EMPLOYMENT TRIBUNALS

Claimant: Mr P Norton

Respondent: Leven Consultants Ltd

Heard at: Manchester **On:** 17 and 18 August 2020

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: Mr B Henry (Counsel)
Respondent: Mr P Powlesland (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed.

2. It is just and equitable to reduce the amount of the claimant's basic award because of blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) of the Employment Rights Act 1996, and any such award should be reduced by 100%.

3. The claimant, by blameworthy and/or culpable action, caused or contributed to his dismissal and it would be just and equitable to reduce the amount of any compensatory award pursuant to section 123(6) of the Employment Rights Act 1996 by 100%.

4. If the respondent had adopted a fair procedure there is a 66% chance that the claimant would have been fairly dismissed in any event, and therefore any compensatory award would have been reduced by 66%.

5. The respondent did not unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and it would not be just and equitable in all the circumstances to increase any compensatory award.

6. The respondent did not breach the claimant's contract of employment in respect of notice, and the breach of contract claim does not succeed.

REASONS

Introduction

1. The claimant was employed by the respondent from 21 October 2015 until 10 September 2019 when he was dismissed. The claimant alleges that he was unfairly dismissed. The respondent contends that the claimant was dismissed by reason of conduct following a full and fair procedure, or in the alternative some other substantial reason. The claimant also alleges that the respondent breached his contract of employment by failing to pay him notice.

The Issues

2. The issues were identified at a preliminary hearing case management held on 12 March 2020 conducted by Employment Judge Tom Ryan. Those issues were recorded in a Case Management Order. Save for one addition (that is the question of an uplift for failure to follow the ACAS Code), those issues were confirmed as being correct at the start of the hearing.

3. It was agreed at the start of the hearing that the time allocated did not allow for remedy issues to be determined. However, it was agreed with the parties that the issues in relation to **Polkey** and contributory fault, as well as the application of the ACAS code and any uplift, would be determined as part of the liability hearing.

4. The issues were as follows:

Unfair Dismissal (s.96 ERA 1996)

(1) What was the principal reason for the claimant’s dismissal?

(2) Was the reason for the claimant’s dismissal one of the potentially fair reasons in accordance with s.98(2) ERA? The respondent contends it was gross misconduct or some other substantial reason.

(a) Did the claimant make serious allegations against his line manager on 29 August 2019 such that the respondent was obligated to investigate?

(b) Did the respondent inform the claimant after the allegations were made that they would be required to review his emails as part of their investigations?

(c) In response, did the claimant delete a large number of his emails on 29 September 2019?

(d) Did the claimant do this to try to mislead the respondent and/or to conceal and destroy evidence in relation to these allegations?

(e) Did the claimant do this to manipulate his own role and conduct in relation to the allegations?

(f) Did the claimant lie to the respondent when questioned about the allegations?

(3) Alternatively, was there an irrevocable breakdown in the relationship of mutual trust and confidence between the claimant and the respondent such as to amount to some other substantial reason justifying dismissal?

(4) Did the respondent hold a genuine belief in the claimant's misconduct, based on reasonable grounds, as set out in paragraph (2) above?

(5) Did the respondent reach that belief having carried out a reasonable investigation or was the decision pre-determined? The claimant alleges that:

(a) the respondent failed to carry out an adequate investigation;

(b) there was a conflict of interest with Joanna Stone of the respondent carrying out the investigation but also being a witness;

(c) the respondent failed to act in accordance with the ACAS Code of Practice on Disciplinary Practice and Procedures by:

(i) Failing to provide the claimant with certain evidence during the disciplinary process;

(ii) Failing to fully investigate the allegations.

(6) Was the decision to dismiss within the reasonable range of responses for a reasonable employer?

(7) In all the circumstances, including the size and administrative resources of the respondent, did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant in accordance with s.98(4) ERA?

(8) If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

(9) Can the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event and at what point? Alternatively, is there a chance the claimant would have been fairly dismissed?

Breach of Contract

(10) It is not in dispute that that respondent dismissed the claimant without notice.

(11) Does the respondent prove that it was entitled to dismiss the claimant without notice because the claimant had committed gross misconduct as alleged above? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct.

(12) To how much notice was the claimant entitled?

5. Whilst the issues identified at the start of the hearing and in Employment Judge Tom Ryan's Order record whether or not the dismissal was for "some other substantial reason" as being an issue which needed to be determined, in the course of submissions the respondent's representative accepted that the arguments in relation to "some other substantial reason" did not add anything to the respondent's case (having made no submissions in reliance upon it). The respondent's primary argument was that the claimant was dismissed by reason of conduct.

The Hearing

6. The claimant was represented at the hearing by Mr Henry of counsel. The respondent was represented by Mr Powlesland of counsel.

7. The Tribunal considered a bundle of documents which ran to approximately 370 pages, the content of which was predominantly agreed. Only pages referred to in the witness statements or expressly referred to by the parties were read by the Tribunal. The claimant's representative did highlight that the claimant had objections to some limited content of the bundle, but as those pages were never referred to no such issues needed to be addressed.

8. On the first morning of the hearing the Tribunal read the witness statements together with the relevant pages from the bundle.

9. The Tribunal was also provided with a chronology and a cast list (together with an attached structure chart) prepared by the respondent.

10. The Tribunal heard evidence on behalf of the respondent from Mr Ivan Rowland, the respondent's Sales Director, and Mr Chris Bellamy, the respondent's Managing Director. Both witnesses were cross examined by the claimant's representative. The respondent also provided a witness statement from Ms Joanna Stone, its Business Support Manager. However, as she did not attend the hearing to give evidence, only limited weight was given to her statement.

11. The Tribunal also heard evidence from the claimant who had prepared a witness statement in advance of the hearing. He was cross examined on his statement by the respondent's representative. The claimant provided short witness statements from two other former employees of the respondent, Ms L Crowther and Ms S Lynch. As they did not attend limited weight was given to their evidence, which in any event appeared to relate to a matter that was not ultimately in dispute in the hearing.

12. At the conclusion of the evidence, the Tribunal heard oral submissions on behalf of each of the parties. Neither party produced any written submissions for the Tribunal and only limited case law was referred to.

13. Judgment was reserved at the end of the second day as there was insufficient time for judgment to be considered and delivered.

14. Based on the evidence heard, and insofar as relevant to the issues that must be determined, the Tribunal makes the findings set out below.

Findings of fact

Background

15. The claimant was employed by the respondent from 12 October 2015. His role was that of salesperson. In the course of the hearing there was some dispute about whether the claimant's job title had changed during his time with the respondent, albeit nothing material turns upon whether that was the case. The claimant describes himself as a salesperson in the grounds of claim which he submitted to the Tribunal.

16. The respondent provides search engine optimisation services and has approximately 44 employees.

17. The claimant was subject to a disciplinary process during August 2019 (prior to, and in addition to, the one that led to his dismissal). An investigatory meeting was held on 12 August 2019. On 15 August 2019 the claimant was invited to a disciplinary hearing. That hearing was held on 19 August 2019. The process related to various things, including lateness and alleged insubordination to his manager by the claimant. The claimant was issued with a final written warning by Ms Stone, the Business Support Manager. Following an appeal hearing, held on 6 September 2019 and conducted by Mr Bellamy (the respondent's Managing Director), this was reduced to a written warning. This warning was not taken into account when the decision to dismiss was made, and therefore the process is only relevant inasmuch as it is background to the issue which led to the claimant's dismissal.

18. On 15 August 2019 the claimant raised a grievance, which was about the conduct of his manager. It was initially raised verbally to Ms Stone and, as was required, subsequently put in writing. The grievance was acknowledged and it was confirmed that it would be addressed in accordance with the grievance procedure.

The 29 August meeting

19. On 29 August 2019 Ms Stone had an informal meeting with the claimant which included discussion of his grievance. At this meeting the claimant referred to emails from his manager which he believed supported his grievance. The claimant's evidence was that he was told that pursuing his grievance could result in everyone being in trouble and he was told that Ms Stone would be checking both the manager's emails and the claimant's own. The claimant confirms in his statement that he agreed with this approach. It was accepted by the claimant that the meeting took place between 12:03 and 12:25 on 29 August.

20. The claimant did pursue his grievance and it was heard by Ms Stone on 6 September 2019 and an appeal was heard by Mr Bellamy on 24 September. The grievance and appeal were not upheld. As with the initial disciplinary, the outcome is

not relevant to the issues in the claim. However, the meeting on 29 August and what followed from it are central to the issues to be determined.

Events on 29 August

21. The claimant’s statement says that after his meeting with Ms Stone (on 29 August) he took a 45 minute lunch break and was then pulled into the office again by Ms Stone to be told that his manager had identified that an excessive number of emails had been deleted and he was asked why. The claimant denied deleting the emails - as he has done throughout the internal process and as he did at the Employment Tribunal hearing.

22. In the course of the Tribunal hearing the claimant accepted the timeline which had been prepared by the respondent and which was discussed with him in the course of his disciplinary appeal meeting. The agreed events are that:

(a) At 12:27 the claimant went out of the office for lunch, returned after about ten minutes, remained at his desk for about 15 minutes, before leaving the office again and returning after 18 minutes at 13:10;

(b) Between 13.10.33 and 14.11.54 on 29 August there were no gaps in the mouse/keyboard activity of the claimant’s user log-in which exceeded three minutes;

(c) Between 13:13:09 and 13:13:37 the claimant was recorded as being on a call. In answer to a question from the Tribunal, the claimant suggested that the call would have been slightly longer than these recorded times;

(d) At 13:14:56 the claimant recorded on the respondent’s case management system that a lead had been “deaded”, that is discontinued;

(e) On the same system, the claimant updated a lead at 13:15:16;

(f) Between 13:15:38 and 13:16:28 a large number of emails were deleted from the claimant's sent items folder, being at least 138 emails. The claimant does not dispute that the emails were deleted (albeit he disputes that he deleted them);

(g) The claimant made another phone call at 13:17:19 to a client;

(h) At 14:28 the claimant went to a meeting with Ms Stone when he was asked about the deleted emails; and

(i) The claimant had a further meeting with Ms Stone at 14:36 when he was asked if he had deleted the emails and denied that he had.

23. The respondent’s CCTV footage (from which the Tribunal was shown two still photographs) showed the claimant as being at his desk between 13:15:38 and 13:16:38. The claimant highlighted that it also showed the claimant's manager sat a few seats away.

24. The respondent's evidence was that two specific logs provided to the Tribunal showed that:

(1) A system user using the claimant's user name deleted the sent items at the time recorded (pages 149-151); and

(2) That the only computer which was used to log in to the system using the claimant's user name on 29 August was the computer used by the claimant.

25. The claimant confirmed that his computer was a tower computer placed at his desk (that is not a laptop or portable device).

26. The claimant did not accept that either of the logs showed what the respondent contended. Some considerable time was spent during the claimant's cross-examination with him arguing that: the first log showed only that the emails had been deleted from the claimant's email account, not necessarily by a user using the claimant's login; and that the second log did not record what was contended, as the claimant did not recognise the descriptor used for his computer.

27. The claimant's manager received a notification about the deletion of the emails and this was raised verbally with Ms Stone at about 13:40. The claimant does not accept this occurred as described by the respondent, and highlights the fact that this occurred shortly after he had raised a grievance about the manager.

28. When Ms Stone first met with the claimant on 29 August he said he had not deleted the emails. When she met with the claimant again on the same day, he again denied deleting the emails. There were no notes provided of these meetings undertaken by Ms Stone, however there was no dispute that what the claimant told Ms Stone at each of the meetings was that he had not deleted the emails.

29. The Tribunal heard some evidence about the claimant's inbox which was transferred on 29 August. The respondent's position was that this was done as a result of the investigation into the deletion of the sent items and following the IT service provider becoming involved. The claimant suggested that he did not know when his inbox had been frozen as he did not use it frequently. During the disciplinary proceedings and during the Tribunal hearing the claimant highlighted the fact that he was never provided with any documentation about the actions taken in relation to his inbox. The respondent's position was that the inbox was entirely unrelated to the deletion of the sent emails and any record would provide no assistance in identifying anything about the deletion of the sent items.

The disciplinary process

30. On 30 August 2019 the claimant was invited to a disciplinary meeting. He was also suspended on full pay. The invite to the disciplinary meeting was written by Ms Stone (pages 144-145). The invite letter recounts the events in relation to the deletion of the emails and states:

> *"As we may consider that a deliberate attempt to conceal evidence which may reflect badly on you in regards to the Grievance process and lying twice when questioned about this could be considered Serious Gross Misconduct, if you*

were found to have committed these acts the penalty to impose could be Summarily Dismissal without notice."

31. The invite letter informed the claimant that the meeting would take place on Friday 6 September 2019 and also enclosed the following:

(1) The two photographs (146 and 147) taken from the CCTV system showing the claimant at his desk at the time that the emails were deleted;

(2) A witness statement prepared by Mr Ben McDougall, Director of Greystone Consulting Limited who provided IT services to the respondent. His statement said that the attached log *"shows that 138 deletion events occurred between 13:15:38 and 13:16:28 and were made by Philip Norton himself".* The statement was signed on 30 August 2019; and

(3) The log referred to which, the respondent said, showed someone using the claimant's log-in deleting the relevant items (pages 149-151) (which the claimant contended at the Tribunal hearing showed only that the items had been deleted from his email account).

32. The disciplinary hearing took place on 6 September 2019. It was chaired by Mr Rowland. The claimant attended with Ms Clare Hansen, his trade union representative. Ms Stone attended. Ms Dawson, a member of the respondent's administration team, attended as a notetaker. The Tribunal was provided with typed notes of the hearing (298-304). These notes were broadly accepted as being accurate albeit, the claimant contended, incomplete (and during the hearing the claimant went through in detail a number of things which he said had been omitted). In terms of the meeting, the key points are as follows:

(1) The claimant denied deleting the emails;

(2) The claimant was provided with a number of opportunities to respond to the allegation, and the case being considered was put to him on a number of occasions;

(3) The claimant alleged that more investigation should have been done, albeit neither the claimant nor his representative highlighted any specific investigation which should have been undertaken;

(4) Ms Stone was referred to as "part investigator" of the events - Mr Rowland's evidence was in fact that Mr McDougall was the person who had carried out the investigation;

(5) Ms Hansen asked to review the emails which were the subject of the investigation as she wished to establish whether there was anything that would warrant the investigation and the allegation of attempted concealment of evidence;

(6) Ms Hansen stated that she believed that Ms Stone telling the claimant that his emails would be reviewed (in the meeting on 29 August) was threatening; and

(7) The claimant confirmed that it was him in the picture.

33. At the end of the meeting and only after it had concluded, the claimant and his representative were provided with the relevant emails on a memory stick. In fact, neither the claimant nor his representative were able to access those emails from the memory stick.

34. Mr Rowland's evidence was that the content of the emails was not particularly relevant to the question which he was considering. He said that the claimant was dismissed because of deleting the emails and subsequently denying it. Mr Rowland's evidence was that the content of the emails was *"by the by".* For him, the content of the emails was not relevant.

35. In the course of cross-examination, Mr Rowland was asked why Mr McDougall, the investigating officer, was not asked to attend the disciplinary hearing. Mr Rowland's explanation was that his investigation was factual. He said that he did not feel the need to invite Mr McDougall along. Mr Rowland's evidence was that he felt that the evidence was so overwhelming that there were no questions that he needed to ask Mr McDougall. Mr Rowland explained that he could not think of any questions that he might need to ask Mr McDougall that would require his presence. He accepted that, in hindsight, he should have asked Mr McDougall to attend in case there were questions from other attendees such as the claimant or his representative.

36. Mr Rowland suffers from dyslexia. He required some assistance with documentation. Ms Stone, that is the part investigator and a witness to the material facts, undertook the role of assistant to Mr Rowland in the disciplinary hearing.

37. The outcome of the disciplinary hearing was that the claimant was dismissed. That decision was contained in a letter dated 10 September 2019 (190). Mr Rowland's conclusion was that the emails were deleted by the claimant. The claimant had denied and continued to deny deleting those emails. Mr Rowland concluded that, as the claimant had deliberately deleted the emails from his sent items box and as he subsequently denied doing so, this amounted to gross misconduct. The claimant was dismissed with immediate effect.

38. Mr Rowland was very clear in his evidence that the claimant was dismissed for saying he had not deleted the emails when the respondent concluded that he had. The content of the emails was not part of the decision to dismiss. Whilst the disciplinary invite letter had incorporated reference to concealing evidence as part of the preliminary allegation, the basis for Mr Rowland's decision was purely that he decided that the claimant had lied repeatedly about something which the respondent concluded he had done.

39. Mr Rowland's evidence was that the dismissal letter (190) was not written by him. Mr Rowland was not sure who had actually written the letter, he suggested Ms Stone may have done so (as well as suggesting others). Whilst the Tribunal had no

actual positive evidence about who had written the letter save for Mr Rowland's uncertainty, on balance the Tribunal finds that the letter was written by Ms Stone: that is the witness, part investigator and the person who had supported Mr Rowland in the hearing.

The appeal

40. The claimant subsequently appealed against the outcome of the disciplinary decision. The claimant was asked to provide more detailed grounds of his appeal and these were provided in an email of 17 September 2019 (223-228). In summary, the grounds of appeal were:

(1) There was no investigation;

(2) The investigating manager (that is Ms Stone) was also a witness and this was a conflict;

(3) The claimant contested the evidence, raising issues about monitoring of emails and CCTV and alleging that Ms Stone and the claimant's manager colluded against him;

(4) The claimant contended that CCTV footage should not be used against him and alleged that the claimant's manager deleted his emails. He contended that his manager was clearly sat at the end of the same desk at the same time as the claimant and could have deleted the emails;

(5) The claimant alleged inconsistent treatment – this was an allegation in relation to the claimant's manager (who was subsequently given a warning in relation to the content of emails); and

(6) Withholding evidence – that is that the USB stick had only been provided after the meeting.

41. Mr Bellamy was appointed to consider the claimant's appeal. On 18 September 2019 Mr Bellamy sent a lengthy email to the claimant responding to each of the points that he had made in his appeal (pages 221-223). Mr Bellamy had obtained additional call logs for the purposes of his response. Those logs confirmed the times of the telephone calls and other activities detailed above. They also included the log which the respondent contended showed that only the respondent's computer had been used on 29 August to log in by someone using the claimant's user name. This was explained to the claimant in the email. The email also recounted the respondent's position: that it was not saying that it was physically impossible for anyone else to have deleted the claimant's emails. What Mr Bellamy said was:

> *"What the company has been trying to show, is that based on the evidence we have available to us, we have reasonable belief, that the emails were deleted by you."*

42. In the Employment Tribunal hearing, Mr Bellamy explained in answering questions that, prior to the appeal hearing taking place, he:

(1) spoke to Mr McDougall, the investigator;

(2) spoken to Ms Stone, that is the witness, part investigator and assistant to the decision maker; and

(3) spoke to Mr Rowland, the decision maker.

43. Mr Bellamy's evidence was that he had made notes of the conversations, but these had now been destroyed. They had never been provided to the claimant. There was no record of what was said available to the Tribunal. Mr Bellamy's evidence was that he had told the claimant in the course of the appeal hearing that he had spoken to Mr Rowland. The claimant denied this. The notes of the appeal meeting do not record that being said, as the Tribunal believes would have been the case for something this significant. The Tribunal accordingly finds that Mr Bellamy did not inform the claimant (at any time) that he had spoken to the decision maker (in private) about the claimant's case prior to the appeal hearing.

44. The appeal hearing took place on 24 September 2019. It followed the grievance appeal hearing. The claimant was again accompanied by his trade union representative, Ms Hansen. Ms Dawson also again attended to take notes. Those notes are at pages 229-236. It was acknowledged this was a lengthy meeting. The notes were accepted as broadly accurate, albeit the claimant went through and highlighted lots of things that he said had not been recorded. It was confirmed to the claimant in the appeal that the meeting would come down to whether or not the claimant did or did not delete the emails based on the evidence that the respondent had. Mr Bellamy ran through the evidence with the claimant and he was given a full opportunity to explain his case.

45. The outcome of the appeal was notified in an email of 2 October 2019 (249). Full reasons were provided on 3 October 2019 in a letter from Mr Bellamy (251-255). Mr Bellamy concluded that the company had a reasonable belief that the emails had been deleted by the claimant and his appeal was rejected. Each of the claimant's points of appeal were addressed by Mr Bellamy. In particular, Mr Bellamy highlighted the timeline on 29 August and what he concluded that showed.

46. The copies of the emails which had been deleted, were never in fact accessed by the claimant or his representative. Mr Bellamy was critical of them for not doing so and gave evidence that they had established, using a junior member of staff, that such documents could be accessed. A number of the images were shown to the claimant in a file in the course of the grievance appeal hearing held prior to the disciplinary appeal on 24 September. Mr Bellamy's evidence was that he found the messages "*distasteful*" and the Tribunal agrees with that assessment.

47. Mr Bellamy's conclusion was that the content of the emails deleted was not important to the allegation: the hearing, in his view, was to establish if the claimant had deleted the emails or not. He felt that, regardless of the content of the emails, deleting such a large quantity of emails after being informed that emails would be reviewed for the grievance investigation was a deliberate attempt by the claimant to destroy evidence and obstruct a fair investigation.

The claimant's evidence

48. In his evidence in the Tribunal hearing, the claimant said that when Ms Stone had spoken to him on 29 August about the grievance, he had understood that she was referring only to looking at emails which he had previously provided regarding his manager, he had not understood that she was referring to reviewing emails contained on the system. The respondent's position was that this was the first time the claimant had ever stated this. It is certainly the case that neither Mr Rowland nor Mr Bellamy understood this to be the claimant's explanation, and indeed this explanation was not put to those witnesses when they were cross examined.

49. The Tribunal has carefully considered this evidence. On a literal reading, the wording in each of the relevant documents records only that Ms Stone would be looking at the claimant's emails and does not expressly record that this was emails on the system. Those records do not contradict the claimant's evidence to the Tribunal. However, the Tribunal does not find the claimant's evidence on this issue to be credible. Had this been the claimant's account, he would have raised this clearly in his meetings and/or the grounds of appeal. When Ms Hansen (his trade union representative) raised in the disciplinary hearing on 6 September that when Ms Stone said she would look at his emails that was threatening, that complaint only makes sense if Ms Hansen believed that Ms Stone was saying she would look at all of the claimant's emails and not just emails which he had physically given to Ms Stone himself. The claimant would have explained his position to Ms Hansen. On such an important point in relation to the case alleged against the claimant, he (or his representative) would have made this position clear during the internal procedures and/or prior to the Tribunal hearing. The Tribunal finds that the claimant's insistence in the course of his cross examination that this is what he understood lacked credibility and, occurring as it did during his evidence under oath, it undermined the credibility of the claimant's evidence more generally.

The Law

50. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade the Tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair.

51. If the respondent does persuade the Tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

52. In conduct cases, when considering the question of reasonableness, the Tribunal is required to have regard to the test outlined in **British Home Stores v Burchell [1980] ICR 303**. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

53. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

54. It is important that the Tribunal does not substitute its own view for that of the respondent, **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220** at paragraph 43 says:

> "*It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal*"

55. The appropriate standard of proof for those at the respondent who reached the decision, was whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They did not need to determine or establish that the misconduct was committed beyond all reasonable doubt (nor did they need to do so on any other more onerous basis than the balance of probabilities).

56. In considering the investigation undertaken, the relevant question for the Tribunal is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted.

57. Where the Tribunal is considering fairness, it is important that it looks at the process followed, as a whole. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of the procedure are sufficient to cure any earlier unfairness. Where the appeal is a re-hearing, it can remedy any defects in the procedure at an earlier stage.

58. The Tribunal referred to the ACAS code of practice on disciplinary and grievance procedures to which it is required to have regard. The Tribunal considered all of the ACAS code but the things within it which were identified as being particularly important were:

(1) "*Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response **before** any decisions are made*" (the Tribunal's emphasis added);

(2) "*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing*";

(3) "*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary* hearing"; and

(4) "*The appeal should be dealt with impartially*".

59. The claimant contended that the ACAS Code of Practice had not been complied with in relation to the investigation undertaken.

60. The claimant's representative also relied upon the ACAS Guide: Discipline and Grievances at Work (which the Tribunal can consider but which does not have the same weight as the ACAS Code of Practice itself). That says in relation to investigating cases:

> *"When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which support the employee's case as well as evidence against. It is not always necessary to hold an investigatory meeting (often called a fact finding meeting). If a meeting is held, give the employee advance warning and time to prepare."*

61. In **Polkey** the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by the Tribunal) *may* be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. If the evidence shows that the employee *may* have been dismissed properly in any event, if a proper procedure had been carried out, the Tribunal should normally make a percentage assessment of the likelihood and apply that when assessing the compensation. In applying a **Polkey** reduction the Tribunal may have to speculate on uncertainties to a significant degree.

62. In **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274** the EAT explained **Polkey** as follows:

> *"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer* would *have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance.*

> *It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."*

63. That Judgment emphasises that the issue is what the respondent would have done and not what a hypothetical reasonable employer would have done in the circumstances.

64. The onus is on the respondent to adduce evidence to show that the dismissal would (or might) have occurred in any event. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the claimant. There will be circumstances where the nature of the evidence on which the respondent seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. (**Software 2000 Ltd v Andrews [2007] IRLR 568**).

65. The claimant's representative submitted that, if dismissal was found to be substantively unfair because it was pre-determined rather than procedurally unfair, no **Polkey** reduction should be applied. The Tribunal does not agree with that formulaic approach. The key question is whether the Claimant would still have been dismissed by this employer had a hypothetically fair process been followed.

66. Section 122(2) of the Employment Rights Act 1996 provides that the basic award shall be reduced where the conduct of the employee before dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to do so. It is important to note that a key part of the test is determining if it is just and equitable to do so.

67. Section 123(6) of the Employment Rights Act 1996 provides that if the Tribunal finds that the claimant has, by any action, to any extent caused or contributed to his dismissal, it shall reduce the amount of the compensatory award by such amount as it considers just and equitable having regard to that finding. This test differs from the test which applies to the basic award.

68. There are three factors required to be satisfied for the Tribunal to find contributory conduct (under section 123(6)): the conduct must be culpable or blameworthy; it must have cause or contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified. The Tribunal must identify the conduct which give rise to the possible contributory fault.

69. The claimant's representative also placed reliance upon the case of **Sidhu v Superdrug Stores PLC UKEAT/0244/06**. That is authority for the fact that if the claimant does not help himself in a disciplinary process, regarding that as contributory fault should be judged very carefully. The claimant's representative's submission was that (if it were found) the claimant lying in the respondent's process should not be considered as conduct which leads to a reduction for contributory fault. The Tribunal does not find that **Sidhu** assists the claimant or is authority for this proposition – it determines a different point in different circumstances. In a case where the alleged culpable conduct is that the claimant deleted emails and then lied about it, the Tribunal can see no legal reason why such lying (if found) should not be: culpable or blameworthy; or found to cause or contribute to the dismissal.

Discussion and Analysis

Unfair dismissal

70. The Tribunal is satisfied that the reason for dismissal was the claimant's misconduct. Mr Rowland was a genuine and clear witness and his evidence was that he made the decision to dismiss because he concluded that the claimant had deleted the emails and then lied about it on a number of occasions. The reason for dismissal was dishonesty, which was misconduct. Mr Rowland had a genuine belief that the claimant was guilty of misconduct and there were reasonable grounds for that belief.

71. As acknowledged by the respondent's representative, arguments relating to "some other substantial reason" added nothing to the respondent's case. The Tribunal did not find that the reason for dismissal was "some other substantial reason". Clearly an intrinsic part of the reason for dismissal for the claimant's conduct, on the evidence of Mr Rowland and Mr Bellamy, was that an employee who lied repeatedly in formal proceedings could not be one who the company trusted, but in this case the reason for dismissal was conduct.

72. In relation to the questions asked in the List of Issues, the Tribunal does not make findings in relation to the sub-issues at issue 2, as these are not all material to the key legal questions which the Tribunal needs to ask to determine the unfair dismissal claim. The claimant did make serious allegations against his manager on 29 August 2019 which did require the respondent to undertake an investigation process. It was not in dispute that the respondent informed the claimant after the allegations were made that they would be required to review his emails as part of their investigations, and as confirmed above the Tribunal finds that the understanding of the claimant was that those investigations would involve a review of his emails on the system.

73. Issue 5 is whether the respondent reached their belief having carried out a reasonable investigation and/or was the decision predetermined? The claimant and his representative were very critical of the investigation undertaken by the respondent. It is true that the notes of the initial meetings and the investigation undertaken were not overly detailed. Nonetheless the Tribunal does find that a reasonable investigation was undertaken taking account of the fact that both the Code of Practice and the ACAS Guide made it clear that an investigatory meeting is not always required. The ultimate question in terms of whether there was an

appropriate investigation is to be considered based upon the investigation as at the end of the disciplinary hearing. The claimant was given numerous opportunities at the disciplinary hearing to provide his explanation. The claimant's criticisms in relation to the inbox did not, in the Tribunal's view, mean that a reasonable investigation had not been undertaken, nor did the Tribunal really understand why the evidence in relation to the inbox would have any bearing on the disciplinary decision.

74. It is true that the claimant was not provided with the emails themselves until the end of disciplinary hearing (and then only in a format he could not access), and ideally those emails should have been provided earlier. Had they been material to the decision reached, that would have been a serious procedural failing. However, as Mr Rowland took no account of the content of the emails in reaching his decision, the failure to provide them to the claimant was not material and does not render the dismissal unfair.

75. However, the Tribunal does find that the dismissal was unfair for the following reasons:

(1) Ivan Rowland had clearly predetermined the outcome of the disciplinary hearing prior to it even taking place, or at least had made up his mind that it was for the claimant to disprove the allegations made against him. This was clear from the answers given by Mr Rowland to the questions put to him during the Tribunal hearing in relation to Mr McDougall and his non-attendance at the disciplinary hearing. Mr Rowland had concluded that the claimant was guilty of misconduct, prior to hearing what the claimant had to say. As highlighted above in the ACAS Code, the individual must be given the opportunity to put their case in response before any decisions are made, and in practice Mr Rowland had already made the decision before the claimant had the opportunity to do so;

(2) Mr Bellamy had predetermined the outcome of the appeal before the decision was reached. The content of the email of 18 September 2019 did explain to the claimant the decision that the company had made and answered most of the points the claimant raised. However, the terminology used by Mr Bellamy in the email and the way in which it is written, record him as advocating a position which had already been decided by him - the company, in his view, had a reasonable belief. That predetermination renders the appeal process unfair, being a decision reached (and explained) before the claimant had the opportunity to put his case at the appeal; and

(3) Mr Bellamy spoke to both of the investigators (one of whom was a witness) and the disciplinary decision maker prior to the appeal meeting in unrecorded meetings, about which the claimant was not informed. This fundamentally failed to adhere to a fair and transparent process and rendered the appeal process and the dismissal unfair.

76. The Tribunal has carefully considered Ms Stone's involvement in the disciplinary process as: a key witness; a part investigator; support to Mr Rowland in the disciplinary hearing; and the writer of the decision letter. The Tribunal does take

account of the size and administrative resources of the respondent and the limited number of senior employees available to it (whilst noting it would have been possible for the respondent to have provided someone else to assist Mr Rowland with his documents in the hearing, such as Ms Dawson who was in attendance as a notetaker). The Tribunal does not find that this alone rendered the dismissal unfair, however it is an additional circumstance which supports the finding of unfairness when added to the reasons given at paragraph 75.

77. The Tribunal finds that dismissal was in the range of reasonable responses for a reasonable employer. The claimant himself accepted this when questioned (whilst of course denying that he had committed the misconduct alleged)

Did the claimant delete the emails?

78. Turning to the issue which needs determining in relation to contributory fault and the breach of contract claim, the Tribunal needs to decide whether, on the balance of probabilities, the claimant did delete the emails as alleged (if he did it follows that he lied to the respondent on a number of occasions during the formal procedures, and if he did not delete the emails he did not lie).

79. It is accepted that the emails were deleted. The only real question is whether someone else deleted the emails (probably logged in as the claimant) or whether the claimant himself did so.

80. The Tribunal finds that, on the balance of probabilities, the claimant deleted the emails on 29 August 2019 based upon the following evidence: the timeline of events on 29 August 2019; the activities of the claimant on the day including the calls that he made and there being a gap in activity at the time of deletion; the photos showing the claimant at his desk at the time the emails were deleted; the log recording that the emails were deleted by someone using the claimant's log in; and the log which records that the claimant's log in was only used that day on the tower computer at the desk at which the claimant was sat at the time.

81. The Tribunal does not accept the claimant's assertion that his manager deleted the emails, on balance that is considerably less probable than that the claimant did so himself, taking account of the evidence referred to in the previous paragraph.

82. Whilst the claimant does not himself accept or believe the evidence of Mr Bellamy about the logs or what the evidence shows, the Tribunal found his evidence on these matters to be credible, considered and knowledgeable, and finds that what he said was true. Those documents show a user, using the claimant's log-in, at the claimant's computer, deleting the emails.

83. Whilst the Tribunal's findings on the claimant's credibility detailed above lend some limited support to this finding, the Tribunal's determination on the claimant's credibility was not a material factor in determining whether (on the balance of probabilities) he deleted the emails. The material evidence upon which the decision was reached is that identified at paragraphs 80-82.

84. In the light of that finding, the Tribunal also finds that the claimant lied to Ms Stone on two occasions and thereafter lied throughout the internal process.

85. The claimant's arguments about the absence of evidence about the inbox have, in the Tribunal's view, no relevance and the absence of any such record does not alter the finding of what occurred on the balance of probability.

Contributory fault

86. In relation to contributory fault, the Tribunal is mindful of the slightly different statutory wording that applies in relation to the basic award and the compensatory award as recorded above.

87. On balance, the Employment Tribunal has found that the claimant did delete the emails and did lie about doing so to the respondent throughout its internal procedures. As a result, this conduct was culpable and blameworthy. It caused the claimant's dismissal. The Tribunal finds it to be just and equitable to reduce the compensatory award by 100%. For similar reasons, but applying the slightly different test, the Tribunal also finds that it is just and equitable to reduce the basic award by 100% as a result of the claimant's conduct.

Breach of contract

88. In relation to the breach of contract claim, the Employment Tribunal finds that the claimant did himself fundamentally breach the contract of employment with the respondent and accordingly dismissal without notice was not a breach of contract by the respondent.

Polkey

89. Applying **Polkey**, what the Tribunal needs to assess is what decision this employer would have reached had a fair process been followed. The predetermination findings in relation to both stages, mean that the Tribunal does not conclude that it is 100% certain that the claimant would have been dismissed had a full and fair process been followed – it is simply not possible to say that where both stages were pre-determined before they were heard. However it is more likely than not that the claimant would in any event have been dismissed by this employer in the light of the evidence. Accordingly, the Tribunal finds that any compensatory award should be reduced by 66% to reflect the likelihood that the claimant would have been dismissed in any event had a fair procedure been followed (however in the light of the finding on contributory fault, there is no award to reduce).

ACAS code

90. In his submissions the claimant's representative relied only his arguments on the investigation in applying for an uplift in relation to the ACAS Code. The Tribunal does not find that the respondent substantively and unreasonably failed to comply with the ACAS code. It endeavoured to follow the code, albeit for the reasons identified that process was unfair (and not in adherence with what the code says should occur). In any event, due to the claimant's conduct, it would not be just and equitable to increase any award (even had any award been made).

Conclusion

91. For the reasons given above, the conclusion of the Employment Tribunal is that the claimant was unfairly dismissed.

92. In relation to contributory fault, the claimant's basic and compensatory award should be reduced by 100%. As a result, whilst the claimant succeeds in his claim, he is not entitled to any remedy.

93. Had it been necessary to apply **Polkey**, the claimant's compensatory award would have been reduced by 66%.

94. The claimant's breach of contract claim fails.

Employment Judge Phil Allen

Date: 27 August 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
28 August 2020

FOR THE TRIBUNAL OFFICE

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