



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100039/2019**

5

**Held in Glasgow on 13, 14 & 15 May and 26 & 27 August 2019**

**Employment Judge P O'Donnell**

10

**Mr M Hill**

**Claimant**

**Rolls Royce Plc**

**Respondent**

15

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the complaint of unfair dismissal is not well-founded and is hereby dismissed.

20

### **REASONS**

#### **Introduction**

1. The Claimant has brought a complaint of unfair dismissal. The claim is resisted by the Respondent.

#### **Preliminary issues**

25

2. At the outset of the hearing, it was explained to the Claimant and his representative that the Respondent's agent, Mr McGuire, being Counsel, would be instructed on a case-by-case basis and had been instructed by the Judge when he was in private practice. Equally, it was explained that Mr McGuire had also appeared in cases on the opposite side from the Judge in the past. The Judge confirmed that he was not presently instructing Mr McGuire in any case and was not aware of anyone in his firm doing so. This was confirmed by Mr McGuire.

30

**E.T. Z4 (WR)**

3. The Claimant, having had the opportunity to consider this explanation, did not take any objection to the Judge proceeding to hear the case.

**The claims before the Tribunal**

4. Towards the end of the hearing, the Tribunal was taken to the Claimant's Schedule of Loss. In the course of looking at this, two issues arose in relation to which the Tribunal sought some clarification from the Claimant's representative:-

- 5 a. There was an item under the compensatory award for unfair dismissal described as "*deduction of accrued holiday pay*" and the Tribunal sought clarification as to whether this was pay in lieu of untaken holidays accrued prior to the Claimant's dismissal. It was confirmed that this was what was being sought. The Tribunal explained that no such claim was pled in the ET1 and so the Tribunal, absent an application to amend the claim and re-open the Claimant's case, could not determine such a claim.

- 15 b. The Schedule of Loss also included damages for failure to provide the Claimant with notice. Again, the Tribunal explained that no such claim was pled in the ET1 and so the Tribunal, absent an application to amend the claim and re-open the Claimant's case, could not determine such a claim.

- 20 5. No application to amend the claim was made and so the only complaint being determined was that of unfair dismissal.

**Evidence**

6. The Tribunal heard evidence from the following witnesses:-
- 25 a. The Claimant
- b. Andrew Prow (dismissing officer)
- c. Gordon Hutchieson (appeal officer)

7. There was an agreed bundle of documents prepared by the parties and the reference to page numbers below are a reference to pages in the bundle.

8. This was not a case where there was any significant dispute of fact between the witnesses and so the credibility and reliability of the witnesses was not a particular issue. In the event. The Tribunal considered that all witnesses gave their evidence in an open and honest manner, seeking to assist the Tribunal in determining the facts of the case.

### Findings in fact

9. The Tribunal made the following relevant findings in fact.

10. The Claimant was employed by the Respondent at their base in Inchinnan from 16 August 2004 until he was dismissed on 4 September 2018. He had started as an apprentice and was employed as a mechatronics engineer at the time of his dismissal. At that point he had also taken on the role of team coach for two years.

11. In 2016, it was proposed that the Claimant be sent on a training course abroad and he was advised to obtain a company credit card to pay for expenses when on the course.

12. A copy of the Claimant's application for a credit card is at p154. It is an online application form which includes two Word documents which can be opened and read; a "Corporate Credit Card Declaration" and a "Data Privacy Statement". The form requires the person completing it to tick a box confirming that they have read these documents and agree to those terms. The Claimant ticked this box.

13. The credit card declaration (p155) involves the applicant to make a number of confirmations:-

- a. They have read and understood the Respondent's Global and UK Travel and Expense policies.

- b. The credit card must only be used for business purposes and not for personal use.
  - c. Transactions on the card are submitted as expenses in a timely manner to avoid late payment fees and that anything which cannot be recovered as an expense will be reimbursed by the employee.
  - d. Cash withdrawals cannot be made on the card other than for business purposes and should be kept to a minimum.
  - e. Failure to abide by the requirements of the relevant policies may result in disciplinary action up to and including dismissal.
- 10 14. As it happens the business trip do not go ahead and, although the Claimant was given a company credit card in 2016, he did not use it at the time and had no occasion to use it until 2018.
- 15 15. The Respondent's expenses policy (p110) at paragraph 1.2.1 again states that the credit card should not be used for personal or non-business items. It also repeats the warning regarding making cash withdrawals.
16. The Respondent has an online system for claiming expenses called "Concur". Employees are required to complete a claim on this system shortly after incurring expenses. When the claim is approved then it is used to settle the credit card balance.
- 20 17. The Claimant had been on business trips before 2018 but had no occasion to either use a credit card or claim expenses through Concur on these trips.
18. The Claimant was asked to go to Austria for training in April 2018 and during the course of this trip he made a number of cash withdrawals; some of these were made in the UK before the trip and others were made in Austria when he was away.
- 25 19. The Claimant's partner had made arrangements with a taxi driver to take the Claimant to and from Glasgow Airport. She had contacted a taxi driver directly via Facebook and it was agreed that the journey would cost £40 each

way. In the end, the Claimant also paid a tip of £5 on each occasion. One of the cash withdrawals made in the UK was to get cash to pay for the taxi journeys.

5 20. The cash withdrawals made in Austria were to pay for personal expenses such as drinks when socialising with the others on the training. The Claimant did not have his own bank card with him when abroad as he had left this with his partner.

10 21. On his return to the UK, the Claimant submitted an expenses claim on Concur for the trip. He could not complete this immediately as he did not have a receipt for the taxi journey. He eventually obtained one from the driver (p146) which purported to be from Inverclyde Taxis and was for the sum of £100. This receipt along with a claim for £100 expenses in relation to the journey was submitted by the Claimant.

15 22. On 1 June 2018, the Claimant's expenses claim was referred to Allan Curran (a HR Specialist at Inchinnan) by one of the Respondent's Compliance and Resolution Advisers (p69). This was referred because there was a concern that there had been potential personal misuse of the card by the Claimant.

23. On 8 June 2018, Brian McCulloch was appointed as the investigating manager with Mr Curran as HR support.

20 24. On the same date, Mr Curran requested further information in relation to the issue in the form of the June credit card statement to see if the Claimant had made any payments to the card in relation to the cash withdrawals made (pp70-72). It was confirmed that an expenses claim was going through but that there were other payments which the Claimant had not made at that point  
25 in time.

25. On 27 June 2018, Mr Curran contacted Inverclyde Taxis by telephone and spoke to a Betty McDonald. This was followed up by an email exchange at pp127-128. Ms McDonald confirmed that Inverclyde Taxis had no record of any booking for the Claimant and that the cost of a journey to the airport would  
30 be £30 each way. She subsequently confirmed that the receipt provided by

the Claimant was not a receipt from Inverclyde Taxis and provided examples of the receipts used by the company (p149).

26. On 22 June 2018, Mr McCulloch and Mr Curran met with the Claimant's line manager, Stewart Letham. A note of this meeting is at pp158-160. Mr Letham confirmed that he had been advised by HR in early June that there were discrepancies on the Claimant's expenses claim relating to cash withdrawals. When he spoke to the Claimant about this, the Claimant explained that these were cash transactions but that he had not claimed for them through Concur and would pay these back.
27. The Claimant was invited to an Investigation Meeting by letter dated 25 June 2018. The reason for the meeting was given as personal use of the company credit card.
28. On 29 June 2018, Mr McCulloch and Mr Curran met with the Claimant who was accompanied by a union representative, Tom Stafford. A typed note of the meeting is at pp161-168. There is also a separate handwritten note at pp83-86.
- a. The Claimant confirmed that he had seen and electronically signed the credit card declaration form.
  - b. The Claimant was asked about the cash withdrawals on the card and he explained that the cash withdrawals made in the UK were to buy Euros for when he was on the trip and for money to pay for the taxi to and from the airport.
  - c. He went on to explain that the cash withdrawals made in Austria were for personal use and were made because he did not have his bank card with him.
  - d. He was also asked about a transaction made on 20 June 2018 and he explained that this was to buy huggies for his child. Again, he did not have his bank card as his wife had it.

- e. He was asked about discrepancies in the sums claimed through Concur and he said these were for business expenses but he may have clicked the wrong button. Mr McCulloch agreed that this be the case as he had looked at Concur and the buttons were confusing.
- 5 f. He was asked about the taxi journey to the airport and he explained that his partner had arranged this. He was asked if he or his partner knew the driver and he confirmed they only knew him through Facebook.
- g. He was shown the taxi receipt submitted as part of his expenses claim and he confirmed this was the receipt he received. He explained that he had to contact the driver after he returned to get the receipt.
- 10 h. The Claimant was asked how much he paid for the taxi journey and he confirmed it was £50 each way.
- i. Mr McCulloch informed the Claimant that they had been in touch with Inverclyde Taxis and the receipt did not look like the receipts which Inverclyde Taxis had provided to the Respondent.
- 15 j. Mr McCulloch explained to the Claimant that he was to be suspended while further investigation would take place.
29. The Claimant's suspension was confirmed by letter dated 16 July 2019. The reasons for his suspension were:-
- 20 a. Allegedly making cash withdrawals which were not declared in his expenses claim
- b. Allegedly not submitting an accurate expenses claim
- c. Allegedly submitting a fraudulent taxi receipt
- 25 d. Breach of the discipline and grievance policy
30. After the first meeting, the Claimant provided screenshots showing the Facebook discussions between his partner and the taxi driver (pp134-139).

31. A further investigation meeting was held between the Claimant (again accompanied by Mr Stafford) and Mr McCulloch with Mr Curran on 31 July 2018. A typed note of the meeting is at pp169-172:-
- a. The Claimant was asked why he paid £50 for the taxi journey when the price given in the Facebook exchange said it would be £40. He replied that he paid £45 each way and was given a receipt for £100.
  - b. He was asked if he queried this and he said that he did not think it would be a problem.
  - c. He explained that the majority of the cash withdrawals were used for going out in the evenings when on the training course.
32. An Investigation Report was produced by Mr McCulloch on 6 August 2018 (pp95-175) and, on 27 August 2019, Steven Daly, manufacturing engineering manager decided that, on reviewing the documents, the case should proceed to a formal disciplinary. Andrew Prow was appointed to be the disciplinary manager with John Jarvie providing HR Support.
33. The Claimant was invited to a disciplinary hearing by letter dated 30 August 2019 (pp179-181) enclosing the Investigation Report prepared by Mr McCulloch. The letter set out the allegations against the Claimant as follows:-
- a. He used his company credit card for personal use in April 2018; this was a reference to the Cash withdrawals made when the Claimant was on the business trip in Austria.
  - b. He submitted a fraudulent expense claim supported with a taxi receipt for the sum of £100.
  - c. He used his company credit card for personal use in June 2018.
34. The disciplinary hearing was held on 3 and 4 September 2018. The Claimant attended again accompanied by Tom Stafford. Mr Prow also attended accompanied by Mr Jarvie. A note of the meeting is at pp185-190:-



5 a. Mr Prow first asked the Claimant about his use of the company card in April. The Claimant explained that he was on training in Austria and that he did not have his bank card but needed money for the trip. He stated that he did not realise that he was not able to take money from the credit card

10 b. He was then asked about the use of the card in June 2018 and the Claimant explained that he went to Tesco and found that he did not have his bank card with him. He used the company card to pay for nappies for his daughter and, again, stated that he did not realise that he could not use the card.

c. Mr Prow went on to ask about the taxi receipt and the Claimant explained that his partner had seen a Facebook advert for the driver. He explained that neither of them knew the driver and his partner made the booking.

15 d. He was asked the price for the journey and the Claimant explained that it was £40 each way and that he paid £45 including a £5 tip

e. Mr Prow asked why the receipt was for £100 and the Claimant explained that he did not know. He did not question it at the time when was putting his expenses through.

20 f. The Claimant stated that this was an honest mistake and he was not attempting to defraud the company.

35. After the meeting on 3 September 2018, Mr Prow conducted further interviews with Lindsay Gardener who was a HR manager at the Inchinnan site and Stewart Letham. Notes of those interviews are at pp191-192.

25 a. Lindsay Gardener was asked about whether there had been other similar cases and she replied that she was aware of two other cases over the previous two years at the Inchinnan site. Both of those involved cash withdrawals and action short of dismissal was taken.

- b. Stewart Letham was asked when the Claimant had flagged his cash withdrawals with Mr Letham and he explained that it was Allan Curran who had brought these to his attention.
- c. Mr Letham was also asked if the Claimant had raised any issues with using Concur and he replied that he could not recall anything of this nature.
- 5
36. The disciplinary hearing was reconvened on 4 September 2018. The Claimant was provided with a copy of the notes of the discussion with Ms Gardener and Mr Letham. He was asked if he had any comments and he had none.
- 10
37. Mr Prow then went on to explain that he had issues with the taxi receipt; the Claimant had accepted a receipt he knew to be wrong, did not ask for it to be corrected and then submitted that as his expenses claim. He also had issues with the Claimant's use of the company credit card.
- 15
38. Mr Prow informed the Claimant that he considered these matters to be gross misconduct and so he had made the decision to summarily dismiss the Claimant.
39. Mr Stafford asked if the Claimant's time with the company had been taken into account. He submitted that this was not deliberate and that he took money out when abroad without his own bank card. Mr Prow stated that he did take all this into account and that it was a difficult decision.
- 20
40. The Claimant's dismissal was confirmed by letter dated 4 September 2018 (pp193-194). The reason given was that he had misused the company credit card and deliberately submitted a fraudulent expenses claim. It was considered that this breached the Respondent's Code of Conduct as well as their Expenses Policy and Global Travel Policy.
- 25
41. The Claimant appealed his dismissal by letter dated 5 September 2019 (p197). This letter was prepared by Jim McGivern from the trade union who

also accompanied the Claimant at the subsequent appeal hearing. The grounds of appeal were:-

- a. The Claimant was not taken through the company training for use of the company card and the Concur system.
  - 5 b. Other employees had not been dismissed for similar issues.
  - c. Other sanctions could have been considered.
42. Gordon Hutchieson was appointed as the appeal manager and, by letter dated 13 September 2018 (pp200-202), he invited the Claimant to a hearing on 18 September 2018.
- 10 43. The appeal was held on 18 September 2018 with Kathryn Leedham providing HR support to Mr Hutchieson. The Claimant was present supported by Mr Hutchieson. A note of the hearing is at pp 203-211. The Claimant produced a statement for the hearing and this is produced at pp212-213.
- a. The hearing started with Mr Hutchieson setting out the grounds of appeal as set out in the letter of appeal.
  - 15 b. The Claimant explained that he was not given any training about how to use the Concur system or the company credit card. He had applied for the card and ticked the box but no-one instructed him to read the documents about the use of the card.
  - 20 c. Mr McGivern explained that there had been a course which would give an insight into the use of the card.
  - d. Ms Leedham asked the Claimant if he would read instructions relating to his role and he agreed that he would and that there would be consequences if equipment is not used properly.
  - 25 e. The Claimant was asked for details about other employees not being dismissed and he made reference to the two cases referenced in Lindsay Gardener but could provide no further information.

- f. The Claimant was asked about other sanctions and examples were given in relation to warnings, suspension without pay, demotion and other actions short of dismissal.
- g. Mr McGivern raised the fact that the Claimant had been a model employee for 14 years and had been doing a job above his grade.
- h. The Claimant read out his prepared statement:-
- (i) He had never used the card or claimed expenses before.
  - (ii) He had believed that it was okay to withdraw cash as long as it was paid back. He did not intend to steal from the company.
  - (iii) He had not been made aware of the issue of the taxi receipt before the first investigation. When he was shown it and asked what he had paid, he automatically said £50 each way because the receipt said £100.
  - (iv) He had looked over the documents and there were a lot of mistakes and omissions in the investigation notes.
  - (v) It was not documented that the investigation meetings were being stopped to have off the record discussions.
- i. The Claimant was asked to give more detail of the off the record discussions and mistakes in the investigation report. He gave an example that at page 5 of the first investigation meeting note it said that his partner knew the taxi driver and he had not said that.
- j. The Claimant also gave an example relating to the receipt being produced at the meeting and he was not asked how much it was for.
- k. He was asked if there were any other notes with which he was unhappy and he gave no further examples.

44. By letter dated 19 September 2018 (pp215-216), the Claimant was invited to a reconvened hearing on 21 September 2018. The hearing was attended by the same people as before and note of this hearing is at pp217-221.

- a. Mr Hutchieson went through each of the Claimant's appeal points as set out in his letter of appeal.
- b. In relation to the issue of training on Concur and the credit card, Mr Hutchieson was satisfied that the Claimant had ticked the box on the application for the card indicating he had read and understood the terms and conditions. He was, in Mr Hutchieson's view, fully aware of his responsibilities.
- c. In relation to the treatment of other employees, the Claimant had given no other specific cases and so there was no evidence for Mr Hutchieson to consider.
- d. Mr Hutchieson was satisfied that Mr Prow had taken time to consider sanction and that dismissal was appropriate.
- e. He also addressed the additional points raised in the meeting. He noted that the Claimant had not raised any issues with the investigation notes until the appeal hearing and that it was his responsibility to address such issues.
- f. Mr Hutchieson also took account of the personal issues set out in the Claimant's statement but did not consider this made any difference to the outcome.
45. Mr Hutchieson decided to uphold the decision to dismiss and this was confirmed by letter dated 21 September 2019 (pp222-225).

### **Respondent's submissions**

46. The Respondent's agent produced written submissions and supplemented these orally.
47. It was the Respondent's submission that the claim should be dismissed but if there was a finding of unfair dismissal then compensation should be reduced.

48. Mr McGuire noted that the only claim pled is one for unfair dismissal and that the grounds set out in the ET1 as to why it was unfair was that the sanction of dismissal was not merited. The submissions for the Respondent would focus on what is said in the ET1 but would address the issues that have arisen in the course of the evidence.
49. It was submitted that the potentially fair reason for dismissal was conduct and that this was a case of gross misconduct.
50. Mr McGuire submitted that the facts of the case are not significantly in dispute and he sets out the main events in paragraph 3 of his written submissions. In particular, there was no dispute that the Claimant made six large cash withdrawals on the company card. Similarly, there was no dispute that the Claimant submitted a receipt for £100 for the taxi journey.
51. Paragraphs 4 and 5 of the written submissions set out the chronology of the internal procedures and, again, Mr McGuire submitted that there is no particular dispute about this sequence of events.
52. The written submissions go on to set out the relevant statutory provisions and the test set out in the case of *British Home Stores v Burchell* [1980] IRLR 303. It goes on to state the “band of reasonable responses” test from *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 and that the Tribunal must not substitute its own view for that of the employer (*Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 82). These tests apply not only to the decision to dismiss but also the investigation as well (*Sainsbury’s Supermarkets Ltd v Hitt* [2003] IRLR 23). Reference was also made to *London Ambulance Service NHS Trust v Small* [2009] IRLR 563 in this context. Finally, reference was made to *Taylor v OCS Group Ltd* [2006] ICR 1602 as authority that the appeal hearing is to be treated as part of the whole dismissal process.
53. Mr McGuire submitted that the ET1 does not set out a criticism of the investigation and he submitted that the investigation was carried out in a reasonable fashion. Further, the Claimant had the benefit of trade union representation and was able to raise issues at all stages of the process.

54. In relation to the suggestion that Mr Curran had overstepped the boundaries for HR, it was submitted that there was nothing improper in him asking questions where he was there to support Mr McCulloch. In particular, given that there was not much dispute on the matters for which the Claimant was dismissed then the input from Mr Curran was minimal.
55. Mr McGuire went on to submitted that the Claimant had accepted that he used the card for personal use and that he submitted a taxi receipt claiming £100 when he knew he had not paid £100.
56. The matters being discussed at the disciplinary were narrow in compass; the Claimant accepts he knew the case against him and what he had to answer.
57. It was submitted that it was well within the range of reasonable responses for an employer to conclude that the use of the card was not minor and not an emergency.
58. Mr Prow gave evidence that he had considered alternative but the submission of the receipt for an amount which the Claimant knew was incorrect was enough to justify dismissal. In this regard, it was submitted that Mr Prow took account of the Claimant's service and the effect of his conduct on the trust and confidence between the Respondent and Claimant.
59. It was submitted that there had been a reasonable investigation and the Claimant had been able to put his points in answer to the allegations.
60. Mr McGuire submitted that dismissal was justified as a sanction in the circumstances of the case.
61. In relation to the differences between the handwritten and typed notes of the investigation meeting with the Claimant, it was submitted that the Claimant did not raise these with Mr Prow at all at the disciplinary hearing and did not draw much material difference to the attention of Mr Hutchieson at the appeal and it was not accepted by the Respondent that there were material differences. In any event, these alleged differences are irrelevant to the reasons for dismissal especially where the factual background is not in dispute.

62. Mr McGuire submitted that the Mr Hutchieson considered all the matters raised at the appeal and it was possible for the Claimant to have raised any further matters (such as those being raised in evidence before the Tribunal) but he did not do so.

5 63. Taking the evidence as a whole, it was submitted that the Burchell test was satisfied.

64. In terms of remedy, Mr McGuire submitted that there was an obvious contribution issue arising from the actions of the Claimant to the extent that both basic and compensatory award should be reduced by 100%. A similar submission was made in relation to the Polkey reduction.

10

65. It was also submitted that there had only been brief evidence of mitigation; there was no evidence produced that the Claimant had made any applications for other jobs and that his oral evidence was unreliable.

15

66. In terms of the Claimant's Schedule of Loss, the cap on a "week's pay" had not been applied to the basis award; this was £525 at the time and so this should be £6096.

20

67. In rebuttal, Mr McGuire commented on the Claimant's reliance on Ramphal; he submitted that the claim as set out in the ET1 does not address the issue of HR being over-involved in the decision and so it does not fall to be considered; in any event, this case is miles away from the facts in Ramphal as Mr Curran had no involvement in either the decision to dismiss or the appeal.

25 **Claimant's submissions**

68. The Claimant's agent produced written submissions and supplemented these orally.



69. Ms Craig set out the primary basis of the Claimant's case as being a belief that he had not had a fair and unbiased process in relation to the process followed by the Respondent and that the ACAS Code of Practice and guidance was not followed.

5 70. In her written submissions, Ms Craig goes on to set out the evidence the Claimant sought to rely on in the form of a narrative of events as described by the Claimant. The following points were of particular note:-

- a. The Claimant did not have his personal bank card when in Austria as he had left this with his partner.
- 10 b. He was not aware that he could not make cash withdrawals on the company card and he had been given no direction or guidance on using the card from management.
- c. He was given no guidance or training on how to log receipts on the Concur system and so he put the taxi receipt on the system.
- 15 d. Brian McCulloch had been involved in organising the Austria trip and so was personally involved in the matter. If the process was fair then he would take some responsibility for the mistakes made by the Claimant but he did not. It is not fair for an employer to expect one employee to follow policies to the letter but not apply the same
- 20 expectation to others.
- e. The letter inviting the Claimant to the first investigation meeting did not mention the issue of the taxi receipt even though there had been contact made with Inverclyde Taxis about this prior to that meeting.
- f. There were inaccuracies in the minutes of the investigation meeting
- 25 but these could not be explored because neither Mr McCulloch or Mr Curran were called as witnesses.
- g. Mr McCulloch did not try to find evidence to undermine the allegations and that the Claimant was telling the truth.

h. The Claimant had pointed out discrepancies at the appeal but Mr Hutchieson did not make any attempt to look into these.

i. It was submitted that there were discrepancies in the statements given by Mr Letham but neither Mr Prow or Mr Hutchieson queried these.

5 71. Ms Craig made reference to the case of *Ramphal v Dept of Transport* [2015] IRLR 985 regarding the involvement of HR in disciplinary processes; the role of HR is to advise but not to go beyond that remit and be “judge, jury and hangman”. She read out an article on the case and its implications.

72. It was submitted that HR did overstep the mark in this case:-

10 a. Mr Curran sent the investigation report to an unnamed person asking if there was anything to add.

b. HR officers who provided support at the investigation and disciplinary asked the Claimant questions.

15 c. When the Claimant contacted the Respondent after his dismissal asking how to raise a grievance, he received a response from HR a month later saying he could not have a grievance but this was wrong.

d. Lindsey Graham from HR was copied into all the emails recovered in a Subject Access Request.

20 e. Jane Moles from HR advised management that they did not have to respond to a Subject Access Request until the Tribunal had been raised. This was wrong and so other advice from HR must be wrong.

### Relevant Law

73. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

25 74. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is conduct.

75. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

5 76. The test for whether a dismissal on the grounds of conduct (or misconduct) is set out in the well-known case *of British Home Stores Ltd v Burchell* [1978] IRLR 379.

77. The test effectively comprises 3 elements:-

- a. A genuine belief by the employer in the fact of the misconduct
- b. Reasonable grounds for that belief
- 10 c. A reasonable investigation

78. It is important to note that, due to changes in the burden of proof since Burchell, the employer only has the burden of proving the first element as this falls within the scope of s98(1) with the second and third elements falling within the scope of s98(4).

15 79. In order for there to be a reasonable belief, especially where there is a dispute as to whether or not the employee committed the misconduct in question, the employer must have some form of objective evidence on which to base their conclusion.

20 80. If the Tribunal is satisfied that the requirements of Burchell are met then they still need to consider whether dismissal was a fair sanction applying the “band of reasonable responses” test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

25 **Decision**

**Was there a potentially fair reason for dismissal?**

81. The Tribunal held that the Respondent had shown that they had dismissed the claimant for reasons which would fall within “conduct” for the purposes of

s98(1) ERA and that there was, therefore, a potentially fair reason for dismissal.

5 82. The Claimant had not sought to argue that the reason for his dismissal could not fall within the description of “conduct” and it is difficult to see how the reason could be anything other than conduct.

83. In these circumstances, the Tribunal was of the view that the reason given by the employer clearly fell within that category of potentially fair reason.

**Did the respondent have a genuine belief in that the claimant had committed the misconduct in question?**

10 84. The Claimant has not sought to argue that the Respondent had dismissed him for a reason other than those given in the letter of dismissal and there has been no evidence from which such an inference could be drawn.

15 85. In these circumstances, the Tribunal can come to no conclusion other than that the Respondent had a genuine belief that the Claimant had committed the misconduct in question.

**Had there been a reasonable investigation?**

20 86. It is a feature of this case that the Claimant does not dispute that he did the things for which he was dismissed and this is highly relevant to the questions of both the reasonableness of the investigation and the Respondent’s belief; where the wrongdoing is admitted then the threshold which the Respondent has to cross in relation to both of these matters is much lower than when there is a dispute as to whether events occurred (*Royal Society for the Protection of Birds v Croucher* [1984] IRLR 425).

25 87. However, the Tribunal is conscious that, whilst an admission may lower the threshold for reasonableness in relation to whether the misconduct occurred, there may still be an issue as to the intention of the Claimant and so the issues of reasonableness need to be considered in relation to any conclusion reached by the Respondent in relation to the Claimant’s intentions (*John Lewis plc v Coyne* [2001] IRLR 139).

88. On the face of it, the Respondent has conducted a full investigation into the allegations; they spoke to the Claimant on more than one occasion in order to get his version of events; they spoke to other relevant employees such as Stewart Letham and Lindsey Graham; they contacted Inverclyde Taxis in order to confirm the legitimacy of the taxi receipt.
89. The Claimant made a number of specific criticisms of the investigation which are worth addressing:-
- a. It was said that it was somehow inappropriate for Mr McCulloch to be the investigator when he was the person who had asked the Claimant to go on the trip to Austria. However, the Tribunal struggles to see how this meant that the investigation was not reasonable; there was no evidence that the outcome of the investigation would have been any different if he had not been involved.
  - b. It was submitted that Mr McCulloch did not try to find evidence that would undermine the allegations against the Claimant but there was no evidence as to what the Claimant suggested could have been found. At no point during the internal process or at the Tribunal hearing, was there any suggestion made by the Claimant or his representatives that there was some additional evidence which the Respondent could have obtained that would have affected their decision.
  - c. The Claimant is correct that the letter inviting him to the initial investigation meeting did not mention the issue of the taxi receipt and the Respondent could have been more transparent about this issue given that they had been looking into this. However, it is difficult to see how this rendered the investigation as unreasonable given that there was a subsequent investigation meeting at which the Claimant had the opportunity to comment further on this issue and was aware that it was an issue by the time of that meeting. Further, this has to be considered in the context that the Claimant admits that he

submitted the receipt and expenses claim for more money than he actually spent.

5 d. Some time was spent by the Claimant's representative cross-examining the Respondent's witnesses on differences between the handwritten and typed notes of the first investigatory meeting. The Tribunal agrees with Mr McGuire that this was not a matter specifically  
10 pled in the ET1 as rendering the dismissal unfair but the Tribunal is conscious that the Claimant drafted his own ET1 and should not be held to the same standards as a legally qualified person. The ET1 does broadly say that the procedure was unfair and no objections were taken to this line of cross-examination. In these circumstances, the Tribunal will address the issue.

15 One of the difficulties for the Claimant is that this issue was not raised in the same level of detail in the internal process as it was before the Tribunal. It is correct that he said at the appeal that there were discrepancies or inaccuracies in the minutes and this was explored but he only gave very minor examples which did not have any real bearing on the decision to dismiss.

20 The biggest difficulty for the Claimant is that the various alleged discrepancies between the two sets of notes do not materially impact on the fundamental facts of this case that he admits that he used the company card for personal use and submitted an expenses claim with a receipt for a sum that he had not paid. None of the alleged  
25 discrepancies which were raised in cross-examination would have made any difference to the facts on which the decisions by Mr Prow and Mr Hutchieson were based.

90. In the Tribunal's view, none of these criticisms, taken on their own or as a whole, are capable of rendering the investigation as unreasonable.

91. In all these circumstances, the Tribunal is satisfied that the investigation  
30 carried out by the Respondent was one which was reasonable in all the circumstances of the case.

**Did the respondent have a reasonable belief?**

92. In considering whether the Respondent held a reasonable belief that the Claimant had committed the misconduct in question, the Tribunal bore in mind that it was not a question of whether or not the Tribunal believed that he had done so.
93. The question for the Tribunal was whether there was objective evidence from which the Respondent could come to the view which they had.
94. In this case, the Claimant admits that he did the things for which he was dismissed; he used the credit card for personal use and he submitted an expenses claim with a receipt for a sum which he knew he had not paid.
95. In these circumstances, the Tribunal is of the view that there is no question that the Respondent had a reasonable belief in the guilt of the Claimant in relation to whether he did the things he was said to have done.
96. However, as noted above, this is not the end of the matter; the Claimant maintains that he had no intention to deliberately engage in misconduct and so there is the question of whether it was reasonable for the Respondent to have taken the view that the conduct in question was deliberate.
97. It was a feature of the Claimant's case that, in relation to personal use of the company credit card, he was not aware that this was not allowed because he had not read the relevant declarations when applying for the credit card in 2016.
98. However, from the Respondent's point of view, they have the application form with the box ticked by the Claimant confirming that he had read and understood the relevant terms and conditions. In those circumstances, it is reasonable for the Respondent to believe the Claimant did know for what he could and, more importantly, could not use the card.
99. More importantly, there can be no question that the Claimant knew that the expenses claim and receipt for his return taxi journey to the airport was for more than he had actually spent on this. In these circumstances, it must be

reasonable for the employer to have concluded that the Claimant knowingly submitted a false claim. Indeed, it is difficult to see how any other conclusion could have been reached.

100. In these circumstances, the Tribunal is satisfied that the Respondent had  
5 reasonable grounds to believe that the Claimant not only committed the misconduct in question but that he acted deliberately in doing so.

### **Was the dismissal procedurally fair?**

101. The Tribunal has already addressed the conduct of the investigation above  
10 and, for the reasons set out previously as to why the investigation was reasonable, we have concluded that there was no procedural unfairness in that element of the process.

102. Overall, the Respondent conducted what the Tribunal considers to be a fair  
15 procedure, giving the Claimant every opportunity to answer the allegations and there was nothing in what had happened which the Tribunal considered to be unfair.

103. It would be convenient at this point to address the submissions on behalf of  
the Claimant related to the *Ramphal* case, both in relation to the investigation and subsequent disciplinary process.

104. The Claimant has placed great reliance on the *Ramphal* case and the  
20 involvement of HR in the process. However, the Tribunal is of the view that the conduct of the Respondent's HR function in this case falls well short of what was being considered in *Ramphal*. The fact that Mr Curran carried out the leg work in the investigation process, that he and Ms Leedham asked some questions during certain meetings, that the investigation report was sent  
25 to someone for comment or that Lindsey Graham was copied into emails does not provide any evidential basis that HR have overstepped their boundaries and had an undue influence on the decision to dismiss.

105. For example, it was quite clear that Mr Curran's involvement came to an end  
30 at the conclusion of the investigation process and there is no evidence he had any influence on the decisions made by Mr Prow and Mr Hutchieson.



Similarly, the fact that Ms Leedham asked some questions at the appeal does not suggest that she then had any influence on Mr Hutchieson's decision.

106. There was also some reliance on emails which were sent after the Claimant's dismissal and the Tribunal struggles to see how these have any bearing on the procedure followed in making the decision to dismiss the Claimant. To the extent that it is said that the advice from Jane Moles was inaccurate, this is not sufficient for the Tribunal to draw any inference that any other advice which may or may not have been given by HR during the process was wrong.

**Was dismissal in the band of reasonable responses?**

107. The Tribunal reminds itself that it is not for it to decide if it would have dismissed the Claimant in such circumstances but whether dismissal was within the band of reasonable responses.

108. In circumstances where an employee is accused of dishonesty, even for a small amount of money, dismissal must be within the band of reasonable response where the employer has a genuine and reasonable belief in that dishonesty. The issue of trust and confidence goes to the heart of the employment relationship and so anything which damages that must be something for which an employer is entitled to dismiss.

109. The Tribunal notes, as did Mr Prow, that the Claimant had a long and clean service with the Respondent. However, the difficulty for the Claimant is that a single act of dishonesty is sufficient for an employer to dismiss.

110. In a similar vein, it was clear that the outcome of other disciplinary processes were considered by the Respondent where action short of dismissal was taken but those were only in relation to personal use of a company credit card and the Claimant's case had the addition element of the expenses claim. It was clear that this was a significant issue for the Respondent and there is no suggestion that other employees who had submitted fraudulent expenses claims were not dismissed.

111. The issue of the training and guidance given to the Claimant on the use of the Concur system and the Code of Conduct was put in cross-examination to the

Respondent's witnesses. It is correct to say that the Claimant was not given significant training on these matters but the Tribunal struggles to see how this would have made a difference:-

- 5 a. This was not a case where the Claimant had made errors in using Concur; the personal use of the card and the submission of the receipt had nothing to do with the Claimant's ability to use Concur.
- 10 b. The Claimant did have the opportunity to read the terms governing the use of the company card (and, indeed, ticked a box saying he had done so). The declaration in question was in relatively short and simple terms; anyone reading would have no doubt that personal use was not allowed. If the Claimant had not made the effort to read this then he has to take the responsibility for not familiarising himself with the terms of use.
- 15 c. In any event, it is very difficult, if not impossible, to see how the alleged lack of training and guidance had any effect on the issue of the receipt. The Claimant submitted this with his expenses claim for a sum he knew he had not paid and it would be obvious to anyone that they should not be claiming expenses for a sum they have not paid.

112. In these circumstances, the Tribunal is of the view that dismissal was  
20 within the band of reasonable responses open to the Respondent.

### **Conclusion**

113. In these circumstances, the Tribunal has determined that the Claimant's  
25 dismissal was not unfair; there being a potentially fair reason for dismissal which the respondent was entitled to rely on having come to a genuine and reasonable belief, after a reasonable investigation, as to the Claimant having committed the misconduct in question and having done so deliberately. Dismissal was clearly within the band of reasonable responses in all the circumstances of the case and there was no procedural unfairness.

114. The claim of unfair dismissal; is, therefore, dismissed.

5

**P O'Donnell  
Employment Judge**

**25 September 2019  
Date of Judgment**

10 **Date sent to parties**

**27 September 2019**