EMPLOYMENT TRIBUNALS

Claimant: **Mr C. Paling**

Respondent: **The Commissioners for Her Majesty's Revenue and Customs**

Heard at: **East London Hearing Centre**

On: **29 October 2020**

Before: **Employment Judge Massarella**

Representation
Claimant: Ms T. Hand (Counsel)
Respondent: Mr T. Brown (Counsel)

RESERVED JUDGMENT

This was a remote hearing, which was not objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

The judgment of the Tribunal is that: -

1. **the Claimant's claim of unauthorised deductions from wages is not well-founded, and is dismissed; and**

2. **the Claimant's claim of unfair dismissal is not well-founded, and is dismissed.**

REASONS

Procedural history

1. By a claim form presented on 1 July 2019, after an ACAS early conciliation period between 7 and 24 June 2019, the Claimant, Mr Chris Paling, claimed unfair dismissal and unauthorised deduction from wages.

2. The claim was originally assigned to the Newcastle region, but later transferred to East London.

The hearing

3. I was provided with a bundle in three volumes, the first two relating to liability, the third to remedy. The first bundle ran to over 1115 pages, the second to 484 pages, and the third to 83 pages. I observed at the beginning of the hearing that this was disproportionate both to the scope of the case, and to the time available.

4. The Claimant's solicitor had provided a reading list, which ran to some 245 pages. Again, given the time available, this was excessive. I asked Counsel to provide me with a short, agreed list, which they helpfully did, consisting of around fifty pages, which I read before hearing evidence.

5. I heard evidence from the Claimant; and, on behalf of the Respondent, from Ms Gillian Bates (Head of Digital Delivery Centres for HMRC).

Findings of fact

6. The Respondent is a non-ministerial department of government; it is the UK's tax and customs authority.

7. The Claimant commenced employment with the Respondent on 6 November 2017, joining from Export Finance. His period of continuous employment ran from 25 April 2016. His job title was IT Senior Delivery Manager. He was a Grade 7 civil servant, on a salary of £60,209. Grade 7 is the grade below Grade 6, which in turn is the highest grade below the Senior Civil Service. The Claimant's line manager was Ms Katie Brooks. As a Grade 7, he had line management responsibilities. He worked primarily from the Respondent's offices in Canary Wharf.

8. The Claimant's team built the online services used by taxpayers, for example when completing their tax returns online.

<u>The system for logging annual leave</u>

9. The Claimant was entitled to 25 days' annual leave, as well as public holidays and a privilege day. The Claimant's leave year began on 1 December.

10. The Respondent has a dedicated HR system, Enterprise Resource Planning ('ERP'), which was the primary system used for recording and approving leave. Each time annual leave was requested, the employee was required to enter the details into ERP. The system sent an alert to the employee's line manager, who could authorise it or not. If authorised, ERP then deducted the leave from the annual total. If leave was not recorded on ERP, the total was (self-evidently) incorrect.

11. Leave was also recorded in other systems, but in a more *ad hoc* fashion: team members used the shared Outlook calendar, which showed their whereabouts, including when they were on leave; there was a team leave sheet, in which some leave was recorded; records were also kept in the form of flexi-sheets, the main purpose of which was to keep track of flexi entitlement (although the

Claimant, as a Grade 7, was not entitled to flexi-time). In addition, there was the Clarity system, which was specific to the Claimant's department: this was used to record the hours worked against different IT projects; its purpose was to establish the cost of projects, and to monitor how staff were being used.

Relevant policies

12. As might be expected, the Civil Service Code emphasised the importance of honesty and integrity:

> 'We expect you to be honest in everything you do whilst working for us. This is particularly important given that the integrity of the Department depends on how honest and impartial our employees are seen to be.'

13. HMRC's disciplinary policy (HR23007) characterised the deliberate falsification of attendance records as potential gross misconduct.

14. HMRC's annual leave policy (HR33008) provided that employees were required to confirm annual leave via ERP; if the employee did not have online access, s/he was obliged to keep a record and update the system afterwards.

15. The policy on agreeing leave (HR33020) provided that the responsibility for calculating and managing leave was shared between employee and manager, and that leave had to be approved by the manager, before it could be taken.

16. The guidance Working Time Flexibility: Grade 6, 7 and Band T (HR35002) stated that employees could be asked to work more than their normal hours when the job demanded, and went on to state that s/he may be able to take time off in lieu ('TOIL') in recognition of this. However, any possible TOIL had to be agreed with the employee's line manager. The manager must agree: how much time off it was reasonable to take; and when it was convenient for it to be taken, allowing for business need and the needs of colleagues.

17. There was also a policy (HR33017) in relation to anticipating/borrowing annual leave against the following leave year. It required the express approval of the employee's line manager, and was subject to specific conditions, including that the employee had used up all their current years leave, and proposed to take the anticipated leave in the last month of their current leave year (in the Claimant's case, November).

TOIL

18. In an email exchange of 6 February 2018, there was a discussion within the team of taking time off in lieu. It was clear from Ms Brooks' contributions that she was unclear as to what the entitlement to TOIL might be; further that she was 'expecting the entire team to be efficient with their time and look at what adds value etc.' She expressed the view that 'we should explore overtime and ways of working instead'.

Ms Brooks' concerns

19. Between August and October 2018, Ms Brooks recorded in a file note concerns about the Claimant not properly notifying his team as to his whereabouts. On 30 October 2018, she recorded a discussion with him, in which she reminded him (among other things) that the Respondent must know

where he was during working hours; that he must not work from home without prior agreement; and that he must not record that he was working from home when that was not, in fact, the case.

20. Ms Brooks then recorded further concerns in entries in her file note for November 2018. She carried out an audit of the Claimant's annual leave and discovered anomalies in his annual leave records. On 21 November 2018, she asked the Claimant to provide his Clarity data.

21. Ms Brooks had an initial discussion with the Claimant about her concerns on 26 November 2018. She explained that it appeared that he had taken 40 days' leave that year, when he was only entitled to 25. The Claimant said that he was not aware that he had taken so much leave, and would check his calendar. He then said that his mother and grandmother had been in poor health, and that he had had to care for them. He did not suggest that the additional leave had been taken as TOIL.

22. Ms Brooks also asked the Claimant why he only recorded a working week of 35 hours on Clarity. He replied that he was only required to work 35 hours per week in his previous job.

23. Ms Brooks was not satisfied with the Claimant's explanation. She believed that he had taken 15 days' annual leave over and above his standard allowance. On 29 November 2018, she referred the matter to Internal Governance (IG) to conduct an investigation.

24. On 30 November 2018, the Claimant emailed Ms Brooks:

> 'I believe the forty days was overstated and I am doing some investigation to identify the correct number of days I will consider the following factors:
>
> TOIL – I had a conversation with Billy. I understand that TOIL works much the same way as flexi-leave.
>
> I actually worked over my contractual hours of thirty-seven hours/week in some instances. It was 'wrongly' recorded in Clarity because I was under the impression that G7s were not allowed to book any time off for working over their contractual hours.
>
> I am going over my old timesheets and Outlook entries to calculate the amount of days that should have been booked as TOIL leave.'

25. On 30 November 2018, Ms Brooks emailed the Claimant to say:

> 'TOIL is different to annual leave. TOIL is only agreed to be taken, in advance, around the needs of the business, e.g. when it is quiet. It is also not applied retrospectively.'

26. On 20 December 2018, Ms Brooks summarised her concerns in an email to Mr Chris Sim of the Fraud Investigation Service. Mr Sim thought there was sufficient evidence to give rise to concerns. A new disciplinary case was opened on 21 December 2018 by Civil Service HR.

The investigation

27. Ms Bates was appointed as the decision-maker, having agreed to replace another manager, who considered that he was too closely involved in the Claimant's line management chain. Under the Respondent's procedure, the decision-maker appoints the investigator; the investigator then reports back to the decision-maker, who decides whether there is a case to answer. If there is, s/he formulates the allegations, and invites the employee to a disciplinary hearing, which s/he conducts. Ms Bates informed the Claimant that she had appointed Ms Carley Cooke of Internal Governance (IG) as investigator.

Ms Cooke's report

28. The Claimant was provided with the relevant documents on 25 January 2019, and attended an interview with Ms Cooke on 5 February 2019, which was recorded and transcribed. Ms Cooke went through the anomalies with the Claimant in the course of the interview, point by point.

29. The Claimant agreed that it was his responsibility to keep up to date with HMRC guidance and policies. He accepted that he was aware of the requirement to record annual leave on ERP, but said that he was not familiar with the guidance on booking annual leave without access to ERP, and agreeing leave with his manager. He consistently accepted that he should have entered his leave on ERP, but blamed his poor record-keeping.

30. As well as days which the Claimant accepted he had taken as leave, but had failed to record on ERP, he advanced a number of other explanations as to why the ERP record was not correct, including: days which he booked as leave, but ended up working instead (without rectifying the record); days when he had extended his leave at the last minute, and did not have access to the system to record the leave; and days which he recorded as leave in one of the other records, but not on ERP.

31. He agreed that his contract, which he had received when he joined the Department, stated that he was contracted to work forty-two hours a week gross, which was thirty-seven hours net of the five hours paid meal breaks. The Claimant had only been recording thirty-five hour weeks; his explanation was that he did not know he needed to record his travel time in Clarity.

32. He stated that he believed that the excess annual leave over his entitlement could be accounted for as travelling time. He accepted that he was responsible for some, but not all of the discrepancies, and insisted that he did not deliberately falsify his attendance records to benefit himself. He did not believe that he owed the Department any hours back.

Ms Cooke's enquiries after the interview

33. After the interview, and at the Claimant's request, Ms Cooke sought information from Ms Brooks as to the process in her team for claiming TOIL. In an email dated 5 February 2019, Ms Brooks stated that she was not aware that the Claimant had accrued any TOIL, and that he had never asked her for permission to take TOIL. Ms Kayley Moran of IG forwarded that email (with attachments) to the Claimant on 8 February 2019. Both Ms Brooks' email of 5

February 2019, and the emails about TOIL from February 2018 (referred to above) were included in the appendices to Ms Cooke's report.

34. On 13 February 2019, the Claimant supplied IG with a spreadsheet, detailing his travelling time between 20 November 2017 and 28 November 2018. On 19 February 2019, IG advised the Claimant that, if he believed he was due TOIL, then he would need to discuss this with his manager, and provide evidence to support that belief.

35. On 4 March 2019, IG conducted a review of the Claimant's Outlook calendar, to verify the dates of travel, which he had provided. They discovered that the majority of calendar entries for the relevant dates (in 2017/2018) showed a modified date of 11 February 2019. Ms Cooke concluded that the Claimant had made amendments to the calendar after the investigatory interview.

Ms Cooke's conclusions

36. Ms Cooke completed her investigation report, which she sent to Ms Bates on 7 March 2019.

37. She concluded that the Claimant had failed properly to maintain accurate, mandatory records, detailing his leave, travel arrangements, and hours actually undertaken on those days he was out of the office; that he had taken extra leave, to which he was not entitled, and that he appeared to have retrospectively amended his online diary in an attempt to mislead the investigator.

Ms Bates's analysis

38. Ms Bates spent a weekend conducting her own analysis. She went through every entry in the ERP, Clarity and team records, producing a spreadsheet of her own, analysing the different sources of information. She concluded, as Ms Cooke had, that there were significant anomalies, and that there was a case to answer.

39. In the letter inviting the Claimant to the disciplinary meeting, she set out the charges, and warned him that, if proven, they could result in dismissal for gross misconduct; a further possible sanction was that he might be added to the Cabinet Office Internal Fraud database, which would lead to a five-year ban from further employment in the Civil Service. A copy of the internal governance report was attached to the letter.

The disciplinary hearing

40. The disciplinary hearing took place on 28 March 2019, and lasted around an hour and three quarters. The Claimant was accompanied by a work colleague, Mr Bob Murphy. Notes were taken by Ms Louise Trevitt.

41. In the course of the hearing, Ms Bates asked the Claimant if he had agreed his TOIL in advance with his manager. The notes record the following exchange:

> 'CP answered yes, further explaining that all leave was agreed with his manager in advance. GB asked if it included TOIL. CP explained that it may not have been crystal clear that it was TOIL rather than leave, which is supported by the evidence submitted, however CP confirmed that all

> leave was agreed in advance confirming that he never had any period of unauthorised absence'.

42. With regard to the copies of his diary, showing dates and locations of travel, Ms Bates asked the Claimant to explain why all of the entries had been modified on 11 February 2019, after his meeting with IG. The Claimant said that he had modified the diary to prepare notes, not to mislead; he had created the entries by reviewing bookings in retrospect.

43. In response to evidence from the Claimant that he was confused about the processes in relation to taking recording leave, Ms Bates asked him how he could know what his staff were recording was accurate, if he himself was confused. The Claimant replied that this was 'a good point'.

44. Ms Bates provided the Claimant with the matrix she had produced. She told him that it compared entries in ERP, Clarity, the diary and the team leave sheet. It showed that the total leave recorded in ERP was 26 days, in Clarity 32 days, in the team calendar 36 days, and in the Claimant's diary 39 days. The notes record the following:

> 'CP accepted that there was a discrepancy and requested that any excess leave taken in the last year be deducted from his current leave entitlement and anything in excess of that to be deducted from his pay.'

45. The Claimant, in turn, provided Ms Bates with a six-page document of his own, setting out his position. He then talked her through the document, which was supported by a number of evidence packs, the third of which included flexi sheets. The Claimant told Ms Bates that he had looked back at every week and included all the hours he had worked, in addition to his contracted hours. Ms Bates asked him when the flexi sheets had been generated; the Claimant replied that they had been generated since his meeting with IG on 5 February 2019.

46. The Claimant had calculated that the flexi sheets showed a TOIL entitlement of twelve days, which was exactly what he believed he was entitled to. Ms Bates concluded that he had 'retro-fitted' the flexi sheets, so that they tallied with his case. However, she noted that, for the week of 22 January 2018, the matrix which the Claimant had produced did not tally with the Clarity record, which had been created at the time. In her opinion, if they were to be treated as reliable, the two records should have aligned absolutely.

47. The Claimant drew Ms Bates' attention to a statement Ms Brooks had made in the course of the investigation that he did not travel regularly, only once or twice a month to Southend, and asserted that it was demonstrably false, given that he had produced evidence of travel to Newcastle and Birmingham. Moreover, an analysis conducted by IT as to when he was using his laptop (as an indicator of when he was working/not working) was inconsistent with emails he was able to produce which he had sent on days which had been identified as nonworking days.

48. The Claimant did not refer to anticipated leave in his discussion with Ms Bates.

Ms Bates' conclusions

49. Ms Bates recorded her conclusions in a document entitled 'Decision-managers deliberations'. That document went through a number of drafts, with revisions suggested by HR. I accept Ms Bates' evidence that HR did not influence her decision, they merely prompted her to clarify the conclusions, which were her own. To the extent that she expanded on those conclusions in her witness statement, I am satisfied that it reflected her thinking at the time, only in greater detail.

50. Ms Bates' starting point was that, at the meeting on 5 February 2019 and 28 March 2019, the Claimant had accepted that he had not kept accurate records on ERP, but maintained that there was no attempt to mislead. She recorded that, on his own case, he had taken 13.5 days' annual leave over his allowance. She noted that the Claimant said he had failed to record travel time throughout the period and, after recalculation, believed that he was owed 12 days' time off lieu.

51. Ms Bates gave the Claimant the benefit of the doubt as to three occasions during the relevant period (1 December 2017 to 30 November 2018), in relation to which the Claimant had said that he had extended an agreed leave period, but had forgotten to update ERP. Even setting those aside, she concluded that there were occasions, which could not fall into that category, when the Claimant had taken leave, but not booked it in ERP. They occurred throughout the period, and followed and preceded instances of leave, which had been correctly recorded by the Claimant. She considered that this demonstrated that the Claimant knew that he had to enter leave into ERP, and knew how to do so. He did keep his Clarity records up-to-date, and could have cross-referred between them to ensure that his ERP records were accurate. She was not convinced by the Claimant's contention that the omissions could be accounted for by lack of training; he had accepted that he managed staff, and was responsible for checking their records.

52. Ms Bates had regard to the fact that the Claimant had produced twelve months of flexi records, showing start times, lunch break and end times, which he accepted he had put together retrospectively, after the IG interview. Ms Bates noted that they matched what he had told IG, but did not match the contemporaneous Clarity records. She found it implausible that he would have known what he was doing some in the previous fifty weeks, and concluded that he had tried to reconstruct the position from memory, and make it fit his case. In her view, this made things worse for the Claimant, and further called into question his honesty and integrity.

53. Ms Bates also had regard to the fact that the Claimant had amended his diary entries after the IG interview. She was not convinced by his explanation for this, and concluded that it was a further attempt to align contemporaneous records, so as retrospectively to match his explanation.

54. As for the Claimant's argument that the excess could be a accounted for as TOIL, Ms Bates concluded that Ms Brooks had not agreed any TOIL. In reaching that conclusion, she took into account the email from Ms Brooks to the Claimant of 30 November 2018 (see above at para 25), and the email from Ms Brooks to Ms Cooke of 5 February 2019 (above at para 33). Ms Bates did

not accept that the Claimant had both worked the extra hours, which might have entitled him to take TOIL, and secured the necessary approval from his line manager for TOIL. On the contrary, Ms Bates concluded that the Claimant was being dishonest in this respect, and using TOIL as an excuse after the fact.

55. Nonetheless, Ms Bates calculated that, had he been entitled to TOIL, the hours owed to him would have been no more than 29.5 hours (the equivalent of four days). I accept her evidence that, in doing so, she was not accepting that the Claimant had such an entitlement, rather she was making a calculation, for the sake of argument, as to his best case.

56. She concluded that the anomalies were 'not a lack of system knowledge or confusion regarding the ERP system, but knowingly omitting to keep accurate ERP records'.

The dismissal

57. Ms Bates spent a further weekend going through the evidence again, and satisfied herself that she had come to a reasonable conclusion. She concluded that the Claimant had deliberately taken more annual leave then he was entitled to, that he had acted dishonestly, and that dismissal was an appropriate sanction in the circumstances.

58. Ms Bates decided that the Claimant should be dismissed without notice, and recorded that decision in a letter dated 3 April 2019, which informed him of his right to appeal. Mr Paul Smyth conveyed the decision to the Claimant, because Ms Bates and the Claimant were not on the same site. The Claimant's dismissal took effect on 3 April 2019. He was also added to the Internal Fraud Hub.

The Claimant's resignation

59. In the meantime, the Claimant had applied for, and been appointed to, a different job within the Civil Service, at a higher grade. He accepts that he did this to avoid dismissal, particularly in view of the potential for his name to be included in the fraud database.

60. He submitted his resignation 7 March 2019, with notice, giving a termination date of 6 April 2019.

61. Because the Claimant had been registered on the fraud database, his new job offer was withdrawn before he could begin work.

The appeal

62. The Claimant appealed against his dismissal to Mr Shaun Weller (one of the Respondent's deputy directors). For the first time, at this appeal stage, the Claimant contended that he was entitled to take five days' anticipated leave, taken against the following leave year.

63. On 30 April 2019 Mr Weller had a meeting with the Claimant, who made a number of points, which Mr Weller then checked with Ms Brooks by email dated 1 May 2019. She provided her replies the same day.

63.1. The Claimant said that he took five days annual leave in November 2018, which was anticipated against the following years entitlement. Mr Weller asked Ms Brooks if he had asked her approval to do this, in line with HR guidance 33017. She replied that he had not.

63.2. Mr Weller asked Ms Brooks whether the Claimant ever asked her for approval to take TOIL. She replied that he had not, and that he only ever asked her to approve annual leave.

63.3. The Claimant told Mr Weller that lack of training in how to record and manage TOIL was a factor which led to ERP being inaccurate. He asked Ms Brooks if she had given him guidance in this area. She replied that, other than pointing the Claimant to guidance on the HMRC intranet, she had not done so herself, but had encouraged him to seek guidance from others.

63.4. Mr Weller also asked Ms Brooks whether the Claimant had formal line management responsibility for employees. She replied that, at different times, he had had responsibility for employees, whose annual leave and flexi he approved, and to whom he gave guidance about leave.

64. On 2 May 2019, the Claimant wrote to Mr Weller in the following terms:

> 'Please note that I have not and I do not accept reinstatement or re-engagement as a remedy and any attempt to reinstate or re-engagement [*sic*] will have no legal effect. My sole purpose of engaging in the appeal process, as you will be aware in view of the fact that I handed my notice in the for dismissal, was to clear my good name.'

65. By letter dated 15 May 2019, Mr Weller dismissed the Claimant's appeal.

The law to be applied

66. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

67. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it— ...**
>
> **(b) relates to the conduct of the employee ... ...**
>
> **(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

68. In *Orr v Milton Keynes Council* [2011] ICR 704 at [78], Aikens LJ summarised the correct approach to the application of s.98 in misconduct cases:

> **'(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.**
>
> **(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.**
>
> **(3) Once the employer has established before an employment Tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the Tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).**
>
> **(4) In applying that subsection, the employment Tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief."**
>
> **If the answer to each of those questions is 'yes', the employment Tribunal must then decide on the reasonableness of the response of the employer.**
>
> **(5) In doing the exercise set out at (4), the employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.**
>
> **(6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.**
>
> **(7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.**
>
> **(8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.'**

69. At (4) above, Aikens LJ was summarising the well-known test in *British Homes Stores Ltd v Burchell* [1980] ICR 303 at p.304.

70. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) cited paragraphs (4) to (8) from that extract in Aikens LJ's judgment in *Orr* and added:

> **'As that extract makes clear, the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.**

71. It is impermissible for a Tribunal to substitute its own findings of fact for those of the decision-maker (*London Ambulance Service NHS Trust v Small* [2009] IRLR 563 at [40-43]). Nor is it for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did.

72. Even if the dismissal decision falls within the band of reasonable responses, it may still be unfair, if the Respondent has not followed a fair procedure. The Tribunal must evaluate the significance of the procedural failing, because 'it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process' (*Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at [26]).

73. When considering whether the employer acted reasonably, the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at [48]). This need for a holistic approach has been reiterated in later cases, notably *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW and *NHS 24 v Pillar* UKEATS/005/16/JW.

74. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

<u>Contribution</u>

75. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

Submissions

76. Both Counsel made oral submissions.

77. For the Claimant, Ms Hand accepted that it was not in dispute that the Claimant was entitled to 25 days annual leave, but had taken 38.5. It was the Claimant's position that, of the 13.5 additional days, 12 days were TOIL, to which he was properly entitled. That left only 1.5 days unaccounted for. If that was right, Ms Hand submitted, the case for dismissal would have fallen away; it would have been outside the band of reasonable responses to dismiss for 1.5 days' excessive leave, especially if consideration had been given to treating those days as anticipated leave against the following leave year.

78. Ms Hand submitted that there was a serious procedural failure, in that Ms Bates did not speak directly to Ms Brooks, to ask her whether the leave was authorised. For that reason, the investigation was incomplete. She acknowledged that questions had been put to Ms Brooks in the email from HR of February 2018, but submitted that the answers she had given were unsatisfactory. She acknowledged that further questions had been put to Ms Brooks in May 2019, but they post-dated the Claimant's appeal meeting, and he was not given the opportunity to challenge what she said.

79. Ms Hand further submitted that there was joint responsibility between Ms Brooks and the Claimant for recording leave, and that there was clear evidence that the Claimant was confused as to how leave and/or TOIL should be recorded.

80. For the Respondent, Mr Brown drew my attention to the shifting explanations, which the Claimant had given throughout the process, which he submitted undermined his credibility on these issues. In support of that submission, he relied on a table which he had produced: 'Respondent's summary analysis of leave records', which identified the leave taken by the Claimant, where it was recorded (or not, as the case may be), and the explanations provided by the Claimant. There was no challenge to that summary by Ms Hand.

81. Mr Brown suggested that it was perverse of the Claimant to expect Ms Brooks to have a better understanding of how much annual leave he had taken then he had. His claims as to confusion as to the entitlement, and lack of training as to the process, were unpersuasive, both at the time and in his evidence to the Tribunal.

82. Mr Brown submitted that the investigation process was thorough, that Ms Bates was fair and precise in her approach, and that she gave the Claimant considerable benefit of the doubt, especially in relation to emails relied on as proof that he was working on particular dates. He submitted that Ms Bates was reasonably entitled to conclude that he had taken more time than he was entitled to, and had done so knowingly and dishonestly.

83. In the alternative, he submitted that, if the Tribunal finds that the dismissal was unfair, the Claimant contributed to his dismissal by his own blameworthy conduct, and compensation should be reduced by 100%.

Conclusions: unfair dismissal

<u>What was the sole or principal reason for the dismissal? Was it a permissible reason?</u>

84. I am satisfied that the sole reason for the Claimant's dismissal was his conduct in relation to annual leave.

Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?

85. The investigation meeting conducted by Ms Cooke was thorough: the Claimant was given every opportunity to provide an explanation for the anomalies in the recording of annual leave; Ms Cooke made further enquiries after the interview; and the report she prepared, recommending disciplinary action, was comprehensive.

86. Ms Bates not only reviewed the report, but also cross-checked it against her own analysis of the data, and agreed that the matter should proceed to a disciplinary hearing. She too conducted a lengthy interview with the Claimant, in the course of which she listened carefully to his explanations, and probed them conscientiously.

87. In particular, she took into account the material provided by the Claimant, including emails, which suggested that he was working on days recorded as leave. I accept Mr Brown's submission that, in doing so, she gave the benefit of the doubt to the Claimant. As Ms Bates observed in cross-examination, the emails were evidence that the Claimant did some work on those days, not necessarily that he did a full day's work. Nonetheless Ms Bates treated eight days which had been investigated by IG, as working days, and discounted them. Had she not done so, the number of days' leave taken would have been 47.5.

88. As for Ms Hand's submission that there was a *lacuna* in the investigation, in that Ms Brooks was not interviewed by Ms Bates, it was the Claimant's case that 12 of the excess leave days could be accounted for as TOIL. Ms Bates had before her the email exchange between Ms Brooks and the Claimant of 30 November 2018, in which the Claimant wrote that he had not thought he was entitled to book TOIL, and Ms Brooks pointed out that it could not be agreed retrospectively. The Claimant had suggested to Ms Cooke that she follow up the TOIL point with Ms Brooks, which she had done. In her email of 5 February 2019, Ms Brooks confirmed that she was not aware of the Claimant's accruing any TOIL, and that he had never asked her to take it. Both of those emails were included in the disciplinary pack. Further, at his meeting with Ms Bates, the Claimant did not himself assert that Ms Brooks had authorised TOIL; rather, he volunteered that the position 'may not have been crystal clear'. Although another employer might have decided to interview Ms Brooks, in my judgment, the decision not to do so did not fall outside the band of reasonable responses: Ms Bates was entitled to conclude that the documentary material available to her was sufficient to confirm that Ms Bates had not authorised TOIL.

89. Ms Hand also relies on the fact that Mr Weller made further enquiries of Ms Brooks at the appeal stage, without the results being shown to the Claimant. In my judgment, Ms Brooks' replies merely confirmed the position as previously understood by Ms Bates, as evidenced in contemporaneous emails, which was that the Claimant did not consider at the time that he was entitled to TOIL, and so cannot have sought, or secured, Ms Brooks' permission to take it. I am satisfied that, looking at the investigation as a whole, its reasonableness was not vitiated by the fact that the Claimant was not given an opportunity to comment on it Ms Brooks' email.

Did the Respondent believe in the guilt of the Claimant of that misconduct at that time?

90. Focusing on Ms Bates' state of mind, I have no doubt that she believed that the Claimant committed the misconduct alleged.

Did the Respondent have reasonable grounds for that belief?

91. The central fact was not in dispute: the Claimant had taken more leave than he was entitled to take. His explanation was that this was mere poor record-keeping. I have concluded that Ms Bates had reasonable grounds to reject that explanation. She had evidence that the Claimant understood the importance of ERP, and knew how to use it: many dates had been entered correctly, which she believed indicated familiarity with the system; and she knew that he was responsible for managing the annual leave of those reporting to him. She considered that the number of omissions was so significant that poor record-keeping was not a sufficient explanation.

92. She was entitled to disbelieve the Claimant's assertions in relation to TOIL, for the reasons I have already given, including the emails from the Claimant and Ms Brooks, and the Claimant's own equivocation on the issue.

93. In my judgment, she acted reasonably by taking into account the fact that the Claimant's position had shifted over time; further, that he had admitted amending contemporaneous documents after the event, and creating documents retrospectively, which aligned with his case.

94. I remind myself that, in deciding whether a dismissal was fair, it is not for me to substitute my own assessment of the employee's credibility for that of the decision-maker. I am satisfied that, in assessing the Claimant's credibility as she did, Ms Bates acted reasonably.

95. I am satisfied that it was reasonably open to Ms Bates, on the evidence available to her, in the light of the Claimant's conduct in the course of the investigation, and in view of the inadequacy of his explanations, to conclude that he had deliberately, and dishonestly, taken excessive annual leave.

By the objective standards of the hypothetical reasonable employer, did the decision to dismiss the Claimant fall within the band of reasonable responses which a reasonable employer might have adopted in response to the misconduct?

96. Having reached her conclusion that the Claimant had deliberately taken more annual leave than he was entitled to take, I am satisfied the sanction of summary dismissal fell within the band of reasonable responses, having regard to the seriousness of the offence, and in the light of the Respondent's policies, referred to above (at para 12 onwards).

Conclusions: contribution

97. If I am wrong in my conclusion that the dismissal was fair, I heard evidence and submissions on the question of contribution, and I record my findings and conclusions on that issue in the following paragraphs.

98. I am satisfied, on the evidence before me, that the Claimant understood that he was required to record annual leave in the ERP system (he said as much at the interview with Ms Cooke), and that he understood the process for doing

so. It is a matter of record that he took annual leave without recording it in ERP: by way of example, in January 2018, he took two days' leave, but only recorded one; in March 2018, he took the 15th and 16th as leave, without logging them in ERP. In total, there were 13.5 days' leave which the Claimant did not record in ERP. Annual leave is a highly-valued benefit for all employees. I find it implausible that, as an experienced and senior employee, the Claimant could have been unaware of the fact that he was taking more than half his leave entitlement again, especially as he had responsibility for monitoring other employees' compliance.

99. I have concluded that the Claimant's reliance on TOIL, as an explanation for the excess leave, was one which he settled on later in the process, absent any other explanation. There was no suggestion by him, when Ms Brooks first raised these issues with him on 26 November 2018, that it could be accounted for by reference to TOIL. He first mentioned it in his email to Ms Brooks of 30 November 2018, in which he wrote that he was 'under the impression that G7s were *not allowed to book any time off for working over their contractual hours*'. In the same email, he stated that he was 'going over my old timesheets and Outlook entries to calculate the amount of days that *should have been booked* as TOIL leave' [*emphasis added*]. By saying that the days 'should have been' booked as TOIL, he was acknowledging that, as a matter of fact, they were not.

100. Further, there was no suggestion in this email to Ms Brooks that she had agreed that he could take TOIL; that would have been incompatible with his stated belief that he was not entitled to it. Rather, he was seeking retrospectively to ascribe the excess to TOIL. On the basis of the Claimant's email alone, I reject any suggestion that Ms Brooks had agreed at the time that he could take TOIL. If corroboration were needed (which I do not think it is), there is Ms Brooks' email of 5 February 2019.

101. As for anticipated leave, I find, on the balance of probabilities, that the Claimant neither sought nor secured Ms Brooks' permission to take five days against the following year. Under the relevant policy, the Claimant could only take anticipated leave in the last month of his leave year, i.e. November 2018. The Claimant said in cross-examination that Ms Brooks 'accepted verbally' that he could take anticipated leave in November 2018. It found it inconceivable that she would have done so, at the very time when her concerns about the Claimant's management of his attendance at work, and his recording of annual leave, were at their most acute. Her email of 1 May 2019 confirmed that she did not.

102. I reject the Claimant's argument that Ms Brooks was to blame for the fact that he had exceeded his annual leave entitlement. While it is right that the responsibility for managing leave was a shared one between employee and line manager, there was a clear requirement that leave be authorised before it was taken. The Claimant said it was authorised as TOIL; I have rejected that contention. That Ms Brooks took her responsibility seriously is evidenced by the fact that she identified the fact that the Claimant had exceeded his entitlement, and sought to address the issue with him informally.

103. Finally, I took into account the table provided by Mr Brown, charting the evolution of the Claimant's explanations for taking excessive leave. I accept

his submission that the shifting nature of those explanations undermined the Claimant's credibility. His initial position was that he did not know how much leave had been taken, and did not think he was entitled to TOIL; there was no mention of anticipated leave. His final position - that a combination of TOIL and anticipated leave provided an almost complete explanation for the anomalies - was so distant from that starting-point that I could not accept it. His credibility was further undermined by the fact that he had created/amended documents after the event, in an attempt to match his case.

104. On the balance of probabilities, I find that the Claimant dishonestly took more annual leave than he was entitled to, and that this amounted to gross misconduct by him. If I am wrong in my conclusion that the dismissal was fair, I conclude that the Claimant contributed to the dismissal by his own blameworthy conduct, which was so serious that it would have justified a 100% reduction of the basic and compensatory awards.

105. In reaching these conclusions, I had regard to the respective credibility of the witnesses from whom I heard evidence. I considered that Ms Bates was a careful and conscientious witness. By contrast, I found the Claimant to be an unreliable witness. I record two instances, by way of illustration, when I concluded that he was being evasive or untruthful.

    105.1. The Claimant refused to accept in cross-examination that ERP was the official record of leave. He replied, variously, that he 'did not know the definition of official', that he 'never received training as to what was official' and that he was 'not saying if other systems were official or not'. In answer to the question, whether he understood as a senior manager that there would need to be a single, authoritative record of leave, he replied No. I am satisfied that he knew that ERP was the official record of leave; his answers were evasive.

    105.2. With regard to the issue of anticipated leave, in his witness statement (at para 39(c)), the Claimant's stated that 'since my manager knew or ought to have known how much time I had taken and always knew when I was taking time off, her permission was either given implicitly or explicitly'. That careful formulation plainly left open the possibility that Ms Brooks had not given the Claimant express permission, and that consent might need to be implied. However, for the first time in oral evidence, he asserted that she had given express permission, before he took leave on 13 November 2018. If that were so, there was no good reason not to say so in the statement. I concluded that he had not done so, because it was not true, yet he was prepared to assert it in oral evidence.

Conclusions: unauthorised deduction from wages

106. The Claimant's pleaded case was that the Respondent unlawfully deducted £346.50 from his final payslip, and that it failed to pay him for eight days of accrued but untaken holiday in the period from 1 December 2018 to 3 April 2019.

107. Ms Hand made only a very brief submission in relation to this claim, submitting that this claim 'flowed from' the Claimant's case in relation to unfair dismissal. In his witness statement, the Claimant explained the claim as follows:

> 'The Respondent unlawfully deducted £346.50 from the Claimant's final payslip. The Respondent also failed to pay me for 8 days of accrued but untaken holiday for the period from 1 December 2018 and 3 April 2019. The £346.50 deduction is because the Respondent wrongly calculated that I owed eleven days of leave and did not take into account the eight days annual leave that I was entitled to.'

108. Mr Brown submitted that, in relation to 2018/19 leave year (1 December 2018 to 30 November 2019), which was the relevant leave year at the time of dismissal, 8.4 days of the leave year had elapsed by 3 April 2019. The Claimant had taken 13.5 days' excess leave in the previous year. The Respondent, taking the Claimant's case at its highest, then gave him credit for four days TOIL, which left a 9.5-day excess. Offsetting that against the 8.4 days accrued leave, it then deducted a single day's pay at the point of dismissal.

109. I accept those submissions. The Respondent's position was not that the Claimant had proved an entitlement to 4 days' TOIL, merely that, taking his case at its highest, it decided to discount four days in the Claimant's favour. In my judgment, it was not obliged to do so. However, even after it had been applied, there had been an overpayment of wages to the Claimant of one day. Consequently, the deduction was lawful, and the claim is dismissed.

Employment Judge Massarella
Date: 25 January 2021