whom another manager Jon Webster had said might be worth speaking to. Mr Thomson wasn't able to provide a reason for this when asked in evidence and indeed his witness statement confirmed that he had spoken to him. Neither did Mr Thomson speak to Paul Woodwood whom the claimant had also named as the person who alerted him to the renewal of the Argos contract and whom he suggested he contact.

Disciplinary meeting

24. The disciplinary hearing was initially due to held by Gary Corden on 29 March but the claimant asked for the meeting to be rearranged because of transport issues. The allegations which the claimant faced were set out in the invitation letter at p327 of the bundle. These stated:

a. *'That on 14 February 2018 you sent an email to a current VSG client enquiring about a security contract and promoting your own company namely Frontline Operations and Personnel which is deemed as a conflict of interest for VSG as well as jeopardising the relationship between VSG and the customer.*

b. *That your company website shows testimonials that were given to you whilst you were working as a representative for VSG and therefore*

should not be posted on Frontline Operations and Personnel website. Namely that sometime between 17 December 2016 and 29 January 2017 you received feedback from a member of Sainsbury's staff whilst working at Haydock DC, as a VSG representative which was then found to be used as a testimonial for your company. This is a breach of trust and confidence and may be construed as bringing the company into disrepute.

c. That you failed to inform VSG officially that you are the owner of the director Frontline Operations and Personnel creating a potential further conflict of interest.'

25. The claimant was warned that the matter was regarded very seriously by the respondent and that it could result in his dismissal.

26. On 4 April, Mr Follows wrote to the claimant with a further invitation to a disciplinary meeting which was now to take place with David Follows on 9 April. He sent two letters one by recorded delivery and the other by first class post. Neither letter reached the claimant. The claimant did receive two notifications from the Post Office that two letters could not be delivered together with instructions as to how they could be obtained. One was unable to be delivered because he was not in to sign for it and the other had insufficient postage paid. I believe that these were likely to be the two letters. The claimant decided not to collect them. I do not accept the respondent's suggestion that the claimant was deliberately avoiding the hearing so that he could later use his non-attendance to his advantage. He was in contact with the respondent up to the disciplinary meeting including making suggestions who they should speak to as part of the investigation. Not do I accept that the respondent was deliberately excluding the claimant so he could not put forward his case to them.

27. Mr Follows did not know that the claimant had not received the letters. The letter of 4 April had advised the claimant that if he didn't attend, the meeting would proceed in his absence. Although Mr Follows checked and realised that the recorded letter had not been collected, he believed that the first class letter had been delivered. He spoke with HR and having waited an hour to see whether the claimant arrived, decided to proceed in the claimant's absence. I accept that Mr Follows was independent. He did not know the claimant and had not met him, indeed until this tribunal hearing. He considered the evidence provided by the Investigating Officer, including the emails from Mr Robinson and Ms Brown and the notes of the investigation meeting.

28. After the investigatory meeting, the claimant sent his comments upon the meeting notes to the respondent. Unfortunately, he did not address them to Mr Thomson as he was suspicious of his motives and instead sent them to HR with no covering letter. As such they did not find their way to Mr Follows until after he had reached his decision.

29. On 11 April Mr Follows wrote to the claimant with his decision. He confirmed that he had taken the decision to dismiss the claimant without notice on the grounds of gross misconduct. He stated that he had given consideration as to whether there was any other sanction could be applied but concluded that the

claimant had destroyed the basis of trust and confidence which was essential the continuation of the employment contract.

30. He found that in relation to the first allegation, there was evidence that the claimant had approached a current VSG customer and promoted the claimant's own business. Further he had admitted to approaching the client with the intention of bidding for the business and that he had stated to the customer that he was a current VSG employee and not to mention it to anyone so that VSG were not informed. He considered this was a conflict of interest and was an attempt to jeopardise the relationship between the respondent and its client.

31. In respect of the second allegation, he found that the testimonials shown on the claimant's website were written as if they had been given to the claimant's business and were therefore misleading and used out of context. Specifically, the Sainsbury's testimonial had been written in the same manner, and not as if the claimant had been given the information as an individual. He confirmed that no one at Sainsbury's had engaged with the claimant's company or endorsed it and that they had no records of any compliance or health and safety issues raised personally by the claimant as a VSG employee. He considered this was a breach of trust and confidence and could have brought the respondent into disrepute.

32. Finally, in relation to the final allegation, Mr Follows considered that the claimant had informed a number of people that he had set up his own company to provide training, however that the company website showed that there were a number of other services he provided including manpower which was different from what the managers were aware.

33. The claimant appealed against this decision by letter of 13 April. These were added to in an email dated 28 April. The respondent arranged for Mr Ward to hear the appeal and by letter dated 27 April, invited the claimant to attend an appeal hearing on 3 May.

34. The claimant's main grounds of appeal were set out at paragraphs 7.1 to 7.4 and 9.1 to 9.3 of Mr Ward's witness statement. These were summarised as follows:

    a. the disciplinary hearing was held in his absence;

    b. he had not been paid during his suspension;

    c. the clients referred to on his website were not the respondent's clients;

    d. his manager knew about his business and as his business did not provided security services, it was not a conflict of interest;

    e. he felt the respondent had a conspiracy to get rid of him;

    f. his email of 14 February was just a general enquiry and not touting for business; and

g. other employees within the respondent also had their own security business and the respondent had not taken issue with this.

35. He also complained that the notes of the investigatory meeting were inaccurate.

36. Owing to unforeseen personal circumstances, Mr Ward could not attend the arranged hearing and the day before it was due to take place, he advised the claimant accordingly. The rearranged appeal meeting took place on 16 May.

37. Unbeknown to the respondent and Mr Ward, the claimant recorded the meeting. An agreed transcript was made available to me.

Appeal Meeting

38. During the appeal meeting the claimant provided Mr Ward with documentation which he considered supported his grounds of appeal. These included emails from 2016 and 2017 in which the claimant is referring leads and opportunities to tender to his managers Dave Lea and Alan Robinson. Other than one email late in 2018, these are all from his personal email addresses. It is clear from the content of these emails that Mr Lea and Mr Robinson are aware that the claimant was carrying out security work on his own behalf. The claimant also refers to his limited company and the provision of security staff at a potential customer's licensed premises in an email to Mr Lea dated 24 June 2016.

39. Mr Ward explored with the claimant his various grounds of appeal. Although Mr Ward did not conduct a full reinvestigation of the matter, he did conduct a detailed exploration of all of the allegations against the claimant and the evidence collated by Mr Thomson and that produced by the claimant. The claimant was given an opportunity to state his grounds of appeal and present his evidence. Mr Ward focussed on the allegations which Mr Follows had found were proved, but also considered each of the claimant's grounds of appeal.

40. The claimant's approach in this meeting did not assist his position. He appeared to have believed that it was for the respondent to prove the case against him rather than make a decision based upon all of the information available to them, including from him.

41. During the meeting, the claimant was at times evasive and he refused to provide straight forward answers to some of Mr Ward's questions, particularly in relation to the services which his company provided. He maintained that it provided training but would not give a clear answer as to whether it also provided manned guarding services. For example, in one set of questions in relation to the email to David Lea mentioned above, he was asked: 'so is your business set up to deliver security guarding, or training or both? The claimant replied 'It's set up for training and other activities'. Mr Ward said 'this email suggests you're a security guarding business'. The claimant replied: 'that's for you to decide'. Mr Ward asked 'Is it or is it not? The claimant responded: 'I'm not confirming or denying anything.'

42. Eventually he confirmed that 'at the moment' his company did not provide security guarding. He contended that his business was not therefore in conflict with respondent.

43. Each of the allegations of which the claimant was accused was put to him by Mr Ward and the claimant was given the opportunity to respond.

Email of 14 February

44. The claimant contended that this email was confidential and that it shouldn't have been shared with the respondent; that it wasn't an approach from him to take Argos' work from the respondent; that it was a genuine enquiry to try to find out whether the respondent was losing the work and the contract was at risk and that the claimant was going to pass on what he found out to the respondent.

Testimonials on website

45. The claimant sought to argue that CPUK and Sainsbury's and others were not the same Sainsbury's and CPUK which were the respondent's clients. In his investigation meeting, the claimant had previously confirmed that they were the same but he disputed the minutes of that meeting. He refused to expand upon this explanation and who these other companies were to Mr Ward, he said for client confidentiality reasons. He reiterated that the testimonials were for him personally.

Ownership of a competing business/Conflict of Interest

46. The claimant contended that his business provided training and not security guarding and was not in competition.

47. Mr Ward put to the claimant that his website contradicted this and that it showed he was offering security guarding. The claimant's explanation was that this was only so that he could pass those referrals on to the respondent. The claimant's evidence at that meeting concerning what his company did was unclear and evasive. Essentially Mr Ward disbelieved the claimant that he only provided training. He accepted that he had made managers aware of the business but that they were under the impression that the business was for the purpose of providing training.

48. Mr Ward found that in itself providing training was not a conflict of interest, but that his website clearly contradicted that this was all he did. However, the serious conflict of interest as he saw it was the email which had been sent on 14 February to Dawn Walker to solicit the business of the respondent.

49. Mr Ward discussed with the claimant his other grounds of appeal. These included that the disciplinary hearing was held in the claimant's absence; that other staff had their own security businesses, specifically a Stephen Coil and that there was a conspiracy to get rid of the claimant.

50. It was agreed that the meeting would be adjourned in order that Mr Ward could carry out further investigations. Following the meeting the claimant emailed a number of further documents to Mr Ward.

51. Mr Ward took some time reviewing the evidence and making further enquiries. These additional enquiries primarily related to the additional grounds of appeal. Mr Ward did not discuss with David Lea what the claimant had told him concerning the business. Nor did he speak to Paul Woodward about suggesting the claimant pass the business card to the Argos and the claimant's response.

52. On 19 June 2018 Mr Ward wrote to the claimant with his decision. He did not uphold the appeal and he confirmed the decision to dismiss the claimant. His reasoning is set out in detail in his letter which appears at pages 499 – 507 of the bundle and I accept that formed the basis for his decision to uphold the dismissal.

53. In respect of the three main allegations, having considered the claimant's explanations and mitigation, he confirmed that:

    Email of 14 February.

    a. He did not accept the claimant's mitigation, and he considered this was a clear approach to solicit the business of a current client of the respondent which was a conflict of interest. This was on the basis that the claimant had specifically enquired as to the status of the contract and whether there would be a tender process, he had highlighted his own credentials and client reference point that would allow him to conduct the work on behalf of his company, he had made a specific request that the communication was not disclosed to the respondent and that contacting the respondent's clients was not something that he should morally do (This was a misquote and should have read 'would').

    Testimonials

    b. Again, he did not accept the client claimant's mitigation and found that on balance a number of the testimonials were used in reference to feedback provided by VSG clients at times when the claimant was working in his capacity with VSG. In support of this conclusion, he noted the claimant's admissions during the investigation meeting, that the testimonials were aimed at him as an individual albeit he admitted he was conducting services on behalf of VSG. In relation to the statements in the appeal meeting that Sainsbury's Supermarkets Ltd, which was VSG's client was not the same Sainsbury's as the claimant was referring to in the testimonial, Mr Ward found that spurious. He found that the claimant had previously stated that the testimonials referred to Sainsbury's Haydock, and no other business with a store distribution network as outlined in the testimonial could be anything other than Sainsbury's Supermarkets Limited. Mr Ward therefore found that the testimonials were misrepresenting VSG's clients as those of Frontline Operations and Personnel.

c. In coming to that conclusion Mr Ward gave consideration to whether the notes of the investigation meeting were accurate or not. He noted that the claimant was given the opportunity to make any amendments he wished at the end of the meeting and having discussed the matter with Paul Thomson, Mr Ward was satisfied that they accurately reflected the claimant's statements in respect of the client testimonials.

Ownership of competing business/conflict of interest

d. Mr Ward considered the claimant's mitigation that he did make the respondent aware that he was the owner of a company. This was found not to be in dispute, but that as far as Mr Ward was concerned the managers were under the impression that the business was one of training and not manned guarding, nor were they made aware of the name of the business. Although this, in itself, he found was not a conflict of interest, it would amount to a conflict if the company was in direct competition with VSG. In that regard Mr Ward found that the claimant's company's website advertised itself as a supplier of manned guarding and the email of 14 February was a direct approach for solicitation of a client's business. He therefore did not uphold this point of appeal.

The Law

Unfair Dismissal

54. Section 98 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 sub-section (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 sub-section if it … relates to the conduct of the employee …

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (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".

55. Conduct dismissals can be analysed using the test which originated in British Home Stores v Burchell [1980] ICR 303, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal.

56. The "Burchell test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

57. Since Burchell was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

58. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: A v B [2003] IRLR 405.

59. A fair investigation requires the employer to follow a reasonably fair procedure. Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

60. The appeal is to be treated as part and parcel of the dismissal process: Taylor v OCS Group Ltd [2006] IRLR 613**.**

61. If the three parts of the Burchell test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

62. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

63. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for characterising the misconduct as gross misconduct. The position was explained by HHJ Eady in paragraphs 29 and 30 of Burdett v Aviva Employment Services Ltd [UKEAT/0439/13]**.** Generally gross misconduct will require either deliberate wrongdoing or gross negligence.

Unauthorised Deductions from Pay

64. The right not to suffer unlawful deductions from pay arises under Part II of the Employment Rights Act 1996. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by him. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1), or exempt under section 14.

The Decision.

65. The respondent contends that its reason for dismissing the claimant was the claimant's conduct. It is for the respondent to show on the balance of probabilities that this was the reason or principal reason. The three allegations of misconduct upon which the respondent relies are set out in the dismissal letter.

66. The decision of BHS -v- Burchell requires me to consider three questions and then for me to consider whether the decision to dismiss was within a band of reasonable responses. In my considerations I need to consider the whole dismissal process including the appeal and also have regard to the ACAS Code of Practice.

67. There were three allegations which comprised the misconduct for which the respondent says the claimant was dismissed. I will take these in turn.

Email of 14 February

68. I am satisfied that Mr Follows and Mr Ward had a genuine belief that the claimant was guilty of seeking to solicit their client Argos by way of the email of 14 February. The claimant has never sought to deny that he sent that email but his explanation was that he was intending to find out more about the retender process and see what risk there was to the respondent. At the investigation meeting he did not seek to explain that was the reason, and although he suggests later that he was simply making enquiries which he could pass on to the respondent, that is not the way the email read to Mr Follows or Mr Ward. Mr Follows and Mr Ward's understanding of that email was that he was seeking to solicit work from Argos who were a client of the respondent. Mr Ward particularly saw this issue as the primary conflict of interest.

69. There were reasonable grounds for Mr Ward and Mr Follows coming to that conclusion. The wording of the email itself is plain. No matter what the claimant may say were his intentions, that is not the way the email read. The reference to keeping the email confidential from the respondent and the information about the claimant's own qualifications and experience are not what you would expect to see in an email which is simply making an enquiry about whether a contract is to be renewed. Further the email came from the claimant's business email address and had his business website details on it. It was clearly of significant concern to Argos such that they raised it with Mr Ward.

70. Had they come to that conclusion following a reasonable investigation? There was little investigation that was needed in respect of this allegation. The claimant had accepted he had sent the email and Mr Ward and Mr Follows had considered his explanations. The claimant suggests that they should have contacted Paul Woodwood but there is little he could have added. He may have supported the claimant in that he had alerted him to the opportunity and suggested he pass them his business card and his response, but it was the sending of the email which was the issue for the respondent and what that email said. They did not question the claimant's version of where the information about the retender came from, it was what the Claimant then did with it which was of concern.

Testimonials on website

71. I am also satisfied that Mr Follows and Mr Ward had a genuine belief that the claimant had testimonials on his business' site that were given to him whilst he was working as a representative of the respondent and that was a breach of trust and confidence and could potentially have brought the respondent into disrepute.

72. The evidence provided by the claimant at the investigatory meeting was clear and straight forward. He admitted that the comments made on his business' website were provided to him as an individual but in some cases while he was working as an employee of the respondent on the customer's premises. Mr Follows had those investigatory minutes and in the absence of the claimant did not have any other explanations to consider. Although the claimant didn't seem to think that it was an issue because those comments were made about him as an individual, it was clear to Mr Follows that putting such comments on the Frontline website were inappropriate and in breach of the claimant's obligation to the respondent and could potentially bring the respondent into disrepute.

73. Mr Ward held the same view but by that time the claimant was seeking to backtrack on his earlier admissions. His suggestion to Mr Ward that the Sainsbury's on his site was not the same Sainsbury's which was the respondent's customer was not believable to Mr Ward and this supported Mr Ward's view that the claimant was guilty of the misconduct.

74. There were reasonable grounds to come to this conclusion. The claimant's clear admissions in his investigatory meeting and acceptance that he was an employee of the respondent when some of these comments were made and the contents of the website itself support this. In putting up these testimonials the claimant was misrepresenting that Frontline had provided these services to these clients and companies which could potentially have damaged the respondent's relationship with its clients.

75. Was it following a reasonable investigation.? The claimant contends that the investigation undertaken was inadequate in that the email from Sainsbury's wasn't from Sainsbury's itself and was hearsay and that the respondent should first of all have checked with the claimant before it commenced its investigation to see if the CPUK was the same business as their client. I do not accept this position. The respondent was entitled to rely on the evidence

taken as a whole. In this case it had an admission from the claimant and it had evidence from one of their own employees who had spoken with his contact at Sainsbury's. In view of the responses from the claimant to the questions about the identity of the Sainsbury's he was referring to, which Mr Ward found unbelievable, the respondent considered that no further investigation was necessary. I find that the investigation undertaken was reasonable in all the circumstances.

Ownership of a competing business/Conflict of Interest

76. Did Mr Follows and Mr Ward have a genuine belief in the guilt of claimant and was that belief based upon reasonable grounds having undertaken a reasonable investigation? The claimant did not deny that he had his own business and that his business provided training. The claimant was however evasive about whether that business also provided guarding, which would have been in competition with the respondent. From the outset the claimant said that his managers knew about his business.

77. At the time of the claimant's dismissal, Mr Follows had only limited information available to him to consider whether the claimant had notified the respondent about his business interest. Based upon the emails from Mr Robinson and Ms Brown, I consider that Mr Follows genuinely believed that the claimant had a competing business which he had not advised his managers about and that amounted to a conflict of interest. Was that based upon reasonable grounds having followed a reasonable investigation? At that stage, the investigation was flimsy and applying the test set out in Sainsbury's Supermarket Limited and Hitt, Mr Thomson and Mr Follows did not undertake a reasonable investigation into this issue. Specifically, they did not speak to Mr David Lea who was mentioned on a number of occasions by the claimant. Mr Follows' decision was not therefore based upon reasonable grounds following a reasonable investigation. I must therefore consider whether the flaw in the investigation was resolved by Mr Ward as part of the appeal process, as in terms of general fairness, the courts have established that defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal.

78. Mr Ward undertook an extensive and detailed consideration of the allegations against the claimant and his grounds of appeal. When it came to the issue of what the claimant had told the respondent, it was clear that his managers knew that the claimant had a business. It was not entirely clear however whether his managers knew the full nature of that business though the emails suggest that Mr Lea knew that it involved some element of security guarding. The claimant did not help Mr Ward's consideration of that in any way as he would not give any clear answers to the questions which Mr Ward asked. Mr Ward's conclusion was that the claimant's business provided both training and guarding. The claimant said that he told Mr Lea and the emails produced by him appear to support that view. Mr Lea could have confirmed the accurate position, yet Mr Ward did not speak to him. A reasonable employer would have carried out that step and in not doing the decision to dismiss for this reason is outside the band of reasonableness.

79. This was however only one of three reasons that the claimant was dismissed and I accept that Mr Ward's primary reason for rejecting the claimant's appeal against dismissal was the claimant's misconduct in relation to the email of 14 February, which he considered was a clear conflict of interest, and supported by his misconduct in respect of the testimonials posted on his business' website.

80. My finding therefore in relation to the allegation concerning ownership of a competing business, does not therefore make the overall decision to dismissal unfair. As Mr Ward and Mr Follows had a genuine belief based upon reasonable grounds and following reasonable investigation into the other allegations of misconduct, I proceed to consider the other elements required by Section 98(4) ERA.

Procedure

81. The claimant made other complaints about the procedure. I must consider whether any steps the respondent took were outside the band of reasonableness, taking into account the ACAS Code of Practice. I do not accept that there was any delay in progressing the complaint raised by email in January 2019 once the respondent was aware of it. Although the original Frontline email had been brought to the attention of the respondent in January, it was the more serious issue of the email soliciting the work which was of concern to the respondent and which they acted upon swiftly once they received it.

82. Although the claimant did not attend the disciplinary hearing, I accept that the letters were sent to him and that he did not receive them. That was however in part his own fault. Had he acted upon the Post Office notifications and collected the letters, he would have been aware of the hearing. He was expecting a communication by post from his employer and he could have collected them. He decided not to. Mr Follows waited for an hour and checked that the letters had been sent to the claimant. Although the recorded delivery letter had not been collected, he was satisfied that the first class letter had been sent. That letter confirmed that if the claimant did not attend, the hearing would proceed in his absence. In these circumstances, the decision made to proceed by Mr Follows was within a band of reasonableness. In any event the claimant was given a full opportunity to provide his explanations at the Appeal hearing which I consider rectified any procedural issues caused by the failure to attend the earlier hearing. I conclude that the procedure adopted by the respondent was not outside the band of reasonableness.

Mr Owen's motives

83. I do not consider that there is any evidence that Paul Owen was behind the claimant's dismissal. Although there was an involvement and views expressed by Mr Owen at the outset of the investigation including to Mr Ward, who was copied in on the emails, which were unnecessary, I do not consider that this, or any evidence I have heard, support the argument that Mr Owen was seeking to have the claimant dismissed or influenced the views of Mr Ward. I consider that Mr Follows and Mr Ward were both honest in their evidence and that they made their decisions independently and based upon the evidence.

Band of Reasonable Responses

84. I must how consider whether the decision to dismiss the claimant was within the band of reasonable responses open to a reasonable employer. The claimant raises the issue that other employees also had their own businesses and no sanctions were issued against them. The claimant mentioned Mr Stephen Coil specifically. This was investigated by the respondent who found that Mr Coil no longer had a business. This does not answer the question specifically. The claimant was however in a different situation. He was not dismissed based upon this issue alone. The reason for the claimant's dismissal was more than operating another business and indeed Mr Ward confirmed that this, in itself, would not amount to a conflict. The key issues for the respondent was the email of 14 February and the testimonials on the claimant's business' website. Whether Mr Coil or other employees also had their own businesses would not take the decision to dismiss the claimant outside the band of reasonableness.

85. The actions of the claimant in sending the email of 4 February was a conflict of interest and a breach of trust and confidence and under the respondent's disciplinary policy, an act which is contrary to the interest of the respondent is an example of Gross Misconduct. Further the testimonials are actions which could bring a company into disrepute with its client and is another example of Gross Misconduct within the respondent's policy. The respondent considered the claimant's mitigation but decided to dismiss. That decision is one which is within the band of reasonable responses open to a reasonable employer.

86. I therefore conclude that the decision to dismiss the claimant by reason of misconduct was fair.

87. The claim of unfair dismissal therefore fails and is dismissed

Unauthorised Deductions

88. I consider that the claimant was entitled to be paid his full pay for his suspension in accordance with the respondent's disciplinary policy. Suspension is provided to be a neutral act. As such the claimant should not be disadvantaged. The policy provides for full pay when an employee is suspended and I consider that supports this contention. The claimant has therefore suffered an unauthorised deduction from his pay.

89. The claimant however was due to work 8 not 11 shifts over the period of his suspension on my findings. As both parties were unclear of the amount of such deductions without further enquiry, and I was told that there was an outstanding order for costs against the claimant in the sum of £450, I ordered that the parties should have 14 days to confirm whether remedy could be resolved between them or whether a remedy hearing was required.

Employment Judge Benson

2 June 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON 17 July 2020

FOR THE TRIBUNAL OFFICE

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