Case No. 2416531/2019
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr A Stevens

Respondent: KGAL Consulting Engineers Limited

HELD AT: Manchester **ON:** 23 September 2020 and 19 and 20 November 2020

BEFORE: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: Ms G Hazley, friend
Respondent: Mr A Johnston, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed and his claim succeeds;

2. Applying *Polkey*, the claimant would have been dismissed in any event and the compensatory award is reduced by 100%;

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

4. It is just and equitable to reduce the amount of the claimant's compensatory award as the claimant did cause or contribute to his dismissal and therefore his compensatory award should be reduced by 100% pursuant to section 123(6) of the Employment Rights Act 1996;

5. The claimant's breach of contract claim does not succeed;

6. The respondent did make an unlawful deduction from the claimant's wages in relation to the wages due in the period from 14 June to 12 August 2019,

during which the claimant was paid statutory sick pay only when he should have been paid full pay.

REASONS

Introduction

1. The claimant was employed by the respondent from 1 September 2015 until 12 August 2019. He was employed as a Business Development Manager. On 12 August 2019 he was dismissed by the respondent for gross misconduct. The claimant claimed that his dismissal was unfair. The respondent contended that the dismissal was fair by reason of conduct. The claimant also brought claims for: unlawful deductions from wages for a period during which he was paid SSP only from 1 June 2019 to his dismissal; and breach of contract as he was dismissed without notice, when he was contractually entitled to three months' notice. The respondent denies those claims.

Issues

2. The issues were identified at the start of the hearing and it was confirmed with the parties that the issues to be determined were as follows:

a. Can the respondent show a potentially fair reason for dismissing the claimant? The respondent relies upon the potentially fair reason of conduct;

b. Did the respondent act reasonably or unreasonably in treating that potentially fair reason as sufficient reason for dismissing the employee? Relevant to that issue will be:

i. Did it genuinely believe the employee to be guilty of misconduct?

ii. Did it have reasonable grounds for that belief?

iii. At the stage at which it had formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

iv. Was the respondent's decision to dismiss within the band of reasonable responses to the claimant's conduct as the respondent found it to be?

c. If the Tribunal finds that the dismissal was procedurally unfair, would the claimant have been fairly dismissed in any event leading to a reduction in any compensation the Tribunal will award him? – this is known as a *Polkey* reduction;

d. Did the claimant otherwise contribute to his dismissal to such an extent that the compensatory or basic award should be reduced?

e. Did the respondent unreasonably fail to comply with the ACAS code of practice on disciplinary and grievance procedures and, if so, should any award be uplifted as a result and by what percentage?

f. Did the respondent make any unlawful deductions from the claimant's wages and, if so, how much is due to the claimant? The claimant alleges that during his period of absence from 1June 2019 to 12 August 2019 he should have been paid full salary, but was only paid SSP. It was agreed that this broke down into two periods:

i. 1-13 June 2019; and
ii. 14 June to 12 August 2019, when the claimant had been suspended;

g. Did the respondent breach the claimant's contract of employment when it dismissed him without notice? The respondent alleges that the claimant had fundamentally breached his contract of employment entitling the respondent to accept that breach and terminate without notice.

3. It was agreed that all of these issues would be considered as part of the liability decision, even though issues c-e are really issues which relate to remedy.

4. The claim form had included a claim for a redundancy payment, but that was not pursued. At the start of the hearing the claimant's representative also referred to a claim for unpaid holiday pay. She accepted that this was not a claim which was included on the claim form. When the need for an application to amend was explained, the claimant decided not to pursue that claim.

Procedure and evidence heard

5. The claimant was represented at the hearing by a friend, Ms Hazley. The respondent was represented by Mr A Johnson, counsel.

6. The code V in the heading records that the hearing took place by CVP remote video technology. Both parties and all witnesses attended and gave evidence remotely. Members of the public were able to attend the hearing.

7. The parties had exchanged witness statements prior to the hearing. The Tribunal read the statements prepared by each of the witnesses.

8. The respondent had prepared statements for: Mr D Griffiths, Chief Executive; Ms K Speight, Managing Director of HoRde Consultancy Ltd; Mr T Doyle, Projects Director; and Mr N Thorpe, Managing Director of HoRde Consultancy Ltd. Each witness confirmed the truth of their statement under oath and was cross examined, as well as being asked questions by the Tribunal. Mr Griffiths and Ms Speight gave evidence and were cross examined on the first day of hearing, the others on the second day after the gap in proceedings.

9. The claimant had prepared a witness statement. As with the respondent's witnesses, he confirmed the truth of his statement under oath and was cross examined, as well as being asked questions by the Tribunal. He gave evidence on the second and third days of the hearing.

10. The Tribunal was also provided an agreed bundle which was in excess of 283 pages. The Tribunal read only the documents to which it was referred either in witness statements or in the course of the hearing.

11. The case was originally listed for one day. It was agreed at the start of the hearing that the parties would prefer that the hearing commenced on the day listed, even though it was clear that the case was highly unlikely to be concluded in the day allocated. At the end of the first day, the case was adjourned part-heard and re-listed for the two further days on which it was subsequently heard.

12. An important issue was a meeting which took place on 24 May 2019, which had elements which were: open (that is needed to be considered by the Tribunal); and without prejudice and covered by section 111A Employment Rights Act 1996 (that is, should not be). In the bundle, the note had been provided with the relevant without prejudice section redacted. However, the statements prepared by witnesses did contain some elements which referred to without prejudice matters (both in that meeting itself and also in relation to subsequent negotiations). It was confirmed to the parties that the Tribunal would not take into account the elements which were without prejudice, and at the outset of the oral evidence of each relevant witness the parts of the statements which would not be considered were identified and agreed with the parties. The Tribunal has taken no account of those elements when reaching its decision.

13. At the end of the evidence the parties each made oral submissions. In the light of the fact that the claimant was not legally represented, it was agreed by both parties that the respondent's submissions would be heard first. At the end of submissions, the Employment Tribunal reserved judgment and accordingly provides the judgment and reasons outlined below.

14. In her submissions, the claimant's representative was keen to emphasise that she was not a qualified lawyer and the Tribunal should take that into account when considering its decision. The Tribunal has, of course, taken into account the fact that (unlike the respondent) the claimant was not professionally represented. The Tribunal did express its thanks to both representatives at the end of the hearing, for the manner in which the hearing had been conducted.

Facts

15. The claimant was employed by the respondent as a Business Development Manager from 1 September 2015. The claimant largely worked from home, but on occasion (which the claimant contended was at least once a month) he would attend the respondent's Wakefield office. His day-to-day duties and responsibilities involved generating business opportunities to increase the respondent's order intake and turnover. His role was to identify new opportunities and develop business relationships. From 2016 the claimant reported directly to Mr Griffiths, the respondent's CEO.

16. Mr Griffiths' evidence was that the claimant made a valuable contribution to the development of the respondent's business in the period between 2016 and 2018.

Documents

17. The Tribunal was provided with the claimant's contract of employment and a copy of the respondent's handbook. The contract was signed by the claimant on 19 July 2017.

18. The contract provides that the company's hours of work are 8.30am until 4.30pm Monday to Thursday and until 4.00pm on Friday, albeit that it was common ground that the claimant's role involved him working on occasion outside these hours and at weekends.

19. In terms of sickness, the contract requires an employee to contact their manager no later than 10.00am on the day of absence and states that failure to follow correct reporting requirements may result in absence being classed as unauthorised. The contract states that an employee who is absent from work because of sickness or injury may be entitled to statutory sick pay. The contract also says: *"In addition to SSP, the Company will consider making discretionary salary payments as follows"*, with a statement of periods of usual company sick pay relating to length of service. The contract also says, *"the Company retains its discretion to either withhold or enhance occupational sick pay provisions on a case by case basis"*.

20. The contract provides for three months' notice from either party in the usual course of events, and also contains a provision that the contract can be terminated forthwith if the employee at any time commits any serious or persistent breach of the provisions of the contract or is guilty of gross misconduct.

21. The company handbook includes the following provisions:

(1) A statement that employees must not use email and access to the internet on the company's computers, for purposes unrelated to company business;

(2) In relation to occupational sick pay, wording which reflects the contractual provisions (and cross-refers to them) emphasising that payment of occupational sick pay is entirely at the discretion of the company, but saying that would not be unreasonably withheld if the employee had complied with the notification requirements.

22. The Tribunal was also shown an internet and electronic communications policy which made clear that the company's electronic communications should not be used for personal purposes. It also says *"All employees are expected to use common sense in their use of the Company's electronic communications systems"*.

Evidence

23. The claimant's evidence was that he had only received one formal appraisal or performance meeting in his time with the respondent (prior to October 2018). No other documentation was provided to demonstrate that the claimant had been the

subject of any formal process of appraisal or objective setting, nor that there had been any guidance on what the company expected from him in terms of hours of work and conduct at work.

24. The claimant's evidence was that in early 2018 he suffered from a number of personal issues, which it is not necessary to repeat in this Judgment. The company employed Mrs X to provide administrative support to the claimant as, by his own admission, his administrative skills were not the strongest. The claimant's relationship with Mrs X went further than one of colleagues, from around May 2018.

25. The claimant's case was that he informed Mr Griffiths about this and Mr Griffiths was well aware that the claimant and Mrs X were conducting an affair. Mr Griffiths in his evidence acknowledged being aware that something had occurred, but denied that he was aware that it was an ongoing affair.

26. On 9 August 2018 the claimant purchased a train ticket for travel from Bournemouth to Warrington Bank Quay. The ticket purchased was a first class advance single. The cost was £147. The journey was booked for 13 August 2018. The claimant reclaimed these expenses from the respondent. In fact, the journey booked was to enable Mrs X to travel back from Bournemouth rather than the claimant. When challenged, the claimant could not recall whether he had provided the information about the journey when claiming the expenses from the respondent. The respondent's position was that it would not have paid for a first-class ticket for Mrs X, an administrative assistant, and that these expenses would not have been reimbursed if they had known at the time what it was that was being reclaimed.

The October 2018 letter

27. On 25 October 2018 the claimant was issued with a letter of concern by Mr Griffiths. In this letter, Mr Griffiths referred to concerns regarding the claimant's general poor conduct/self-discipline and lack of commitment to his responsibilities, stating that the claimant's conduct did not meet the expectations of the respondent. This letter referred to an inappropriate meeting attended by Mrs X in Poole and associated expenditure, inappropriate use of company credit card for personal expenditure, and non-settlement of fines, tolls and congestion charges. The letter referred back to an email from the claimant which had suggested that issues in the claimant's home life were affecting his work. The letter stated that on this occasion the respondent had decided not to proceed with formal disciplinary action.

28. Throughout the hearing this letter was referred to as a line in the sand, which appears to be exactly what it was. The letter concluded with a series of six bullet points which were stated to be expectations for the future. These included: *"You will complete your expenses in a timely manner and avoid any unnecessary or personal expenditure on the company's account"*; *"You will complete a timesheet"*; a requirement to provide a forecast of activities; a requirement to provide a weekly report of activities; and *"you will keep your personal and professional relationships separate".*

29. The claimant's evidence was that the letter of concern was the first time that he was aware that the company was not totally happy with his performance, albeit that was not something with which the respondent agreed. Nonetheless there was

no dispute that following this letter the claimant was aware of the matters that had been highlighted.

30. Two weeks after the letter had been issued, the claimant arranged for Mrs X to attend an external event. The claimant's evidence was that Mrs X never in fact attended this event, or any of the other relevant events. The respondent's position was that there was no reason for an administrative assistant to attend these events and indeed it was not appropriate for her to do so.

7 May 2019

31. The Tribunal heard a considerable amount of evidence about the events of 7 May 2019. What was not in dispute was that the claimant met Mrs X in Warrington during his working day. The timesheet completed by the claimant recorded that for 3½ hours he undertook business development and made particular reference to a named client and London. It also stated that he had spent 4 hours doing general *"travel & accommodation booking, planning, sales plan report update. CMAP update"*.

32. The unchallenged evidence of Mr Doyle was that the claimant sent two work emails between 10.00am and 11.00am and the rest of his emails were sent between 4.30pm and 5.48pm.

33. The telephone records for the claimant's mobile phone show him making telephone calls between 10.02am and 10.19am, with a gap before the next work phone call was made at 3.28pm. Calls were made to Mrs X at 2.56pm and 3.16pm in the intervening period. The last call made to a number other than Mrs X's, was at 3.54pm.

34. Receipts provided by the claimant show that he purchased two drinks at the Patten Arms Hotel (which it was agreed was a hotel opposite Warrington Bank Quay train station) at 3.15pm. At 7.03pm the claimant paid for repairs to his mobile phone at a shop in Tottenham Court Road, London.

35. There was also no dispute that the proposed meeting with the named client recorded on the timesheet, did not in fact take place. The claimant's evidence was that this had been cancelled while he was travelling down to London.

36. At 4:24 pm the claimant sent an email to Mrs X headed, *"You are beautiful".* That email included the statement, *"I have had a fabulous day with you".* The email goes on to express pleasure about the time spent. Notably, later in the email, the claimant says he could not wait for lunch on Thursday with Mrs X. The Tribunal was also provided with some other emails exchanged later in the day, which included a response from Mrs X sent at 17:45 which said, *"I loved today".*

37. In the documents prepared for the respondent's internal procedures, the claimant explained that his timesheet entries and movement records were both completed when meetings or calls were first made or planned. He stated that on 7 May he had travelled to London as stated. He emphasised that there was no fraud in relation to the entries, it was simply a matter of failing to correct the (proposed) entries after the event. The document prepared by the claimant stated that the meeting was cancelled so he had worked remotely. Elsewhere in the same

document the claimant provided a lengthy description of the claimant's mobile phone issues on the day and how the phone was fixed.

38. The claimant's witness statement contained no genuine account about what happened on 7 May 2019. The claimant was questioned about this extensively in cross examination. On the third day, after a break overnight, the claimant provided a detailed account of what he said had occurred on the day for the first time. In summary he explained that he had spent no more than approximately two hours with Mrs X and that he did not see this as an issue as he would be making up the time later when meeting with the client (albeit that meeting did not take place). He explained that Mrs X met him after exercise and only for a short period. He explained the steps which led to him meeting Mrs X at the Warrington Village Hotel for two hours only in the middle of the day. He also said he had missed the train he had intended to catch which delayed his travel from Warrington.

39. In submissions, the respondent's case was that the claimant had spent at least the period between 11.00am to 3.15pm with Mrs X, and possibly longer. The claimant's representative in submissions accepted that he had probably spent three hours with Mrs X.

40. The respondent's submission was that there was no reasonable explanation for the wording used in each of the emails detailed at paragraph 36 above, other than that the claimant and Mrs X had spent a significantly longer time together than the claimant now admits. The Tribunal agrees with that submission and finds that the reference in the claimant's email to having spent the day with Mrs X (and her also referring to today), is entirely inconsistent with the claimant's version of events. The Tribunal also notes the contrast with the claimant's reference in the same email to "lunch" on a subsequent day, which clearly evidences that the time spent together on 7 May was more than just lunch.

41. It was also noted that a detailed account was not provided as part of the claimant's witness statement for the hearing, nor was it included in any of the documents produced for the internal proceedings. The account provided appeared to the Tribunal to be a response to evidence and questions only after the claimant had considered what had been put the previous day.

42. As a result, the Tribunal does not find the claimant's account of the events on 7 May to be truthful. The Tribunal finds that the claimant spent a significant period of time with Mrs X on 7 May and it was not just a meeting for lunch.

43. In any event, as the claimant himself appeared to accept, the Tribunal finds that there was sufficient information contained in the email and other documents, to enable Mr Doyle to quite reasonably draw the conclusion which he did from the evidence, that is that the claimant had spent a significant amount of the day with Mrs X contrary to what was recorded on his time record.

44. The respondent's position was that the timesheets were fraudulent and/or dishonestly represented what the claimant had done on the day. The claimant accepted that his timesheets were not particularly accurate and said he appreciated that the impression somebody might get was that he had spent significantly longer with Mrs X than a business lunch. However his evidence was that he had not

completed the timesheets dishonestly or fraudulently. Rather the timesheet had been completed based upon what he intended to do (and then not changed when it didn't happen). The claimant himself described his preparation of timesheets as *"just negligent".* The Tribunal accepts the claimant's evidence about the timesheets and finds that the completion of them was not done dishonestly, albeit that what was recorded did not reflect at all what in fact occurred on the day.

Dispute re client

45. The claimant undertook meetings with an associate who he believed had the ability to introduce work to the respondent. The parties both agree that this led to a dispute, as Mr Griffiths and Mr Doyle (at least over time) disagreed with the claimant about whether these meetings were potentially of any value to the respondent. They did not see that the contact was one of benefit to the respondent, in particular because the respondent had a need for short-term work/income which was not something the associate could offer. This disagreement culminated in an instruction on 22 May 2019 from Mr Griffiths, for the claimant to cancel a proposed meeting with the associate which was due to take place in London. It is not necessary for the Tribunal to go into the details of this conflict, save to identify that it clearly triggered the subsequent meeting of 24 May 2019. Mr Griffiths described himself in evidence as being *"so annoyed".*

The 24 May meeting

46. On 24 May 2019 the claimant attended a meeting with Mr Griffiths and Mr Doyle. The Tribunal was provided with a note of this meeting. The respondent's witnesses were not challenged on the notes of this meeting, albeit that the claimant in his own answers to questions said that he did not agree that the note actually recorded what was said. It was not in dispute that it was a brief meeting. The note records a discussion about the time spent with the associate and the claimant pursuing that as a potential lead. It records there was then discussion about the claimant's failure to provide his details of his whereabouts as had been agreed, and the lack of his leads and sales generally. The note records a lack of response from the claimant, albeit he said in evidence that he did respond to the issues which were raised (which were not all of those listed).

47. It was accepted by Mr Griffiths that he said to the claimant in this meeting, *"this isn't working".*

48. The meeting also went on to discuss without prejudice matters (about which the Tribunal has not heard evidence and which are not taken into account).

49. At the end of the meeting Mr Griffiths asked the claimant for his company credit card and this was provided to Mr Griffiths. The claimant packed away his laptop and left the office that day. What exactly the claimant was supposed to do in terms of returning to work following this meeting is not entirely clear. None of the witnesses were very clear about what it was the claimant was supposed to do the following week, albeit there appeared to be some agreement he was not expected in the office the following Tuesday (which followed the Bank Holiday weekend). Mr Griffiths stated that the claimant was not dismissed or suspended at the meeting.

50. The claimant in his evidence described himself as being *“shell-shocked”* and *“in a blind panic”* following this meeting. Some of the claimant's domestic issues had included financial problems, and it is clear that the claimant was extremely concerned about the effect it may have upon him if he was to lose his job.

The emails later that day

51. Following the meeting the claimant did two things. He emailed a number of emails to his personal email address from the company. It was not in dispute that these included a complete list of the respondent’s clients. The claimant then deleted all of the emails from his sent items folder (which included those he had sent to his own email address).

52. In answer to questions the claimant referred to the impact which the meeting had on him as described above, which meant that he could not entirely recall what had happened and why he had taken the steps described.

53. The claimant did suggest during his evidence that he deleted all the emails from his sent items folder for laptop housekeeping, which was something he did from time to time. The Tribunal did not find this evidence to be true. It is simply inconceivable that, after returning home in a state of shock from a meeting such as that which occurred on 24 May, that the claimant would delete emails by reason of *“housekeeping”.*

54. In terms of the documents which were sent to his own email address, the explanation (such as one was provided at all) was that the claimant was trying to help himself and his solicitors in addressing the issues which had been raised. No valid reason was provided for the forwarding of the respondent’s entire client list to the claimant’s personal email address (outside the company’s scrutiny and protection). Whilst this explanation from the claimant may explain why he sent some of the emails to himself, the Tribunal does not accept that it was a reason for sending the entire client list to his personal email.

Subsequent events

55. Following the Bank Holiday weekend, the respondent was contacted by the claimant's solicitor. Whilst the content of this email was without prejudice and not seen by the Tribunal, both parties confirmed that the Tribunal needed to be aware that such an email/letter had been sent and received. The respondent described this email as showing that the claimant was threatening legal action. As a result, once that letter had been received, the decision was taken to stop the claimant's email and mobile phone use. The evidence of Mr Doyle was that this was because the claimant was a primary contact for clients.

56. That action also led to scrutiny of the claimant's email account and to an investigation being undertaken. That investigation identified the deletion and forwarding of emails referred to above, as well as various other matters being found including the claimant’s exchanges of emails with Mrs X. Mr Doyle thereafter began an investigation into the email content.

57. On 10 June 2019 Mrs X’s husband sent an email to the claimant at his email address with the respondent, in which he asked “*What’s this about?*”. The email trail

below included the email sent by the claimant to Mrs X of 7 May 2019 headed "*You are beautiful*".

The grievance

58. On 30 May the claimant sent an email to Mr Griffiths headed *"Formal Grievance – Constructive or Wrongful Dismissal"*. This raised concerns about certain issues. The claimant also stated that he remained an employee of the respondent. The respondent arranged for Ms Speight, the Managing Director of HoRde Consultancy Limited, to hear the grievance.

59. On 3 June 2019 Ms Speight was sent the claimant's grievance. She identified that the grounds of the grievance were:

(1) Mr Griffiths requesting that the claimant cancel his travel plans to meet prospective clients on 24 May 2019; and

(2) The subsequent decision to suspend his email account, cut off his mobile phone and demand the return of the company credit card.

60. On 10 June the claimant was invited to a grievance hearing. The claimant responded on 11 and 12 June stating that he could not attend, making reference to his medical issues, and advising that if the company required any information from him they could simply submit written questions and he would provide written responses.

61. Ms Speight informed the claimant on 12 June that the grievance hearing was rescheduled for 14 June. The claimant requested that the grievance be conducted in writing. Ms Speight therefore considered the grievance on 14 June in writing. She concluded that both of the steps taken by the respondent were reasonable and that the grievance should not be upheld. The outcome was provided in a letter of 18 June (157).

62. Ms Speight gave evidence at the hearing and was asked some questions on behalf of the claimant, however in the Tribunal hearing he did not really raise any issues in relation to the way in which this grievance was addressed.

Ill health

63. The claimant did submit a series of fit notes to the respondent certifying him as being absent from work. Those fit notes were ultimately provided to cover absence from 3 June 2019, but at the start of his absence the claimant neither contacted the respondent to explain that he was absent on ill health grounds, nor did he provide the fit notes when they were produced. His own evidence was that he provided the first fit note in response to the letter received on 10th June in relation to the grievance, albeit that is not spelt out in correspondence and none of the respondent's witnesses confirmed receipt at that date. The claimant's evidence was that he provided the fit notes as soon as they were provided to him, but it is not clear why there was a delay. There is no dispute that the claimant was unwell.

64. A medical report of 8 July 2019 was sent to the respondent which refers to acute stress reaction in coping strategies. The doctor writing the letter had seen the

claimant on 12 June and 3 July and there had been no significant improvement. The report describes the claimant as feeling very overwhelmed. It describes the claimant as displaying symptoms of anxiety and depression, which had been triggered by an acute stress reaction. The report does make clear that, at that time, the claimant was not fit to attend a hearing.

65. The claimant's own evidence to the Tribunal was that at the time he was not fit to attend any hearing, and indeed had the respondent delayed any disciplinary hearing for a further period of weeks or even months (from the date on which it was ultimately heard – see below) he would still not have been fit to attend.

Suspension

66. Mr Doyle had conducted an initial investigation undertaken into the various matters. His witness statement described how, on or around 7 June 2019, Mr Doyle had met with Mr Griffiths "*where we discussed my initial findings".* What he says is that they both "*agreed that the evidence appeared to be* clear". The discussion was followed by Mr Griffiths writing the letter of 14 June.

67. Mr Griffiths sent the claimant an email on 14 June 2019 which said that there had been a number of attempts to contact the claimant to discuss allegations of gross misconduct. This letter stated that the claimant was suspended with effect from 14 June 2019 *"on full pay".* The suspension was said to enable the respondent to conduct a thorough and speedy investigation and was stated not to, of itself, carry any implication of guilt of prejudgment. The usual instructions regarding suspension were included in the letter. Notably the letter made no reference whatsoever to any requirement for the claimant to demonstrate that he was fit to work, nor did it require the claimant to provide any certification in relation to not being fit.

Correspondence

68. It is not necessary for the Tribunal to reproduce, or refer to, all of the correspondence which followed the 24 May meeting. However, there was a potentially significant exchange of correspondence between the claimant's solicitor and Dr Rahnavard (deceased), who described himself as a barrister from Fountain Legal and who corresponded for a period on the respondent's behalf.

69. In an email of 2 July 2019 (that is before the disciplinary hearing took place, but after the allegations were outlined in the letter of suspension), Dr Rahnavard, whilst corresponding on behalf of the respondent, stated *"your client has committed fundamental and numerous breaches of contract, most notably serious gross misconduct, which I will also point out, is not relative to a single one-off incident. Any stress your client is suffering is self-induced".* When asked about this statement, Mr Griffiths responded that he didn't write it. The respondent's representative submitted that this was legal posturing by a lawyer in correspondence.

Disciplinary process

70. On 19 June 2019 Mr Griffiths wrote to the claimant setting out the allegations which were to be considered at a disciplinary hearing (which at that time was arranged for 24 June) (160). The allegations were stated to be alleged gross misconduct. The allegations were as follows:

(1) Sending personal emails and bringing the company into disrepute. Enclosed was the email correspondence around the events of 7 May, including the email of 10 June from Mrs X's husband;

(2) Export of company email correspondence to a private email account on 24 May 2019;

(3) Improper use of company mobile phone. Excessive personal calls. Call records for April and May 2019 were enclosed, which it was not in dispute showed that the claimant had made a significant number of phone calls to Mrs X during that period. - The respondent's position was that the claimant had spent 37 hours on personal calls, and 30 of those 37 hours were during what it considered to be working time. The claimant subsequently emphasised that his view was that everyone used their mobile phone for personal use and, spread over the period involved, the time shown was not significant.

(4) Misuse of the company credit card for private and unauthorised expenditure. The credit card bill for May 2019 was attached.

(5) Inviting unauthorised persons to corporate events - which related to arrangements being made for Mrs X to attend various events with the claimant, on behalf of the company;

(6) Unauthorised first class rail travel for a non-employee, which related to Mrs X's travel back from Bournemouth referred to above;

(7) Fraudulent time records, which related to the timesheet entry for 7 May 2019, the letter also made reference to a *"contradictory email"*; and

(8) Unauthorised absence since 1 June 2019.

71. The letter was signed by Mr Griffiths. The letter enclosed the disciplinary policy and the documents which related to the various matters. The letter was provided with a covering email from Mr Griffiths (159) which said, *"Please see attached letter of invitation to disciplinary hearing and associated documents, which collectively support our Claims of Gross Misconduct"*.

72. In answering a question about the allegations included in the 19 June letter, Mr Doyle described how the letter *"lists the gross misconduct items we felt had occurred and attached the evidence we had relating to that"*. The language used by Mr Doyle in answering that question, notably mirrored the language used by Mr Griffiths in the covering email.

73. The claimant initially asked for the disciplinary hearing to be delayed for six weeks to enable him to recover. There was various correspondence with the claimant. The hearing did not in fact take place until 8 August 2019, that is more than six weeks after the initial date proposed for the hearing. As confirmed above, the claimant's evidence was that he would not have been fit to attend the hearing even had it been further delayed.

74. On 25 June 2019 Mr Griffiths sent the claimant a letter which provided a series of questions to which the respondent was seeking answers or explanation (169). Those questions reflected, but were not the same as, the allegations which had been made. The letter stated that the disciplinary hearing would be conducted by Mr Griffiths but invited the claimant to provide written responses to the questions asked. The respondent's position is that this approach mirrored that which had been agreed with the claimant and taken for the grievance process. It says it gave him an opportunity to provide in writing anything he wished to be considered at the disciplinary hearing.

75. On 9 July the claimant provided a lengthy response to the questions raised following the numbering used in that letter (176). The claimant's evidence to the Tribunal was that he had prepared the document with the assistance of a solicitor. He denied gross misconduct. The document provided some of the account explained above in relation to personal emails and the events of 7 May. In relation to expenses, the claimant provided a detailed account of the expenses included in his statement. He did, however, acknowledge that £74.25 spent at a restaurant in Manchester for a personal meeting was not a legitimate expense and explained that he was happy to reimburse the company for that amount. He also stated that Mrs X had never attended any corporate event with him. The claimant highlighted, in relation to alleged unauthorised absence, that his access to and use of systems had been stopped on 28 or 29 May and, since 14 June, he had been suspended.

76. On 23 July Mr Griffiths wrote to the claimant again (183) acknowledging the claimant's response and stating that, unless it heard otherwise, the company would assume that the 9 July document (and attachments) was the claimant's response to the allegations. The disciplinary hearing was rescheduled to 8 August. The claimant was invited to provide anything else in writing he wished to submit, or to attend the meeting (with accompaniment).

77. In this letter Mr Griffiths explained that the disciplinary hearing would not now be conducted by himself, but would be conducted by Mr Doyle, Projects Director (albeit no reason was provided in the letter for the change in approach). Mr Doyle's evidence to the Tribunal was that the change was made because: he was more impartial than Mr Griffiths; and, as he had already carried out the investigation, he was already aware of the evidence which gave rise to the allegations.

78. The claimant responded by email on 24 July (185) arguing that the outcome had been predetermined and that Mr Doyle was no more impartial than Mr Griffiths. He said that the hearing going ahead would be grossly unfair. The claimant did not however provide any counter-proposal for how the issues could be addressed, nor did he indicate that a particular period of delay would be of benefit to him. The claimant's letter was acknowledged on 24 July by Mr Griffiths, who reiterated that the meeting would go ahead on 8 August (188).

The disciplinary hearing

79. The disciplinary hearing went ahead on 8 August attended by Mr Doyle and Ms O'Donnell. The Tribunal was provided with a detailed note which contained the matters that Mr Doyle had taken into account (189). Mr Doyle's evidence to the Tribunal was that he carefully considered the allegations and the document which

the claimant had provided, before reaching his decision. Mr Doyle was also very clear in his evidence that had he found that misconduct was not proven, he would not have reached the decision to dismiss. He explained that, whilst Mr Griffiths was senior to him in the company, he was his own person and made his own decision.

80. The document prepared by Mr Doyle goes through the issues carefully and reaches conclusions in relation to each of them. Mr Doyle found each of the allegations to be found. He concluded that the claimant had committed gross misconduct and committed an irretrievable breach of trust between himself and the company in relation to all of the allegations, save for the last one (unauthorised absence, which accordingly does not appear to be part of the decision to dismiss).

81. In relation to the various allegations, Mr Doyle was asked about which of the allegations on their own amounted to gross misconduct and/or would have been dismissible. In his answer he emphasised that he did not reach the decision on this basis and had considered the matters he found collectively. The respondent in submissions also emphasised that this was what they described as a cumulative case, with a number of individual strands which came together to form the bigger picture. However, in answer to the question Mr Thorpe went through each of the allegations and provided his own view of whether they would have been dismissible individually. His answers, in summary, identified that three of the allegations on their own would have been dismissible, but not the others. Those were:

- Sending personal emails and bringing the company into disrepute (which it was emphasised was a single allegation – the disrepute being the fact that Mrs X's husband had seen the emails);

- Exporting the email correspondence to the private email account and deleting the sent items; and

- The fraudulent time records.

82. The improper use of the company mobile phone, the misuse of the company credit card, the unauthorised attendance at corporate events, and the first-class rail travel were all part of the decision to dismiss collectively, but each on their own would not have been dismissible, in Mr Doyle's evidence to the Tribunal.

83. The note of the disciplinary hearing is written using terminology which differs from that which would usually be used in a note of such a hearing. Some examples are provided below, but the Tribunal's view of this note is based upon a reading of it as a whole and not simply upon any single detail. The claimant is referred to as "*Stevens*". At paragraph 1.3 in relation to allegation A it says "*Stevens makes no defence of the allegation*". At 3.6 *"we have asked Stevens to explain the reasons for these calls in April and May…we have had no explanation"*. Paragraph 5.3 records an issue which appears to be irrelevant "*As an aside but important point*". Paragraph 5.4 refers to sharing with Mrs X private information in relation to the allegation about inviting unauthorised persons to corporate events, to which it cannot be relevant. At paragraph B2.3 (196) it records *"Stevens claims that".* At B2.5 *"he now states that".* The Tribunal finds that the note, whilst thorough, reflects an approach which is prosecutorial and is Mr Doyle effectively seeking to support or defend what had been

identified in the investigation, rather than explaining an even-handed consideration of the matters alleged.

84. The Tribunal found Mr Doyle to have clearly thought-through the allegations and found his evidence on the issues to be considered. His outcome was fully explained. The Tribunal accepted his evidence that the decisions were his own and were made independently of Mr Griffiths (or anyone else in the company). Had Mr Doyle disagreed with Mr Griffiths, the Tribunal finds that he would have said so and reached his own decision.

85. On 12 August 2019 Mr Doyle wrote to the claimant providing a copy of his notes explaining his decision (199). The letter confirmed that Mr Doyle found that the claimant had committed gross misconduct and that he had decided to summarily dismiss the claimant from his employment with immediate effect. The decision letter was emailed to the claimant. It confirmed the claimant's right of appeal.

Appeal

86. The claimant appealed on 16 August, raising 20 points of appeal in his appeal letter (204). Mr Thorpe, the Managing Director of HoRde Consultancy, was asked to conduct the appeal. He wrote to the claimant on 20 August inviting him to attend an appeal hearing on 28 August (206). The claimant responded on 23 August saying that he was not able to attend, but asking Mr Thorpe to advise him of the outcome of the appeal if he proceeded in his absence (211). Mr Thorpe responded on 29 August (210). He rearranged the hearing for 5 September, encouraged the claimant to attend, but said if he would unable to attend then, as with the precedent which had been set by previous processes, he was invited to provide any written submissions by no later than 3 September.

87. Mr Thorpe conducted an appeal hearing on 5 September and a note was provided to the Tribunal (213). The claimant did not attend the hearing. Mr Thorpe considered each of the claimant's grounds of appeal and rejected each ground. A decision was sent to the claimant on 6 September 2019 (220) which stated that Mr Thorpe was satisfied that the company held a reasonable belief that there had been misconduct pursuant to the company's rules and procedures and he was satisfied that a comprehensive investigation had been undertaken. He was also satisfied that the sanction was in the range of reasonable responses.

88. It was clear from the evidence that Mr Thorpe conducted an appeal limited to the points raised by the claimant and did not himself re-hear the issues. The claimant's only challenge in the Tribunal to the appeal, was that he said the whole process had been predetermined, but no challenge was raised to the process followed. The Tribunal was satisfied that, such as it was, Mr Thorpe conducted a fair appeal process.

89. There was one issue in Mr Thorpe's evidence which it is relevant to include in this Judgment. Mr Thorpe in his decision letter stated that he believed that the process had been "*completed pursuant to the ACAS Code of Practice*". The ACAS Code of Practice states that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. When this was put to Mr Thorpe and he was questioned as to why he had reached the stated conclusion, he

identified that the investigation in this case had involved the consideration and collation of documents only, and the investigator had not conducted any interviews or had any conversations with witnesses. In those circumstances, Mr Thorpe's evidence was that he believed that the fact that Mr Doyle had been both the investigator and decision-maker, did not breach the ACAS Code.

The Law

Unfair dismissal

90. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

91. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for a fair reason. Here the respondent relies upon conduct as being the fair reason. 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.

92. 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 reason relied upon 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.

93. 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?

94. 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.

95. 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'

96. 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 (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**). Where the Tribunal is considering fairness, it is important that it looks at the process followed as a whole.

97. 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 two elements which were particularly noted by the Tribunal were:

(1) That *"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"* [Tribunal's emphasis added); and

(2) In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

Polkey

98. In **Polkey v A E Dauton (or Dayton) Services Ltd [1987] IRLR 503** 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.

99. 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."

100. 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.

101. 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. 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**).

Contributory fault

102. 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 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.

103. 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. The deduction for contributory fault can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss.

104. There are three factors required to be satisfied for the Tribunal to find contributory conduct: 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. (**Nelson v BBC (No 2) [1979] IRLR 346**).

105. For each element of the contributory fault test, it was the respondent's submission that the reduction should be 100%.

Unlawful deduction from wages

106. The claimant's claim for unlawful deduction from wages is to be considered under sections 13-24 of the Employment Rights Act 1996. The respondent must not make a deduction from wages due, unless the deduction is otherwise authorised or for a reason laid down in the provisions. The questions for the Tribunal are: whether the claimant was entitled to sums not paid to him; and whether there was any valid legal and/or authorised reason for deductions from those sums.

Breach of contract

107. For the breach of contract claim, the question is whether the claimant fundamentally breached the contract of employment, entitling the respondent to

terminate the contract without notice. This is a question which it is for the respondent to prove on the balance of probabilities.

Discussion and conclusions

The reason for dismissal

108. The Tribunal finds that Mr Griffiths had made up his mind that the claimant's employment with the respondent was going to come to an end at, or prior to, the meeting on 24 May 2019. That is clear from the statement that he made in that meeting (see paragraph 47). The claimant's employment was not terminated in that meeting, but it was clear that Mr Griffiths had decided that the claimant's employment would be ending. The reason for that decision was Mr Griffiths' perception of the claimant's performance and in particular his view of the claimant's recent conduct and the arrangement of meetings with the associate detailed above. However, Mr Griffiths did not make the decision to dismiss the claimant.

109. When asked at the end of his submissions whether the dismissal would still be fair if the Tribunal were to conclude that Mr Griffiths on 24 May had decided that the claimant's employment was coming to an end, the respondent's representative was very clear in contending that the outcome could still be fair as Mr Doyle was the decision maker. It was submitted that it was clear that he knew his own mind and that he would disagree with Mr Griffiths if he thought that dismissal was not the right outcome.

110. The Tribunal accepts Mr Doyle's evidence that he made the decision to dismiss the claimant. As explained at paragraph 84, the Tribunal finds that Mr Doyle reached a decision which was independent of that of Mr Griffiths. The respondent's submission on this point is accepted. As Mr Doyle made the decision, what is important is what was his reason for his decision recorded in the letter of 12 August 2019.

111. The reason why Mr Doyle dismissed the claimant, was his finding of gross misconduct based upon the allegations set out in the letter of 19 June (save for the unauthorised absence which was not part of that decision). This was recorded in the letter of 12 August and the enclosed notes (199 and 189). Accordingly, the Tribunal finds that the respondent has shown that the claimant was dismissed by reason of conduct.

Did Mr Doyle genuinely believe the claimant to be guilty of misconduct?

112. The Tribunal also finds that Mr Doyle genuinely believed the claimant to be guilty of misconduct. The note which describes how he reached the disciplinary decision, clearly explains the basis for Mr Doyle's belief and the Tribunal accepts Mr Doyle's evidence that that belief was genuine.

Did the respondent have reasonable grounds for that belief?

113. The Tribunal finds that there were reasonable grounds for that belief.

114. In relation to the deletion of sent emails and the sending of the full client list to the claimant's home email address, the fact that these occurred was not in dispute.

Nothing in the claimant's explanation credibly explains why the full client list was sent to his personal email address. Mr Doyle was reasonably able to conclude on the evidence available to him, that the claimant sending the emails (and in particular the list) to his personal email address and subsequently deleting his sent items, amounted to gross misconduct.

115. In relation to 7 May, the claimant accepted that his timesheets were not particularly accurate and that he appreciated that the impression somebody might get was that he had spent significantly longer with Mrs X than a business lunch. In those circumstances, there were reasonable grounds for Mr Doyle's belief that the claimant was guilty of not accurately recording his time at work on 7 May. Whilst the Tribunal has found that the claimant did not act dishonestly in preparing his (woefully inaccurate) timesheet, there was sufficient evidence available to Mr Doyle for him to conclude that the claimant had done so.

116. The claimant had used the company credit card and claimed expenses for an expenditure which he should not have claimed. This occurred even following the line in the sand of October 2018, when the importance of not doing so was highlighted. There were reasonable grounds for Mr Doyle to reach the decision that the company credit card had been misused (even where the claimant offered to reimburse the company).

117. The use of the mobile phone was significant, involved a large number of personal calls, which included personal calls made in work time. The respondent has clear policies. There was reasonable ground for Mr Doyle to conclude that this amounted to improper use.

118. The claimant accepted that the emails sent were not professional. They did not adhere to the respondent's policy. A third party had seen the claimant's email to Mrs X and, being her husband, that did potentially bring the company into disrepute. There were reasonable grounds for Mr Doyle's belief that the claimant sent personal emails and brought the respondent into disrepute.

119. There were also grounds for Mr Doyle's other findings, regarding corporate events and travel, albeit the matters were significantly less serious.

120. Accordingly the Tribunal finds that there were reasonable grounds for the belief that the claimant had committed misconduct.

The investigation and section 98(4) more generally

121. The respondent did conduct an investigation into each of the allegations. It is difficult to see what further investigation could have been undertaken, at least prior to the claimant's input.

122. In circumstances when the claimant was not well enough to attend a disciplinary hearing and would not have been even had it been delayed, the respondent did take reasonable steps to obtain the claimant's input in response to the issues and to give him the opportunity to have his say at the disciplinary hearing. The claimant was aware of the allegations made and was given the opportunity to respond to those allegations, having been provided all of the relevant documents.

The claimant had the benefit of legal assistance when preparing the detailed response document which he prepared.

123. The respondent followed a full and fair appeal process.

124. However, what is emphasised in the ACAS Code of Practice as cited at paragraph 97 above, is that the employee must have the opportunity to put their case **before** any decisions are made. The claimant's primary case before the Tribunal was that his dismissal was predetermined. Whilst the Tribunal accepts that Mr Doyle carefully considered each of the allegations, the Tribunal finds that he had reached his decision prior to the disciplinary hearing, or at least he considered the claimant to be guilty of the allegations unless the claimant proved otherwise. The Tribunal do not find that Mr Doyle conducted the hearing on 8 August in an even-handed way. He had already concluded that the claimant was guilty of what was alleged. That pre-determination means that the dismissal was unfair as: the respondent had not undertaken as much investigation as was reasonable when the decision was made – the hearing and consideration of the claimant's submission not having taken place; the respondent failed to comply with the ACAS code; and (even taking into account the relatively limited size of the respondent) the respondent acted unreasonably in accordance with equity and the substantial merits of the case.

125. In reaching this decision, the Tribunal has particularly taken into account:

a. Mr Doyle's answer to the question about 17 June letter as recorded at paragraph 72 (which itself reflects the wording used by Mr Griffiths in his email of the same date (159) which appears to have pre-determined the issues);

b. The terminology used in the note of the disciplinary hearing of 8 August (189) – as addressed at paragraph 83 above; and (to a lesser extent);

c. The terminology used by Mr Doyle about his meeting with Mr Griffiths following the initial investigation (see paragraph 66).

126. The Tribunal was also concerned by the wording used by Dr Rahnavard of Fountain Legal in his letter sent to the claimant, addressed at paragraph 69 above. The wording used certainly suggested that the decision in the claimant's disciplinary process had already been predetermined by the respondent. The Tribunal is not entirely convinced that such a categoric statement that an employee is guilty of serious gross misconduct before the internal hearing has been conducted, can simply be explained as legal posturing. However, Mr Doyle's evidence was that he had not considered that correspondence and he certainly was not the person instructing Fountain Legal (if indeed the letter was written on instructions at all), and accordingly the Tribunal has not taken that statement into account when determining that Mr Doyle had reached his decision prior to the disciplinary hearing.

127. The Tribunal also accepts the respondent's submission that the fact that Mr Doyle was both investigator and decision-maker would not of itself have otherwise rendered the dismissal unfair. The points made by Mr Thorpe (paragraph 89) are valid considerations and the Tribunal accepts the respondent's evidence that there was not really anyone else in the respondent's organisation who could fairly hear the

disciplinary. The Tribunal finds that it was an eminently sensible decision for Mr Griffiths not to hear the matter, however it does not find that the reasons given by Mr Doyle for conducting the hearing himself to be correct – having conducted the investigation he was not impartial; and both Mr Thorpe and Mr Griffiths were fully aware of the investigation having discussed the matters (and Mr Thorpe's greater knowledge/involvement, made him a less suitable person to conduct the hearing). The respondent was in breach of what is recommended by the ACAS code. A reason why the ACAS code emphasises that those carrying out the investigation and the disciplinary hearing should be different, is because that introduces a degree of objectivity and independence from the person conducting the hearing. Having conducted the investigation, it is clear (for the reasons given) that Mr Doyle decided that the claimant was guilty of the allegations before the hearing, and therefore he did not consider the matter with the necessary independence when considering the claimant's written submission. Whilst the failure to adhere to the ACAS code has not, of itself, led to the decision that the dismissal was unfair, it may well have been a significant factor in the approach which Mr Thorpe took to the hearing.

128. Accordingly, the Tribunal finds that Mr Doyle had already determined that the claimant was guilty of the allegations made and should be dismissed, before he considered the matters at the hearing on 8 August. As a result, the dismissal of the claimant was unfair.

Range of reasonable responses

129. In terms of whether the decision to dismiss was within the band of reasonable responses, the Tribunal does find that dismissal was within the range of reasonable responses for the cumulative matters found. This cumulative approach was both the decision reached by Mr Doyle and the approach emphasised by the respondent's representative, and for what was found collectively dismissal was clearly within the range of decisions which a reasonable employer could reach.

130. The Tribunal agrees with Mr Doyle, that emailing confidential client information (including a full list of clients) outside of the company to a personal email account, and then deleting the sent items folder, was of itself dismissible. Dismissal for that alone was certainly in the range of reasonable responses.

131. The Tribunal would not have found the mis-recording of time to be dismissible based upon the evidence heard by the Tribunal and what the Tribunal has found about the dishonesty of the claimant. However, Mr Doyle's finding differed in that he found that the claimant did dishonestly report his whereabouts and work activities on 7 May (and there was certainly the evidence available for such a conclusion to be reached). The Tribunal accepts that dismissal was within the range of reasonable responses for what Mr Doyle found.

132. The Tribunal would not have found dismissal to have been within the range of reasonable response for any of the other allegations on their own. However, in the light of the findings at paragraphs 129-131 that is immaterial to the outcome. The one issue upon which the Tribunal differs from Mr Doyle in terms of what individually would have been dismissible within the range of reasonable responses, is the misuse of email and the bringing of the company into disrepute. In the absence of any warnings about email misuse and the fact that there was only a single email

from Mrs X's husband's to evidence the alleged disrepute, the Tribunal would not have found that dismissal was in the relevant range for that allegation alone. However collectively, for all the matters found, dismissal was in the reasonable range.

Polkey

133. As identified in the law section above, the application of the case of *Polkey* requires the Tribunal to determine what would have been the outcome had a fair disciplinary hearing been conducted by this employer. Whilst the Tribunal has found that Mr Doyle predetermined the outcome, the Tribunal nonetheless finds that he considered the issues and was able to fully explain his decision at the Tribunal hearing.

134. As explained, it is certainly the case that Mr Doyle could have fairly dismissed the claimant for the matters identified, had he followed an entirely fair process and had he not pre-determined the outcome before the disciplinary hearing. Accordingly, it is appropriate for there to be a *Polkey* reduction. The question is where, on the spectrum between extremes referred to in the **Hill** case above, the claimant's case falls.

135. The Tribunal must emphasise that it is not answering the question what it would have done; it is considering what this employer would have done given the assumption that it acted fairly. On that basis, the Tribunal concludes that this is one of the relatively rare cases where it is correct to conclude that the claimant would have been dismissed had a fair process been followed and therefore the award should be reduced by 100%.

136. The fact that the claimant sent a complete list of the respondent's clients to his personal email address and deleted the sent items, would certainly have resulted in this employer dismissing the claimant had a fair process been followed. Taken together with all of the other allegations and considering the information provided by the claimant in the internal procedures (rather than the fuller account and evidence heard at the Tribunal hearing), the Tribunal finds that the claimant would certainly have been dismissed by this employer following a fair procedure.

Contributory Fault

137. Having made that decision, the question of contributory fault is less important.

138. However, applying the three factors identified in **Nelson**, the claimant's conduct was culpable or blameworthy. The claimant sent the client list to his personal email address and deleted his sent items. The claimant himself described his preparation of timesheets as *"just negligent"* and accepted he had taken no care to record what he did on 7 May (when what he recorded was wrong and was made even in the light of the line in the sand letter of October 2018). The claimant conducted his personal affairs using the company email, and that was identified by Mrs X's husband. The claimant claimed expenses that were not due. These were all culpable or blameworthy conduct.

139. Whilst the Tribunal has not addressed the less serious allegations in the previous paragraph as it is not necessary to do so, the Tribunal would confirm that it

finds nothing whatsoever which could be described as culpable or blameworthy in the claimant's absence from work after 1 June.

140. All of the matters referred to at paragraph 138 contributed to the dismissal.

141. It is just and equitable to reduce the award by 100%, taking account of the contribution identified.

142. Whilst the wording of section 122(2) in respect of the basic award differs from that which applies to the compensatory award, nonetheless the Tribunal also finds that it is just and equitable to apply the same 100% reduction to the basic award. The conduct occurred prior to the dismissal.

Breach of Contract

143. In relation to breach of contract, the Tribunal does find that the claimant fundamentally breached his contract of employment for the reasons explained above. In particular, the claimant sending the respondent's complete list of clients to his home email and then deleting his sent items, was a fundamental breach of contract.

144. As a result, and as the claimant fundamentally breached the contract of employment, he was not entitled to notice.

Unlawful Deductions from Wages

145. With regard to the unlawful deductions from wages claim, during the period from 1-13 June 2019 the claimant remained employed and not suspended. Whilst there was some confusion at the start of the claimant's absence about what the position was, the claimant did subsequently provide a fit note which covered this period. As a result, the claimant was absent on ill health grounds.

146. It is understood that the claimant was paid statutory sick pay for this period. Therefore, there has only been an unlawful deduction from the claimant's wages if he had a contractual entitlement to be paid full pay for this period of absence.

147. As confirmed at paragraph 19, in the terms of the contract, whether or not the respondent chooses to pay company sick pay for the period was at the company's discretion and could be refused on a case by case basis. Accordingly, as the claimant was not fit to work and the respondent was not obliged contractually to pay the claimant company sick pay, there has been no unlawful deduction.

148. In any event, under the provisions of the handbook described at paragraph 21, the respondent identified to employees that company sick pay could be withheld where sickness absence notification requirements were not complied with. As the claimant did not adhere to the respondent's notification requirements, there were valid grounds for the respondent to decide not to pay company sick pay as a result. It is not for the Tribunal to determine whether it would have paid company sick pay to the claimant for that period, but on the terms of the contract and in particular the discretionary aspect of the terms of the contract, the respondent was able to exercise its discretion not to pay the claimant company sick pay.

149. For the period from 14 June to 12 August 2019 the claimant was absent due to suspension. The letter of suspension makes it clear that the claimant would be paid full pay.

150. The Tribunal does not find that there was any basis for that full pay to be reduced because the claimant was unwell. Nothing in the letter identifies any such caveat to the absolute statement within it. The Tribunal has not been shown anything which reserved the right to the respondent or provided the respondent with any contractual ability to pay at a lower rate during suspension, because it chose to do so.

151. For this period, the claimant was entitled to full pay as he was in employment, suspended, and the respondent had informed him that is what he would receive.

152. The respondent's representative was unable to point to any legal authority which supported the respondent's argument that it did not have to pay full pay during the suspension as a result of the claimant's ill health and/or that full pay should be limited only to what the claimant would have been paid had he not been suspended during that period. The claimant was entitled to receive full pay for the period from 14 June to 12 August 2019, during which his reason for not working was that he was suspended. There has been an unlawful deduction from wages.

Conclusions

153. As outlined above and for the reasons given, the claimant's claim for breach of contract does not succeed. The claimant was unfairly dismissed. The awards for unfair dismissal due to the claimant are reduced by 100%. The claimant's claim for unlawful deduction from wages succeeds in relation to the period from 14 June to 12 August 2019 (only).

154. In the course of submissions it was identified that a Schedule of Loss had been prepared but there had been no response to it. The respondent's representative suggested that if the claimant succeeded in his unlawful deductions from wages claim only, he thought it should be relatively simple for the parties to agree the amount due.

155. Within 14 days of the date that this Judgment is sent to the parties, the respondent must write to the claimant and state what sum they believe is due to the claimant and why. The claimant must respond within 14 days, either confirming that he agrees or explaining why he disagrees with the respondent's figure(s).

156. No later than 28 days after the date when this Judgment is sent to the parties, they must write to the Tribunal confirming whether the sum due to the claimant has been agreed, or whether it remains in dispute (and if so, why).

157. If the parties have not reached agreement within 28 days, the case will be listed for a remedy hearing before Employment Judge Phil Allen, with a time estimate of two hours.

Employment Judge Phil Allen

Dated: 1 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

7 December 2020

FOR THE TRIBUNAL OFFICE

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