



THE EMPLOYMENT TRIBUNALS

Claimant: Mr R McKay

Respondent: Evolution Football Coaching Limited

Heard at: North Shields Hearing Centre On: 26th, 27th & 28th October 2020

Before: Employment Judge Martin

Members:

Representation:

Claimant: In Person

Respondent: Ms McGuire (Solicitor)

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is well-founded and the claimant is awarded the sum of £10,579.58.
2. The claimant's complaint of breach of contract (notice pay) is also well-founded. The claimant is awarded the sum of £2,222.04.
3. The claimant's complaint of unlawful deduction from wages is also well-founded. The claimant is awarded the sum of £1,467.50.

REASONS

Introduction

1. Mr Gary Smith the director of the respondent company gave evidence on behalf of the respondent. The claimant gave evidence on his own behalf. The tribunal were provided with three bundles of documents marked appendices 1, 2 and 3. The tribunal was then provided with a further bundle of documents for a remedy marked appendix 4.

The law

2. The law which the tribunal considered was as follows:-

3. Section 98 (1) of the Employment Rights Act 1996:

In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2).

Section 98 (2) of the Employment Rights Act 1996:

A reason falls within this subsection if it—

- (b) relates to the conduct of the employee.

Section 98 (4) of the Employment Rights Act 1996:

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.

4. The case of British Home Stores Limited v Burchell 1978 IRLR 379 where the EAT held that, where an employee is dismissed because of misconduct, the tribunal has to consider three elements. Firstly whether the employer believed that the employee had committed an act of misconduct; secondly that the employer had reasonable grounds upon which to sustain that belief ;and third that the employer at the time he had formed that belief on those grounds had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

5. The tribunal was referred to the case of Gallop v Newport City Council 2013 IRLR23 where the EAT held that the tribunal should not take account of any issues regarding “without prejudice” discussions as they are inadmissible.

6. The tribunal was also referred to and took account of the case of Bresolia v Food Partners Limited 2012/EAT/0317 where the EAT held that a failure to follow the ACAS Code of Practice to the letter of the law did not make a dismissal unfair and a fair procedure was followed.

7. Article 3 of the Employment Tribunals Extension of Jurisdiction Order 1994 provides that a claim may be made where any sum is due and owing to an employee on termination.
8. Section 13 (3) of the Employment Rights Act 1996 provides that where the total amount of wages paid to a worker is less than the total amount of wages properly payable to that worker on that occasion, the amount of the deficiency shall be treated as a deduction of wages.
9. Section 14 (1) of the Employment Rights Act 1996 states that section 13 does not apply where the deduction was an excepted deduction namely whether it was for the purpose of reimbursement of wages or expenses incurred by the worker in carrying out his employment.

Section 14 (4) ERA 1996 states that Section 13 does not apply to a deduction from wages where the worker has signified his agreement or consent by a relevant provision in the contract; or otherwise by way of a prior agreement or consent signified in writing.

10. Section 122(2) of the Employment Rights Act 1996 “where the tribunal considers that any conduct of the complainant before the dismissal was such that that it would be just and equitable to reduce the amount of the basic award to any extent, the tribunal shall reduce the amount accordingly”.
11. Section 123 (1) of the Employment Rights Act 1996 “the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer”.
12. Section 123 (4) of the Employment Rights Act 1996 “In ascertaining the loss referred to in subsection 1 the tribunal should apply the same rule concerning the duty of the person to mitigate his loss as applies to damages recoverable under the common law of England and Wales”.
13. Section 123 (6) ERA 1996 “Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding”.
14. Section 207A Trade Union and Labour Relations Act 1992 which provides for an increase in any compensation awarded to an employee for unfair dismissal of up to a maximum of 25 % for failure to comply with the ACAS Code of Practice.
15. In the case of *Polkey v AE Dayton Services Limited* 1987 IRLR503 the House of Lords held the tribunal has to consider whether if a fair procedure had been followed there was a chance that the employee would have been dismissed in any event. The House of Lords held that this element can be reflected by a percentage representing the chance that the employee would have lost his employment.

16. In the case of Nelson v BBC No. (2) 1979 IRLR346 where the Court of Appeal held that, in determining whether to reduce an employer's unfair dismissal compensation on grounds of contributory employment, the tribunal must consider three elements:- firstly there must be conduct on the part of the employee in connection with the unfair dismissal which was culpable or blameworthy. Such conducts includes conduct which is perverse or foolish. Secondly that conduct must have caused or contributed to some extent by to the dismissal and thirdly it must be just and equitable to reduce the amount of the claimant's loss to that extent.
17. In the case of Hollier v Plysu Limited 1983 IRLR260 the Court of Appeal held that, in considering whether compensation should be reduced on the grounds of the employee's contribution, the employment tribunal's function is to take a broad sense approach to decide what part, if any, the employee's own conduct played in causing or contributing to the dismissal and then to decide in the light of that finding what reduction, if any, should be made to the employee's loss.
18. In the case of Gardiner-Hill v Roland Burger Technics Limited 1982 IRLR498 the EAT held that, in a case of a failure to mitigate, the tribunal has to consider on a balance of probabilities when the claimant would have gained employment at the same rate.

The issues

19. The issues are set out in the order made on 11th January 2020 and are as follows:-
20. Unfair dismissal – what was the respondent's reason for dismissal? Did the respondent have a genuine belief in the reason for which it dismissed the claimant and did that reason relate to conduct. If so did the respondent have reasonable grounds for its belief and did it carry out a reasonable investigation?
21. The tribunal also had to consider whether the respondent followed a fair procedure and acted reasonably in dismissing the claimant for that reason and consider whether dismissal was a reasonable response in the circumstances of the case.
22. In relation to any remedy - the tribunal had to consider the claimant's loss; what was the period of any loss; and whether the claimant acted reasonably in mitigating his loss.
23. The tribunal also had to consider whether the claimant would have been fairly dismissed in any event if a fair procedure had been followed and whether he had contributed in any way to his dismissal. The tribunal also had to consider whether there should be any uplift for failure to follow the ACAS Code of Practice.
24. In relation to the complaint of wrongful dismissal, the tribunal had to consider whether there was a breach of contract by the claimant and whether the respondent was entitled to dismiss the claimant for gross misconduct. If not, what notice the claimant was entitled to and in what amount.

25. In relation to the complaint of unlawful deduction from wages it was agreed that the respondent had deducted the sum of £1,467.50 on 1st July 2019. The tribunal had to consider whether that deduction was authorised by virtue of a relevant provision of the claimant's contract and/or whether it was an excepted deduction under Section 14(1) of the Employment Rights Act 1996 and whether it had been deducted for the purpose of reimbursement of wages and or expenses.

Findings of fact

26. The respondent is a small company based in the North East which provides football coaching to school academies. The two directors of the Company were Mr Smith and his wife. The claimant was employed by the respondent in September in September 2017 as the Academy Manager.
27. The claimant was issued with a contract of employment. At paragraph 6 it states that if the employer makes an overpayment to which the employee is not entitled, or is more than the employee is entitled to, then the employee agrees that the employer can recover the overpayment by a deduction from salary. At paragraph 19 it states that all documents, hardware and software and any documents produced or stored on the employer's computer systems remain the property of the employer. It also states that that any company property must be returned to the director upon request.
28. His contract stated that his place of work was Kingsmeadow School in Gateshead. He was also provided with a travel allowance to the Durham coaching venue, which was to be paid at the usual HMRC rate of 45p per mile. The calculated payment per annum was stated to be £1821.69 (paragraph contract of employment).
29. The claimant said that he would produce invoices in respect of his expenses which he would give to Mr Smith, who said he would pass them on to the respondent's accountant. Some examples of these invoices are at pages 41 and 42 of bundle 1. Those invoices show that the return trip from Kingsmeadow School, the claimant's place of work to Durham coaching venue was 34.6 miles which at 45p a mile was a total of £15.57.
30. Around September 2018, Mr Smith, who also works as a police officer, decided to step back from the business. The claimant then took on the role of Director of football/ Business Development manager. He was not issued with a new contract of employment but received a substantial pay rise.
31. The Claimant said that, around this time, he employed Debbie Wilson as an administrative assistant. He said that he left her to deal with payroll and liaise with the respondent's accountants. He said he gave the invoices for his expenses to Debbie to pass on to the accountant.
32. The claimant said that Debbie left in about December 2018.
33. As part of his new role, the claimant was responsible for coaching and business development. He said that he visited a number of other organisations in the North

East to develop the business. In his evidence, he referred to meetings with Tyne met College and other local schools and colleges including some larger organisations further afield in particular Harrogate Football Club. The respondent accepts that the claimant was undertaking business development work and travelling to other schools and organisations to seek out business opportunities. They accepted the witness statement of Mr Weaver and confirmed a number of meetings took place between Harrogate AFC and the claimant in Harrogate after he took on the new role.

34. In this evidence the claimant said that after Debbie left, he continued to produce invoices for his expenses. He said that he produced them on the company laptop which he used, but did not send them to the accountants or Mr Smith. He said that there was no procedure in place and no request by Mr Smith asking him to send on his invoices for expenses to him so he did not do so.
35. In his evidence, the claimant said that, after Debbie left, he dealt with payment of wages. He said he did not liaise with the accountants, but each month received details of the wages to be paid.
36. In April 2019, Mr Smith looked to sell the respondent business. The claimant said he made an offer for the respondent business. Mr Smith said that that offer was rejected in about April/May 2019.
37. In April 2019, Mr Smith received a bailiff's letter regarding an outstanding debt to HMRC in the sum of £1,354.70. He was on holiday at the time and said that he sent it on to the claimant by way of a screenshot to ask the claimant about it. The claimant says that he contacted the accountants about it.
38. Mr Smith received a further notice from bailiffs regarding the HMRC debt on 2nd May and again on 4th June, both of which he sent on to the claimant. All of the bailiffs' notices were sent to Mr Smith's home address as that was the registered office address for the respondent company.
39. The claimant said that he was not sure when he was sent the screenshot of the bailiff's letter nor if he was sent all of the letters. He said that, when it was sent to him by Mr Smith, he contacted the accountants to find out what it related to and to confirm whether it could be paid.
40. The claimant said in evidence that he had to check the position with the accountants and when he received confirmation from them he arranged to pay the sums due online to HMRC. The claimant said that the monies to HMRC were paid before his employment was terminated. Mr Smith said that the monies were not paid before the claimant's employment was terminated. He referred to a letter from the accountants at the end of June 2019 referring to outstanding debts to HMRC (page C1 – bundle 2). That letter states that the business is struggling due to excess costs, the largest being the payroll bill. It goes on to say that bills are going unpaid, evidenced by HMRC chasing for payment for PAYE. The accountant also refers to his own fees being outstanding.

41. In or around May 2019, Mr Smith was concerned that the respondent company was struggling financially. The respondent informed employees that it may need to look at making redundancies. The claimant was concerned because he was the highest paid employee at the business. As it transpired, the respondent did not proceed with any redundancies, having warned employees of the possibility of redundancies. Mr Smith said he had concerns about outstanding debts which is why he had to consider redundancies.
42. Mr Smith said that there were further outstanding debts to Inspire and Nike regarding equipment. As far as Inspire was concerned, the claimant said that this related to a trip which took place in mid-May. He said that not all the parents had not paid in advance for the trip, but that Mr Smith had said that they could nevertheless go ahead with the trip. He said that he then had to find a way of sorting out the debts owed by the parents. The claimant said he had been chasing those debts and had discussed it with Mr Smith before his employment was terminated, although he acknowledged that it had not been resolved before he left. The claimant said in evidence that he had sorted out the money owed to Nike before he left. Mr Smith said in evidence that money was not paid before the claimant left.
43. On 19th/20th June 2020 Mr Smith attended at the respondent's offices and removed the laptop which the claimant used. At the same time, he handed the claimant a letter; a copy of which is at page 12 and 13 of the bundle 1. That letter appears to be a draft of the document as it is dated 16th June and omits certain information like when and where the meeting will take place and who will conduct it. It is unsigned. In evidence to the tribunal Mr Smith said that this letter was drafted by his solicitors. He said it was handed to the claimant on 19th/20th June. In the letter the claimant is invited to a disciplinary hearing. The claimant is informed that the purpose of the hearing is to consider a number of issues and allegations of misconduct and/or of gross misconduct. It refers to allegations from 2018 when the claimant took on additional responsibilities including the management of the business accounts and developing new business (which he accepted) but states that he has failed to develop the business with new revenue streams yet, spent considerable sums with no extra income; has allowed the company's business overdraft to increase to in excess of £5,000 facility; failed to manage and/or pay required sums due to HMRC for PAYE resulting in demands and penalties; failed to manage and/or pay required monies due to companies/suppliers resulting in e-mails, demands and penalties being received by the company as well as letters from debt collections agencies. The letter also goes on state that the claimant has been claiming mileage and fuel expenses to which he is not entitled. It refers to him being provided with a mobile phone which he has not used, and refers to him paid monies to himself in lieu of. It also states that he that he has failed to attend his place of work at Kingsmeadow Football Academy and perform his roles.
44. The claimant was concerned when he was asked to hand over the laptop and indicated that he had some personal stuff on the laptop which he wanted to remove. The parties agreed to go to a restaurant in a local shopping centre so that the claimant could remove his files from the company laptop. Mr Smith was in attendance and watched the claimant remove the files, but subsequently indicated that the claimant had removed a file which belonged to the respondent

company. The claimant said that the file which had been removed related to another company in which both the claimant and Mr Smith were involved - Evo Football Centre. He said that he immediately arranged for that file to be returned to the respondent the following day.

45. The claimant requested that the disciplinary meeting be rescheduled to 24th June suggesting that he wanted to attend with a representative.
46. The claimant said in evidence that, at the meeting on 19th/20th June when he was handed the letter inviting him to the disciplinary hearing and when the laptop was removed, he was also asked to explain a number of expenses and asked by Mr Smith to produce invoices for those expenses.
47. In his evidence, Mr Smith said that he had spoken to Craig Lynch one of the other coaches, who had told him that the claimant was not regularly attending at the Durham Academy. No notes were made of that discussion.
48. The claimant said that, before the disciplinary hearing on 1st July 2019, he produced the various invoices which he had been asked to produce which are at pages 21-29 of bundle 1. They relate to expenses from September 2018 to June 2019. The claimant said he handed those invoices to Mr Smith at the meeting but that there was no discussion about those invoices at the meeting. The claimant attended the meeting with Mr Molineux. A note-taker was also present. Mr Smith conducted the disciplinary hearing. The notes of the disciplinary meeting are at pages 15-20 of the bundle 1.
49. During the course of the meeting, the claimant asked if there was any more details with regard to the various different allegations. He asked to see the various e-mails from the accountants. He also questioned the situation with regard to the sale of the business and indicated that he understood that a price had been agreed. He also asked where Mr Smith the respondent was getting the information about him not being at Durham Academy but he was not told where the information had come from. The claimant also indicated in that meeting that the accountant had not requested any information with regard to invoicing or billing. He requested copies of all the evidence. He repeated his requested at various times during the meeting for copies of email; documents and further information, but although Mr Smith said further details would be provided, he did not do so. A discussion also took place about the file which had been removed relating to Evo Football Centre. During the course of the meeting, Mr Smith said the business was unsustainable and referred to financial problems within the business. A discussion also took place regarding the role of Mr Lynch regarding Harrogate Football Club. A discussion took place about the Durham Academy and the role the claimant was doing and the coaching sessions which he had undertaken. At one stage, Mr Smith suggested that he would run the business and accounts and Mr Lynch would do the coaching. The meeting was adjourned. The claimant was not dismissed, but was concerned that the decision had been pre-determined. At the end of the meeting, the claimant was questioned about a number of payments and asked to comment on them.
50. At the end of the meeting, Mr Smith handed the claimant a letter, which has not been provided to this tribunal, setting out a number of sums which he considered

that the claimant had been overpaid and/or which the claimant had taken out of the company's bank account which he said the claimant was not entitled to do. As a result, the respondent deducted a sum of money from the claimant's salary due on 1 July 2019.

51. On 2nd July 2019, the claimant wrote to the respondent with details accounting for all the various sums set out in the letter he was handed after the disciplinary hearing (pages 30-36 of the bundle 1). The sums he was asked about related to approximately 15 different payments from September 2018 to May 2019. He was not given any documents relating to those payments - accounts / bank statements or the invoices. At this stage he had no access to the company laptop as it had been removed from him. The claimant said that he was allowed to take money out of the company bank account to pay for different expenses. This was not disputed by the respondent in evidence.
52. Prior to the disciplinary hearing no documents were given to the claimant other than the invite letter of 19/20 June. After the disciplinary hearing was adjourned the only other document he was given was the document about sums alleged overpaid to him and informed of the withholding of those monies from his salary. No other documents were provided to the claimant prior to the disciplinary hearing. The claimant was not given a copy of the company accounts or bank statements referring to the various payments that were in dispute. He said in evidence that he produced his response to those two letters from memory.
53. On 2nd July Mr Smith had a meeting with Mr Craig Lynch which is at page C2 of the bundle 2. In the notes of that meeting which is undated Mr Lynch says that the claimant only came to the Durham Academy once or twice a month. In his evidence, the claimant said that he would go to the Durham Academy on a regular basis and would not always see Mr Lynch.
54. The invoices produced by the claimant are at pages 20 to 29 of bundle 1. On each occasion for the different dates from September 2018 through to June 2019 the invoice is stated to be for expenses. It refers in each case to mileage for meetings. In each case the rate is £15.57 then the number of times range from 10 to 12. The claimant said in evidence that he produced these invoices from memory. He said that the amounts on the invoices were accurate. In cross examination and in response to questions from the employment judge, he accepted that they may be inaccurate with regard to details relating to the mileage. He acknowledged that they all referred to trips to Durham Academy which was 34.6 miles at 45p a mile namely amounting to £15.57 for each trip as noted at pages 41 and 42 of the bundle 1 which shows earlier invoices submitted by the claimant. The claimant however said in his evidence that he had undertaken the mileage, but he was not sure exactly what the mileage related to. He said he was visiting different sites and organisations during this time. He reluctantly accepted that he might not on each occasion undertaken 10 or 11 trips to Durham as was suggested in the invoices. In his evidence to the tribunal the claimant could not explain why he had submitted the invoices in this manner if he could recall the exact trips he was claiming for nor indeed why he had produced the invoices at all if as he said the invoices were already on the system.

55. In his evidence the claimant was adamant that the invoices were already on the system, but he was not able to explain why he had reproduced these invoices if that was the case other than to say he had done so because his employer had asked him to do so. Mr Smith was equally adamant in his evidence that there were no invoices on the system.
56. On 3rd July 2020 the respondent wrote to the claimant to dismiss him (pages 43-46 of bundle 1). The disciplinary hearing was not reconvened by the respondent. The letter stated it was sent by Mr Smith but he suggested in his evidence that it was actually his wife who had dismissed the claimant. The only reference to his wife in the letter refers to a right of appeal against the dismissal which it states should be made to his wife at the same address.
57. The claimant was informed that he was dismissed for misconduct. The reasons given were that he had failed to manage and/or pay the monies to HMRC resulting in e-mails, demands and penalties; that he failed to manage and pay monies to companies/suppliers resulting again in e-mails and penalties. He had given false and misleading information about outstanding invoices; he had claimed mileage and fuel expenses to which he was not entitled; his explanation was not satisfactory and he had created/fabricated invoices to cover up for unauthorised claims; he had failed to attend Durham Football Academy and paid himself travel expenses for attendances when he did not attend; and he intentionally removed sensitive files from the company laptop. The letter also goes on to state that the explanation given by the claimant regarding the alleged sums claimed (which totalled approximately 15 different amounts over a 8 month period) was substantially rejected. The dismissal letter commented on each of the explanations given by the claimant in his e-mail of 2nd July.
58. The note of the meeting between Mr Lynch and Mr Smith was not provided to the claimant nor was any further information given to the claimant prior to his dismissal. He was not given an opportunity to comment on the response from the respondent to his explanations about the various sums claimed nor any opportunity to discuss those matters before he was dismissed. No further documents were given to the claimant before the letter of dismissal was sent to him.
59. The claimant appealed against the decision to dismiss him. His letter of appeal is at page 47 and 48 of bundle 1. The respondent appointed an external HR person to undertake the appeal hearing. No notes have been produced of the appeal hearing nor was the appellant officer called to give evidence at the hearing.
60. In his witness statement Mr Smith said that documents were sent to the appellant officer, but did not indicate which documents were sent to the appellant officer. He suggested in evidence that it was the invite to the disciplinary hearing; the various invoices produced by the claimant pages 21 – 29; the e-mail sent from the claimant of 2nd July and the letter of dismissal. He also said that document C1 of bundle 2, being a letter from the accountant to him dated 27th June 2019, was also sent. He also suggested that the various e-mails between him and the accountant regarding the suppliers was sent on to the appeal officer, although none of those documents are in the bundle before this tribunal.

61. The claimant said that he did not believe the appeal officer had all the documents. He said that she said at the outset of the appeal hearing that she did not have all documents dealing with the invoices and payments and was going to concentrate on the HMRC issue. He said he thought she had a small bundle of documents. He did say that she had a copy of the Craig Lynch statement and notes of the meeting of 2nd July. He was handed the note of he meeting with Mr C Lynch at the appeal hearing.
62. The claimant said that he was not provided with any other documents at the time of the appeal hearing. He said that the only additional document which he was given was the notes of the meeting with Mr Lynch. He said that he was not given copies of any e-mails with the accountant or documents dealing with the Inspire debt or the Nike invoices. He was not given any of the HMRC documents at the appeal hearing or any emails or correspondence about the HMRC matter. He also said he was not given the accountant's letter dated 27 June (C1 of bundle 2) nor copies of any of emails with the accountant. He was also not given copies of any bank statements or company accounts in relation to payments or expenses. He said he did not have access to any of these documents as they would all have been on the company laptop.
63. The claimant says that, during the course of the appeal hearing, the appellant officer went off to speak to the respondent. He then said that a couple of days after the appeal hearing he chased up the matter with the appeal officer and was told that the respondent was dealing with things directly.
64. The claimant said that he then received the letter dismissing his appeal which he said was sent to him by e-mail. That letter is s at page 49 of the bundle. He cannot recall how the e-mail was sent to him namely whether it came via the respondent or from the HR person directly. The appeal from dismissal was upheld. The appellant officer decided that the claimant was aware of the issues regarding HMRC. She relies on the form P32 apparently sent to the claimant from the accountant and the email trail between the claimant and Mr Smith; none of which documents had been provided to the claimant at either the disciplinary hearing or the appeal hearing. She concluded that dealing with HMRC was the responsibility of the business manager. She also suggests that the statement of Mr Lynch suggested the claimant was in attendance freer days than those for he he invoiced.
65. Since his dismissal, the claimant has been looking for alternative employment. He produced a substantial bundle of documents showing various jobs which he had applied for, mostly in tor around football, but he has also been looking for work in related fields where he thinks his skills might be transferrable, namely business development and sales.
66. He did not apply for jobseekers allowance (JSA). He said that was because he was a director of a company and he was advised that he was not eligible. The claimant is a director of three different companies:- Evo Football Centre Limited, Evo Bar Limited and Scott Robert Design Limited. The claimant said that he has not received remuneration from any of these companies. He said that Robert Design Limited is a company owned by his brother, but is not really trading and he is not really involved in it. He said Evo Football Centre is a company in which he

is actively involved in, but is not receiving any remuneration from them. However he was given a leased company car, worth a benefit in kind of £180.00 a month. He received this until he started he started his new employment. In relation to Evo Bar Limited, he said that this company is not trading. It came into existence in conjunction with Evo Football Centre Limited which cannot hold a licence. The claimant said that he has been trying to transfer Evo Football Centre into a charitable institution. He said that he received some consultancy fees from them for work done for them in the sum of £900.00.

67. His gross pay with the respondent was £2666 a month. His net monthly pay was £2022.04. He has now commenced new employment on 12th March 2020 with Arconia Engineering Limited. He is earning approximately £643.94 less a month that he earned with the respondent. He is still looking for alternative work particularly in and around football; sales and business development. He is seeking 12 months future loss.

Submissions

The claimant submitted that the dismissal was unfair. He said that no procedure was followed. He is seeking losses in accordance with his schedule of loss. He did not believe that he contributed to his dismissal or that he would be fairly dismissed. He is seeking an uplift for failure to follow the ACAS code. He is also seeking his notice period and the sums deducted from his wages on 1 July 2019.

The respondent's representative submitted that the dismissal was for gross misconduct. She said that the respondent had a reasonable belief that the claimant had committed various acts of gross misconduct. She also submitted that the claimant had entirely contributed to his dismissal and she relied on the false invoices submitted by him. She also submitted that he would have been fairly dismissed anyway because of those invoices and also the HMRC situation. She further submitted that the claimant had not fairly mitigated his loss. She submitted that he must have been receiving income from the various companies of which he was a director and noted he had not claimed JSA in that regard. She submitted that he was in breach of conduct and the conduct was gross misconduct. She also submitted that the respondent was entitled to deduct the sums from the claimant's wages in July as provided for in the contract as it was an over payment of expenses.

Conclusions

68. This tribunal finds that the claimant was dismissed for misconduct for various reasons inter alia for falsifying expenses claims; claiming sums not due to him; failing to pay suppliers in particular HMRC.
69. Conduct is a fair reason for dismissal under Section 98 (2) of the Employment Rights Act 1996.

70. Although this tribunal accepts that Mr Smith was concerned about the way the claimant was managing the business and in particular concerned when he received demands from bailiffs for outstanding debts regarding HMRC. The tribunal also noted that Mr Smith was concerned about the debts of the business and the way the claimant was managing the business including the way he was submitting invoices regarding his expenses. However, the tribunal does not accept that respondent had a reasonable belief based on reasonable grounds that the claimant had committed the various acts of misconduct alleged because the the respondent did not undertake a reasonable investigation into the matter.
71. The claimant was invited immediately to a disciplinary hearing on 1st July. No documents were provided to him in advance of that meeting. He was given no access to company documents so that he could properly respond to any allegations. He was also asked to produce a number of invoices in advance of the meeting but there was no discussion about those invoices. At the disciplinary meeting. Although Mr Smith (who appeared to be both the investigating officer and the disciplinary officer) undertook further investigations following the disciplinary hearing, in particular an interview with Mr C Lynch, he did not share details of any of those further investigations with the claimant to enable him to respond to any of the allegations. The respondent appeared to be investigating matters with a view to corroborating the case against the claimant and not undertaking any investigation into the matters which might have exonerated the claimant. t is difficult to see therefore how the respondent could have had a reasonable belief based based on reasonable grounds that the claimant was committing acts of misconduct, if the respondent was not prepared to give the claimant an opportunity to respond to the allegations and properly hear his explanation to those allegations.
72. It is acknowledged that the respondent is a small company with little resources however they did not follow a fair procedure. The person who conducted the investigations into the allegations also undertook the disciplinary hearing. The respondent's evidence regarding the disciplinary hearing is difficult to comprehend. Mr Smith in oral evidence suggested that it was Mrs Smith who undertook the disciplinary hearing. She gave no evidence to this tribunal. The letter dismissing the claimant was sent by Mr Smith. Furthermore there was no disciplinary hearing held by Mrs Smith with the claimant. After the respondent undertook further investigations, they made no attempt to reconvene the disciplinary hearing which had been effectively adjourned on 1st July to enable the claimant to respond to the further investigations. Instead the claimant was dismissed by letter without being given any opportunity to respond to any of the further information obtained and upon which the respondent relied in order to dismiss the claimant.
73. The procedure itself appears to be shambolic ,but of more concern is the fact that the claimant was provided with none of the documents relied upon by the respondent in advance of the disciplinary hearing nor given access to any documents so that he had the opportunity to respond to any of the allegations before he was dismissed. He repeatedly asked in the disciplinary hearing for information and documents but was not given any, despite the assertion in the disciplinary hearing by Mr Smith that details would be provided.

74. The procedure was not rectified by the appeal process. Although the respondent arranged for an independent HR person to conduct the appeal hearing, it was not clear what documents were given to that person to conduct the appeal hearing. The appeal officer did not attend to give evidence at the tribunal hearing and no explanation was given for her non-attendance. Furthermore no notes were produced of the appeal hearing. What is clear is that before the appeal hearing, the claimant was still not provided with any documents in relation to the allegations made against him apart from being provided with the notes of the meeting with Mr Lynch. He was only provided with those at the time of the appeal hearing.
75. The claimant was not provided with any documentation in order to properly be in a position to respond to the allegations that were being made against him. He was not provided with any of the documentation relating to HMRC, either the various invoices from the debt agency, the e-mails between him and the accountants and e-mails between the accountants and Mr Smith. He was not provided with any correspondence between Mr Smith and the accountants in particular he was not provided with a copy of the letter of 27th June 2019. He was not provided with copies of any e-mails or correspondence relating to other alleged debts of Nike or Inspire. Furthermore he was not provided with the company bank accounts or the company accounts in relation to the various monies deducted from his salary. Furthermore he was not given access to review any of those documents as the laptop had been removed for him.
76. For those reasons this tribunal considers that the claimant's dismissal is unfair and his complaint of unfair dismissal is well-founded.
77. The tribunal find that the claimant did act reasonably in mitigating his loss. The tribunal has awarded the claimant 6 months future loss taking account of the likely changes that will follow in the Spring when things are likely to open up more after COVID 19 and when there are more likely to be more opportunities in football and other areas available to the claimant.
78. This tribunal however find that the claimant contributed to his dismissal. He produced invoices which caused and/or contributed to his dismissal. He produced invoices for expenses which the tribunal accept may be accurate in relation to the amount claimed, however, the tribunal finds that there were inaccuracies in relation to the expenses actually claimed in those invoices. The Tribunal accepts the claimant's evidence that he was entitled to the expenses. It is quite clear and the respondent accepts that the claimant did other mileage other than just visits to Durham Football Academy, as suggested in the invoices themselves. He went to various other organisations some much further than Durham Academy. However none of the invoices produced by him reflect that additional mileage. The tribunal does not believe that the claimant had already produced these invoices, as otherwise he would not have attempted to produce invoices which he must have realised were not going to be accurate. He says that he felt under pressure to produce the invoices at that stage. The tribunal accepts that, when his employer asked him for the invoices, he may well have felt under pressure to do so, however he nevertheless produced invoices to his employer which were inaccurate and on

that basis it is clear that he did contribute to his own dismissal. The Tribunal assesses his contribution at 40%.

79. This tribunal also considers that the claimant might have been fairly dismissed in any event if a fair procedure had been followed. The tribunal considers that he might have been fairly dismissed because of those inaccurate invoices but he also may have been fairly dismissed because of his failure to deal with the HMRC debts resulting in final demands and bailiffs letters being sent to the director's home. It noted that the claimant believed this was the responsibility of the accountant, who did not attend give evidence. The tribunal also noted that the monies were paid when they were brought to the attention of the claimant. However, the claimant did have responsibility for managing the business and the tribunal would have expected him as part of that remit to manage or at least liaise with the accountants to deal with payments to HMRC. Accordingly, the tribunal consider that here was a chance that the claimant would have been fairly dismissed either because the invoices or failing to pay HMRC if a fair procedure had been followed. The tribunal has considered what is just and equitable and assessed the chance of that happening as 30%.
80. The tribunal finds that the respondent failed to follow the ACAS Code of Conduct. The tribunal acknowledge that this is a small organisation, but nevertheless notes that the respondent appeared to be receiving legal advice throughout these proceedings, even before the claimant was invited to a disciplinary hearing. Therefore, the tribunal finds there should be an uplift on the compensation awarded to the claimant in the sum of 10%.
81. The claimant is therefore awarded compensation for unfair dismissal as follows:

Basic award	£630	£1575.00
3 weeks x £525 per week		
Less 40% contribution		
Total Basic Award		£945

Compensatory award

Immediate loss

Loss of earnings 3 August 2019–
12th March 2020 (7.25 months) @
£2022.04 per month taking account
of 1 month's notice pay - see
below) 14,659.79

Less benefits in kind from
directorship role (car) - £180 per
month £1305.

£900

Less consultancy fee

12,454.79

Sub total

Losses

£4829.55

12 March – date of hearing (7.5
months) @ £643.94 per month

£350

Loss of statutory rights

Future loss
5 months x £643.94

£3219.7

Subtotal

20,854.04

£8341.61

Less contribution at 40%

£3753.72

Less Polkey 20%

£8758.71

Subtotal

Add uplift for failure to follow ACAS
Code of Conduct £875.87

£9634.58

Total compensatory award

Total award on compensation for
unfair dismissal

10,579.58

82. In relation to the complaint of wrongful dismissal the tribunal accepts the claimant's evidence that he did do the mileage expenses which he has claimed. That is not really disputed by the respondent. However the tribunal does not accept that those invoices are accurate, but the tribunal does accept that the claimant did substantial mileage to reflect those claims, which again is not really disputed by the respondent. The invoices were not accurate reflections of the claim for mileage not that the claimant wasn't entitled to the mileage as such. The tribunal accepts that the claimant tried to replicate the invoices because he had no access to his laptop in order for him to reference the documentation which he required. The tribunal considers that the conduct did amount potentially to misconduct, namely inaccurately identifying journeys which he did not potentially undertake, however the tribunal does not consider that it amounted to gross misconduct. The tribunal considers that, if the respondent had properly investigated these invoices with the claimant, he may have been able to provide a proper explanation for them. Therefore, the tribunal does not find that this conduct, on the face of it, amounted to gross misconduct or that the claimant was in breach of contract entitling the respondent to dismiss him with no notice.
83. Accordingly the claimant's claim for breach of contract (notice pay) is well-founded and the claimant is awarded the sum of £2,022.04.
84. The claimant's complaint of unlawful deduction from wages is also well-founded. The tribunal finds that the respondent was not entitled to deduct these monies from the claimant by way of expenses. The tribunal has found that the claimant is entitled to those expenses. Therefore the respondent was not entitled to deduct those sums. The tribunal accepts the claimant's explanation in that regard. It does note that, if there was an overpayment of expenses, the respondent could have deducted the monies, but the tribunal does not conclude that they was an overpayment of expenses, rather the tribunal finds that the expenses were owed to the claimant and rightfully claimed by him.

EMPLOYMENT JUDGE MARTIN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 23 November 2020**

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