EMPLOYMENT TRIBUNALS

Claimant:	Mr P Abreu
Respondent:	New Century Foods
Heard at:	Leeds ET **On**: 16 February 2021
Before:	Employment Judge M Rawlinson (sitting alone)

Representation

Claimant	Ms. C Urquhart (Counsel)
Respondent	Mr Jeremy Clarke (HR Manager, New Century Foods)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. A 50% reduction in the compensatory award for unfair dismissal will be made under the principles in **Polkey v A E Dayton Services Limited 1988 ICR 142**.

3. The respondent unreasonably failed to comply with the **ACAS Code of Practice** on Disciplinary and Grievance Procedures. The claimant's compensatory award will then be uplifted by 15%.

4. The claimant contributed to his dismissal to the extent of 50%, such reduction then to be applied to the basic and compensatory award for unfair dismissal.

5. The Tribunal will decide the remedy for unfair dismissal at a further hearing to be listed in due course.

REASONS

Introduction

1. The claimant, Mr Paulo Abreu, was employed by the respondent New Century Foods from October 2013 until his dismissal without notice on 31 July 2020. At the time of his dismissal and the events that led up to it he was employed as a Hygiene Supervisor. He had previously been promoted from his initial role as a cleaner to Hygiene Team Leader in October 2014, before being promoted again to Hygiene Supervisor in January 2015.

2. The claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996.

3. The respondent contests the claim. It says that the claimant was fairly dismissed for misconduct, in fact gross misconduct.

4. This dismissal related to a telephone call that took place on 9 July 2020, during which the claimant (in the respondent's view) deliberately misled the Factory Manager, Colin Steele, regarding his whereabouts during the COVID-19 pandemic. The respondent contends that this apparent untruth, and indeed what they regarded as a wider deception regarding the matter in terms of the claimant's actions prior to that call, was inconsistent with the

relationship of trust and confidence required between the company and its employee. This, they assert, entitled them to summarily dismiss the claimant for gross misconduct.

5. The claimant Mr Abreu was represented by Ms. Urquhart, counsel, and gave sworn evidence himself. The respondent was represented by Mr Jeremy Clarke, HR Manager, who called sworn evidence from Mr Colin Steele, Factory Manager, and from John Walker, Managing Director. Mr Clarke also gave sworn evidence himself in his capacity as HR Manager at the material time.

6. Although the respondent also produced further witness statements (from Ana Periera, Sarunas Milicius, and Tiago Figuieredo) these witnesses did not attend to give live evidence. No explanation was given in that regard. It follows that they were not cross-examined and I therefore place very little weight at all on any of those statements. In any event, they do not assist me at all in resolving the central issue in this case as to whether the claimant was unfairly dismissed.

7. As well as the relevant witness statements furnished on behalf on the above witnesses, I also considered various documents from an agreed and indexed bundle which ran to some 106 pages.

Preliminary Matters

8. At the start of the hearing, before I heard any evidence, an issue arose regarding whether any evidence could or should be received from Mr John Walker on behalf of the respondent. Mr Walker heard the claimant's appeal in relation to his dismissal. Despite there being no witness statement from Mr Walker, the respondent made an application that he be permitted to give evidence at the hearing.

9. Ms Urquhart, counsel on behalf of the claimant, initially objected to the application given its lateness and various other associated matters, indicating effectively that the claimant would be prejudiced if the application were granted.

10. Having heard the claimant's submissions upon the point, I adjourned for a brief period in order to give Mr Clarke on behalf of the respondent time to consider and to formulate a response to the submissions that had been made by the claimant on the issue.

11. In the event, during that brief adjournment, a very brief, unsigned witness statement was prepared on behalf of Mr Walker and was served upon the Tribunal and indeed the claimant. Following receipt of that, Ms Urquhart confirmed that there was now no objection on behalf of claimant to evidence being received from Mr Walker. It was therefore not disputed by the parties that given Mr Walker had dealt with the claimant's appeal against the original

sanction of summary dismissal that he could, potentially at least, give both relevant and admissible evidence.

12. In light of the above matters I therefore decided that it was both in the interests of justice and in accordance with the overriding objective that his witness statement and his evidence be admitted for consideration.

Issues for the Tribunal to Decide

13. Having dealt with that preliminary matter, I agreed with the parties the issues for me to decide, having provided them with a written draft of the same in advance and having given them some time to consider it.

14. Although the **Polkey**, ACAS Code and contributory conduct issues concerned remedy and will only arise if the claimant's complaint of unfair dismissal succeeded, I agreed with the parties that I would consider them at this stage and invited them to deal with them in evidence and in submissions.

15. The agreed list of issues is effectively reproduced by way of the sub-headings in bold and questions posed from paragraph 52 onwards of this judgment.

Facts

14. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. References to page numbers are to the agreed Bundle of Documents.

15. The claimant Mr Abreu, who is a Portuguese national (the relevance of which will become clear in due course) was employed by the respondent for almost 7 years from October 2013 until his dismissal on 31 July 2020. At the time of his dismissal he was employed in a senior position as a Hygiene Supervisor, responsible for various areas of the business and ensuring they were kept clean. The respondent was and is a food company with factory premises and employs around 100 employees. Their Human Resources Department effectively consisted of Mr Clarke in his role as HR Manager. The claimant when employed was a hard-working, well-regarded and competent member of staff. He had an exemplary disciplinary record which sat alongside his seven years' service.

16. In the summer of 2020 the claimant, was experiencing some legal difficulties in relation to a property he still owned in Portugal. It is not disputed that there was a conversation regarding this issue between the claimant and the Factory Manager, Colin Steele, on or around 29 June 2020. Whilst no firm plans for the claimant to travel to Portugal were discussed during the conversation that

took place on that date, it seems to be agreed between the parties that the possibility of that arising in the future was discussed.

17. The company policy for leave and holiday at that time was that no holiday should be booked until leave had first been granted. The process was that person seeking leave would be required to fill out a handwritten form which would then be approved if the request was acceptable. Examples of that form as completed by the claimant on various occasions appear at pages 80-84 inclusive. It was accepted by both parties that ordinarily, though not exclusively, Mr Colin Steele, the Factory Manager, would be the person responsible for approving or declining requests for leave.

18. On Wednesday 1 July 2020 the claimant received a communication from his lawyer in Portugal that there had been developments with respect to the Portuguese property situation. As a result the upshot was that, as at that stage at least, the claimant would not have to attend Portugal personally in order to resolve the situation. Following this, the claimant decided and agreed to meet his lawyer in Spain to allow him to sign off the relevant paperwork. The matter with his house appearing to have been resolved, he took the decision to fly to Spain on 6th July 2020. He intended to fly to Spain amongst other reasons to specifically allow him to meet with his lawyer and to sign the relevant paperwork.

19. On Friday 3 July 2020, due to the ongoing COVID -19 pandemic, Portugal was added to the list of countries that required visitors returning to the UK from there to self isolate for a period of 14 days.

20. On Monday 6 July whilst at work the claimant completed a holiday form which is reproduced in the bundle at page 87. He requested leave for a period of three days from Wednesday 8 July until Friday 10 July inclusive. In the section headed name, he wrote his 'full' Portuguese name: PAULO RICARDO SEGURA GOMES DE ABREU. He signed it with his normal signature. Despite their previous conversation, there was no discussion regarding the matter between the claimant and the Factory Manager, Colin Steele on that day.

21. At some point on Monday 6 July 2020, and after completion of that form, there was a further relevant conversation that took place this time between the claimant and the HR Manager, Jeremy Clarke. This conversation concerned the application for holiday that the claimant had made and the claimant asking whether it had yet been approved. Again, it also concerned the claimant's issues in Portugal regarding his property and the possibility of him travelling there to resolve them. At some point during that conversation, and following a telephone conversation that the claimant had that was conducted in Portuguese, the claimant told Jeremy Clarke that the issue was *"sorted".*

22. The claimant's application for leave was ultimately approved by a member of staff called Sarunas, a supervisor, at some point on 6 July 2020. Again, it is

not disputed that Factory Manager, Colin Steele, still had no knowledge at this point that the claimant was planning on taking leave later that week.

23. On the evening of 6 July 2020 the claimant booked a return flight from Manchester to Seville in Spain, departing on the morning of Wednesday 8 July and returning on the afternoon of Sunday 12 July 2020.

24. It was not disputed or challenged in evidence that the claimant was also present in work on Tuesday 7 July 2020. This was also confirmed by him in his disciplinary investigation meeting [see pages 93 and 94].

25. The claimant duly travelled to Spain on the morning of Wednesday, 8 July 2020 as he had planned. After he arrived in Spain the claimant subsequently crossed the border by car and travelled to Portugal. He travelled to Portugal on Wednesday 8 July 2020 and remained there until Friday 10 July 2020 as confirmed by a document submitted by the claimant to UK Immigration (see page 35). At what point the claimant decided to travel to Portugal is a highly relevant and live issue in this case. It is self-evident, and both parties agree, that I should make specific findings of fact in respect of it.

26. On 8 July 2020 it was not disputed that Colin Steele received a telephone call from the employee named Sarunas asking if he knew the whereabouts of the claimant. This was notwithstanding the fact that it was Sarunas who had, on the face of matters, authorised the claimant's leave. It was also not disputed that a number of people called Paulo, and indeed Paulo Gomes, worked for the company at the material time.

27. Whilst there seems to be is a dispute between the parties regarding whether the supervisor Sarunas knew or did not know the claimant was going away on leave, what is not disputed is that Mr Steele certainly did not know until that telephone call on 8 July 2020. Further enquiries led Mr Steele to then discover that the claimant had spoken to Jeremy Clarke previously on 6 July about both the Portuguese property issue and his proposed leave from 8 July onwards. From this point onwards Mr Steele suspected that the claimant was in Portugal.

28. On 9 July at around 11am the claimant telephoned Colin Steele. The call lasted something in the order of 2 minutes. As before, what was said by the claimant in that telephone call is a highly relevant and a live issue in this case. It should be noted that on either parties' version, within that call the claimant very quickly admitted at some stage that he was indeed in Portugal rather than Spain.

29. Following this call there were also a series of text messages exchanged shortly thereafter between the claimant and Colin Steele (see pages 38 – 40 inclusive). The claimant asserted within those messages that following his return to the UK, if he tested negative for COVID, he could return to work. It was pointed out to him by Mr Steele that as he had been to Portugal he would

have to self isolate for 14 days upon his return. The claimant indicated that he would indeed do this and indeed there is no suggestion that upon his return that he did anything other than fully comply with the relevant isolation guidelines.

30. On 26 July 2020, the last day of the claimant's isolation period, the claimant was contacted by Jeremy Clarke by telephone. He was invited to attend an investigation meeting in respect of his absence from work to be held the following day, 27 July 2020. The claimant duly attended that investigation meeting on that date.

31. Notwithstanding the fact that the primary basis for that meeting was a misconduct allegation arising from a disputed telephone call between the claimant and Colin Steele on 9 July 2020, Colin Steele himself conducted that investigation meeting.

32. Jeremy Clarke, HR Manager, was also present at that meeting, seemingly in the role of a note taker. This was also notwithstanding the fact that he also had potentially relevant previous interactions and conversations with the claimant regarding the Portuguese property issue and the issue of the authorisation his leave generally on 6 July 2020. In the event, Mr Clarke also in fact contributed to the meeting and asked a number of questions of the claimant. The minutes of that meeting are produced at pages 90 to 95 of the agreed hearing bundle.

33. At one point, when the claimant was disputing the contents of the telephone call of 9 July 2020 between himself and Mr Steele (see page 92), Mr Steele stated:

"OK, ok… Like I said I know what I heard. I know what was said so…"

34. Following the investigation meeting the claimant received a letter dated 28 July 2020 (see page 42 of the bundle) inviting him to a disciplinary hearing. The letter advised the claimant he had:

A) Allegedly placing the entire factory and its employees at risk and in danger, whilst allegedly trying to avoid strict isolation rules from the Government with regards to the global pandemic when entering and returning from a restricted country
B) Allegedly denying your whereabouts directly to the factory manager

The respondent provided the claimant with their evidence, including Colin Steele's notes of the disputed telephone call of 9 July 2020 (see page 37).

35. On 30 July 2020 the claimant attended his disciplinary hearing. The minutes from this meeting can be found at pages 96 -106 of the bundle. As before, the meeting was conducted by Colin Steele, with Jeremy Clarke present as note taker. As before, Mr Clarke in the event actually participated in the hearing

and asked the claimant a number of pertinent questions (e.g. see page 100 regarding the questioning of claimant concerning his identity document). The claimant again denied any intention to mislead during that meeting.

36. Following the disciplinary hearing Colin Steele and Jeremy Clarke discussed the matter and came to a decision together that the claimant ought to be summarily dismissed for gross misconduct. The claimant was written to on 31 July 2020 to that effect (see pages 43 and 44 of the bundle). The matters of concern that had been found proved were described in that letter as:

"Denying your whereabouts directly to the Factory Manager. Therefore attempting to deceive the company".

Although Colin Steele's name appeared at the foot of the letter, it was in fact written and signed by Jeremy Clarke.

37. Within that letter the claimant was offered a right to appeal which he duly exercised. The claimant appealed by way of letter (see pages 45 – 46 of the bundle) denying any intention to mislead and also citing his dedication to the company, hard work, long period of service and exemplary disciplinary record. He again stated that the intention to travel to Portugal only arose once he arrived in Spain, following the arrival of his lawyer at around 1 PM on Wednesday, 8 July 2020.

38. The appeal was heard by a telephone hearing with the Managing Director, John Walker. This took place on 6 August 2020. It lasted between 2 and 5 minutes. At the hearing Mr Walker agreed in evidence that he would have advised the claimant that he fully agreed with and supported the decision that had already been made by Colin Steele and Jeremy Clarke, as that was indeed his view.

39. By letter dated 1 September 2020 the claimant was informed that his dismissal for gross misconduct had been upheld (see page 47). The letter stated that the reasons for this decision were:

"*Denying your whereabouts directly to the factory manager. Therefore, attempting to deceive the company, potentially placing the future of the factory and its staff in danger and possible closer [sic].*"

40. Although he was not present during the appeal meeting, Jeremy Clarke wrote the letter of 1 September 2020 following a subsequent meeting with John Walker where he (John Walker) told him (Jeremy Clarke) his conclusions.

41. The claimant's dismissal therefore stood, and he duly presented this claim to the Tribunal on 5 October 2020.

Relevant law – unfair dismissal

42. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) on 31 July 2020.

43. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

44. In this case it is in dispute whether the respondent dismissed the claimant because it genuinely believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2).

45. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

46. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

47. Both Ms Urquhart, on behalf of the claimant, and Mr Clarke, on behalf of the respondent, provided me with oral submissions on fairness within section 98(4) and generally which I have considered and refer to where necessary in reaching my conclusions.

Conclusions and Findings of Fact

48. There is no dispute that respondent dismissed the claimant.

49. Further, there is no dispute that misconduct is potentially a fair reason for dismissal. I conclude that the respondent has established, on the balance of probabilities, a potentially fair reason for dismissal in the form of the claimant's conduct. It was the principal reason for the claimant's dismissal pursuant to section 98 (2) (b) ERA.

50. With reference to the list of issues agreed at the outset, my conclusions are as follows:

Did the respondent genuinely believe the claimant had committed misconduct?

51. The respondent asserts that they did. The claimant asserts that in this case that given the quality of evidence the respondent could not have had a genuine or honest belief that the claimant had committed misconduct.

52. I find that on balance of probabilities the respondent's management held a genuine belief that the claimant was guilty of misconduct. Their evidence was clear and consistent throughout about why they had dismissed him.

53. Mr Steele was involved in the decision to dismiss the claimant and it is plain from the tenor of his evidence that he genuinely felt misled by the claimant's behaviour both before and during the telephone call between them of 9 July 2020. Mr Clarke, who was also part of the decision to dismiss him, also felt genuinely misled especially given his previous discussions with the claimant regarding the Portugal issue.

54. I conclude therefore that that the respondent genuinely believed that the claimant had committed misconduct and misled the company regarding:

i. his intention to go to Portugal in the first place,
ii. deliberate steps the respondent felt that he had taken to further that deception before he went and to avoid the company knowing of it,
iii. a telephone call on 9 July 2020, albeit briefly, in terms of his initial assertion that he was in Spain which he did not correct until challenged by Mr Steele.
iv. The company also genuinely believed that, although ultimately he had not avoided them, the reason the claimant was behaving in that manner was to seek to avoid strict COVID isolation rules, which had

come into effect on 3 July 2020 with respect to visitors returning to the UK from Portugal.

55. The above matters represent the real reasons that the claimant was dismissed, regardless of the exact label the respondent may have sought to ultimately put on it subsequently.

56. Although there is some force in Ms Urquhart's submission that when one looks at the documents and letters of dismissal, the misconduct for which the claimant appears to have been dismissed was specifically denying his whereabouts during the telephone call of 9 July 2020, such an interpretation ignores the context in which that telephone call took place. The context cannot sensibly be divorced from it. It also similarly ignores, in particular, the specific events and incidents that had preceded it in the days and weeks before upon which the respondents plainly placed reliance.

57. Those specific matters were all put to the claimant in both the investigation and the disciplinary meetings. Thus, even if there was ultimately an element of mislabelling on the documents, this fact alone in my view did not disadvantage the claimant in making his case in any procedure leading up to his dismissal.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:

Were there reasonable grounds for that belief?

58. This considers the information available at the time of the dismissal and appeal decisions and, at this stage, I am evaluating whether the employer's view that there was misconduct is a view within the band of reasonable responses. The way in which the respondent assessed the claimant's explanation for his behaviour is relevant to whether they had reasonable grounds for their belief that they were misled at various points and that as a result, the claimant was guilty of misconduct.

59. The question is whether the employer had reasonable grounds for their belief in the applicant's guilt, based upon the material assembled as a result of their investigation up to the point of dismissal. I consider what material then, did the employer have in this case to entitle them to take the view they had been misled.

60. The respondent had evidence that the claimant had engaged in a number of previous conversations where the potential for him to travel to Portugal had been raised by him in the lead up to him taking leave. The fact of these conversations was not disputed by the claimant. It is also self evident that on 3 July 2020 new restrictions with respect to Portugal came into force.

61. Whilst disputed, the respondent also had evidence that the claimant had potentially signed his holiday request form in a manner materially different than he had done on previous occasions after those restrictions came in.

62. It was also potentially the case that neither the supervisor who granted him leave or certainly as a matter of fact the Factory Manger, Mr Steele, knew that it was the claimant (rather than another Paulo) who had gone on leave on 8 July 2020.

63. The employer also had evidence that despite speaking to Mr Clarke about the issue on 6 July, the claimant had, on any view, failed to speak to Mr Steele at any point prior to his departure, either on 6 July or indeed 7 July when he was present in work. This was accepted to be the normal procedure.

64. Following on from those matters however, there is then the central issue of the telephone call of 9 July 2020 between the claimant and Colin Steele. Importantly, the contents of that call were disputed and further, the person investigating it and making the decision regarding dismissal in respect of it was in fact also a party to that call, namely Mr Steele. Whilst it must be seen in the context of the matters I have referred to above, it is plain from both the face of the documents provided to the claimant, and the evidence given by the respondent's witnesses, that the telephone call itself was a matter of importance and central plank in terms of the respondent's grounds for believing the claimant had committed gross misconduct.

65. As was stated in the case of **W Weddel & Co Ltd v Tepper** [1980] IRLR 96 (see paragraph 20 per Stephenson LJ) if employers form their belief hastily and act hastily upon it, without making the appropriate inquiries or, importantly in the context of this case, not giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably.

66. In essence, with respect to the phone call of 9 July 2020 this was a case where Mr Steele from the outset was required to decide which account of events he preferred between two competing accounts – one of which was his own. In my view, this fact alone renders any opportunity that was given to the claimant to explain his version of events of very little value indeed and I agree with the submission of the claimant that in those circumstances it was vanishingly unlikely, if not impossible, that the claimant's version of that call was ever going to be accepted by the respondent. That view is fortified by Mr Steele's comments in the investigation meeting, reproduced at page 92:

"*"OK, ok… Like I said I know what I heard. I know what was said so…"*

67. The obvious mischief of that particular matter was not cured subsequently on appeal.

68. In that sense alone therefore, I find that the respondent acted unreasonably in failing to properly or fairly assess the claimant's explanations and his competing account regarding the telephone call. I find that no reasonable employer would have engaged a party or witness to an alleged misconduct incident to decide thereafter whether another party's account in respect of it was correct. Such an approach offends against both natural justice and common sense. In those circumstances, and in that regard, the respondent's view that the claimant had committed gross misconduct was not based on reasonable grounds.

At the time the belief was formed had the respondent had carried out a reasonable investigation? Did the respondent otherwise acted in a procedurally fair manner?

69. These two matters can be dealt together in the circumstances of this case. Having heard the evidence in this case I find that that respondent did not carry out a reasonable investigation and, moreover, that it did not act in a procedurally fair manner.

70. I find that the lines between Mr Steele as a witness, investigator and acting in his disciplinary role were blurred to the point of not existing at all. Whilst I took account of and have some sympathy with the respondent in terms of the undeniable effect of the COVID 19 pandemic in terms of its available resources, both Mr Clarke and Mr Steele candidly accepted in evidence that other members of staff or even external personnel could have been engaged.

71. Instead, on the claimant's case, and on their own evidence, Mr Steele – a material witness to the disputed telephone call - and Mr Clarke effectively acted as one mind throughout the investigation, disciplinary and decision-making stages. I find that no reasonable employer in the respondent's position would have investigated and thereafter considered the claimant's explanation and mitigation for his behaviour in the circumstances they did i.e. where it was being considered by the very person, Colin Steele, who was a witness to significant, disputed events and who himself was effectively making the allegation of misconduct.

72. Whilst they were entitled to regard the claimant's actions as potentially serious, a reasonable employer would have objectively considered and genuinely and independently investigated and assessed the competing versions of the telephone call. They would have done the same with respect to the claimant's explanation regarding his conduct generally when deciding thereafter what view to take of his culpability and what sanction to impose.

73. In this case, whilst I do not find that management went as far as to have made up their minds before the investigation or disciplinary process, the involvement of Mr Steele in multiple conflicting roles meant there was no *'separation of powers'* and that the claimant's side of the story had little or no prospects of success from the outset.

74. Thereafter, given Mr Walker's attitude to the case in endorsing and supporting the decision to dismiss throughout (as he very frankly accepted in evidence) I find that no genuine, independent, second opinion was available at the appeal stage. It is not disputed that the appeal hearing, to the extent it can properly be described as that, lasted between 2 and 5 minutes and was conducted via telephone. There are no notes or record of it. Within the decision letter dated 1 September 2020 that flowed from it (page 47) none of the points raised in the claimant's appeal letter were dealt with and no reasons were given as to what extent they were considered or as to why they were rejected. This is perhaps unsurprising given that it was drafted by Mr Clarke, who himself was not present at the hearing.

75. Mr Clarke stated in evidence with regard to Mr Walker's appeal decision:

"Even if the procedure had been different, John's decision would have been the same based on the evidence we had. The decision was the decision. There were areas that were flawed due to the pandemic – I didn't say that I meant that there were things we would have done differently. It doesn't mean the whole process was flawed."

76. Despite the evidence from the respondent's witnesses, to the effect that *"everything was considered",* I find that, on balance of probabilities, the points raised in the claimant's letter of appeal were not properly considered at any stage. There is also no convincing evidence that his length of service and exemplary disciplinary record were properly and adequately considered either at any stage. I find on balance that they were not. In a similar vein, there is no convincing evidence from the respondent, contemporaneous, documentary or otherwise, that any other alternative sanction other than dismissal was properly considered or indeed considered at all and then (for instance) ruled out. I find on the evidence that in fact no consideration was given by the respondent to any alternative sanction other than dismissal in this case.

77. Finally in terms of the fairness of the procedure, I note the ACAS Code on Disciplinary and Grievance Procedures. In particular, paragraph 6 of the ACAS Code provides that, in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. I find that this did not happen in this case in the circumstances I have outlined already, and that it was practicable for it to have happened. Further, Paragraph 27 states that the appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case. Given my findings already regarding Mr Walker, alongside his evidence that he both agreed with and was kept abreast of the issue by Mr Clarke and Mr Steele throughout, I also find that the appeal was not dealt with in an impartial manner. I will return to the ACAS issue in due course.

Was dismissal within the range of reasonable responses?

78. I find for all of these reasons that the respondent's decision to dismiss the claimant in these circumstances was outside the range of reasonable responses to his conduct.

Conclusion on Unfair Dismissal

79. I have considered the size of the respondent's undertaking. This is not a small employer, employing approximately 100 employees. Whilst they do not have a large and dedicated HR department, they do have an experienced HR Manager in Mr Clarke and well-drafted written policies. A formal disciplinary process was followed, although it was significantly flawed from the outset. Within the range of reasonable responses, the respondent's size and resources do not excuse the unfairness in management's actions in this case.

80. I find, therefore, that the claimant was unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996.

Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed? If so, should the claimant's compensation be reduced? By how much?

81. As recorded above, I agreed with the parties at the start of the hearing that if I concluded that the claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8**, **Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40;** and **Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**. I turn to this issue now.

82. The respondent asserted through Mr Clarke that had a fair process been followed, then the outcome would still have been dismissal. Ms Urquhart on behalf of the respondent invites me to find that had a fair process been followed, it would have led to (in her words) an acquittal, i.e. that the claimant would not have been dismissed. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer (acting reasonably) would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: **Hill v Governing Body of Great Tey Primary School** [2013] IRLR 274 at paragraph 24.

83. **Polkey** reductions tend to arise in cases where there has been procedural unfairness, but not necessarily so, and in this case, where the unfairness lies in management's failure to separate witness, investigator and decision maker and failing to properly consider the claimant's explanation in the disciplinary

process, it is appropriate in assessing just and equitable compensation as to what might have happened if they had not acted unfairly in that way.

84. I find that if the respondent's management had properly considered the claimant's length of service, clean disciplinary record and his explanation for his actions, as well as considering alternative sanctions, there is a substantial chance that they would still have dismissed the claimant. Had an impartial assessment taken place of the evidence, the respondent would reasonably have concluded the claimant to be guilty of misconduct. However, I do not regard it as inevitable that they would still have dismissed him, particularly given those factors and also given the fact that on any view, even if the telephone call issue had been decided against the claimant after a fair procedure (as I find it could well have been) any assertion that he was in Spain rather than Portugal was recanted very quickly.

85. In making that assessment, I take into account the claimant's length of service and disciplinary record. I also take into account as Ms Urquhart observed in her closing submissions that, at the material time, everybody in the country was struggling to understand, adapt and comply with COVID travel restrictions and isolation and quarantine rules that were changing on a very regular basis. Whilst I accept that from the text messages that the claimant may have been confused regarding the exact nature of when he would be allowed to return to work, he did not dispute that from 3 July 2020 he knew Portugal was on the restricted list and that there was a need to quarantine for 14 days upon his return.

86. However, I also take into account what I heard in evidence as to how seriously management in fact took the claimant's actions. There is of course a broad, though not infinite discretion afforded to employers as to how seriously they regard certain matters. Whether in fact the claimant avoided the COVID isolation restrictions or not, or indeed whether or not that was in fact the explicit purpose of the claimant's actions, the respondent plainly regarded the claimant's conduct as having serious potential consequences. They considered what could have occurred had he not been challenged regarding his whereabouts and simply returned to the factory. They also regarded it as the culmination of an ongoing deception with the telephone call being the last, albeit important, stage in it. It was viewed by them as both a potentially serious health and safety issue and a serious trust and confidence issue.

87. They also, correctly and properly in my view, regarded the claimant as a senior employee employed in a specific hygiene role. They further considered the prevailing circumstances of the COVID pandemic and their particular factory and business type and recognised the potential serious health and safety implications of being misled as to where a returning employee had actually travelled to. It was not disputed that a number of the respondent's employees were high risk individuals for the purposes of exposure to COVID.

88. Further, the respondents witnesses in my assessment of the evidence they gave, also plainly considered the need for some element of deterrence in terms of the sanction to be imposed having regard to escalating pandemic situation, the possibility similar incidents occurring in the future and the potential effect of those on both the continued health and safety of other employees and the viability of the factory to remain open and operational.

89. In the round, I therefore consider that there is a 50% chance that the claimant would still have been dismissed, and if the respondent's management had conducted a fair procedure. Had they properly and fairly considered his length of service, explanation and mitigation, as well as alternative sanctions, any such dismissal would have been within the range of reasonable responses.

Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

90. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 makes provision where in proceedings concerning a matter to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies and where the employer or employee has unreasonably failed to comply with the Code in relation to that matter, a tribunal may increase or decrease (as the case may be) any award it makes by no more than 25% if it considers it just and equitable to do so in all the circumstances. Section 124A of the Employment Rights Act provides that this adjustment is applied to the Compensatory Award only and it is done immediately before any deduction for contributory fault. In assessing any appropriate figure for the ACAS uplift I must assess the extent of the respondent's unreasonable failure to comply with the Code.

91. Further to my findings in paragraph 77 above, I do find that the ACAS Code applies in this case. The respondent's witnesses, Mr Steele and Mr Clarke, in their evidence also frankly conceded that the respondent had failed to comply with it in the manner alleged. Despite their evidence as to why this was the case (largely due resource and personnel difficulties borne out of the COVID 19 pandemic) I find that this failure was unreasonable.

92. In the circumstances these were procedurally significant, though not deliberate, failures. Having regard to the inadvertent nature of the breaches and difficulties the respondent faced at the material time, I take the view it is just and equitable to increase the award payable to the claimant by 15%.

Did the claimant cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

93. I also agreed with the parties that if the claimant had been unfairly dismissed, I would address the issue of contributory fault, which inevitably arises on the facts of this case. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

94. In considering the issue of contribution under s122(2) ERA 1996 and s123(6) ERA 1996, a three stage approach is set out in **Nelson v BBC (No2)** [1979] IRLR 346, namely that there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy, there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by the action that was culpable or blameworthy, and finally, that there must be a finding that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

95. The respondent says that the claimant's conduct was clearly blameworthy and obviously caused or contributed to his own dismissal. They say that it is just and equitable to make a significant reduction to the basic and compensatory award in the circumstances of this case.

96. The respondent says that the claimant's intention was always to travel to Portugal or that his intention was present, at the very latest, from when he sought to book his leave on Monday 6 July 2020 if not before. They assert that this is the real reason why he wrote his name on the leave form in the manner he did, using his full, Portuguese name and unlike he had on previous occasions when he had simply wrote 'PAULO ABREU'. They allege that this was done in order to get the request approved effectively *'under the radar'* and to obfuscate exactly who it was exactly who was going on leave, easily done they say given the number of employees at the factory know as 'Paulo Gomes'. They also assert that his failure to speak to Colin Steele about his impending leave at any point, allied to his anxiety in checking with Jeremy Clarke later that day as to whether his leave had been granted are further evidence of this. The final element in the claimant's conduct, they say, was a further persistence with the deception in continuing to assert until explicitly challenged by Colin Steele in a telephone call of 9 July 2020, that he was in Spain rather than Portugal.

97. Conversely, the claimant asserts that is not the case and, prior to his trip to Spain, he genuinely believed that he did not have to visit Portugal in respect of the property issue. The need to travel to Portugal only arose unexpectedly and once he was in Spain, having met with lawyer and them both only having realised at that point that his Portuguese identification document was out of date. He had signed the leave form using his normal signature as he always did and had been transparent and not tried to mislead or confuse anybody regarding the matter. It was his choice to phone Colin Steele on 9 July 2020 in order to update him.

98. It is appropriate for me to make specific and detailed findings of fact in respect of the issue of contributory fault. I have given the matter careful consideration.

99. I accept as Mr Steele asserted in his evidence that the claimant had expressed an intention to go to Portugal to him from as early as 29 June 2020, some days before the restrictions affecting travel to Portugal came into effect. I also accept Mr Steele's evidence that, given that fact, he told the claimant that if he did intend to go then he (the claimant) should come and see him about it. Mr Steele was not challenged by the claimant on those specific points.

100. I find that in light of that conversation as between the claimant and Mr Steele on 29 June 2020, and what seems to have been accepted by both parties as a reasonable working relationship between them, the lack of any subsequent conversation between them regarding the matter until some days later on 9 July 2020, is highly significant.

101. On balance, I also accept Mr Steele's evidence that he was at work and generally around during that period, and in particular on 6 and 7 July 2020 when the claimant (even on his own version) was at work. In my view, on the evidence I have heard the claimant could have found and spoken to Mr Steele either in person or by some other means had he wished to do so at any point between 6 of July and 9 July when he did next speak to him. Even on the claimant's version, this could have been either regarding the matter of leave generally or concerning him going to Spain (on 6/7 July 2020 when the claimant was still at work) or later regarding the fact that he planned to, or had in fact already travelled to, Portugal (as of afternoon of 8 July 2020 onwards). Nevertheless, the claimant did not speak to him. I also accept what was undisputed evidence that the ordinary and usual procedure was that Mr Steele would usually be the person to approve any requests for leave.

102. I find on the evidence as a whole that, on the balance of probabilities, the claimant had decided to travel to Portugal at the very latest by 6 July 2020. Having made that decision to go to Portugal, and notwithstanding their earlier conversation, I also find that the claimant made a further, conscious decision not to speak to Colin Steele about his plans in the hope that he could get his leave authorised by somebody else and take his trip without Mr Steele's knowledge – the claimant in my view suspecting that Mr Steele either did not

approve of the trip and would, in all likelihood, not approve his leave at such short notice in any event.

103. I do not accept the claimant's evidence that the need to travel to Portugal arose suddenly and only when he was in Spain. I also find it inherently unlikely that the claimant would have travelled to Spain specifically to meet with his lawyer regarding the Portugal property issue yet would have failed to notice that his Portuguese identification was out of date until he got there. On his own version, one of the reasons he was travelling to Spain was to meet with his lawyer and deal with the property issue. In my view it would have been obvious to him and indeed to anybody that he needed that document to be in order in order to properly deal with the issue. I also do not accept the claimant's evidence that it was mere coincidence that he decided to fly to Spain at short notice (booking late on 6 July, flying on 8 July) for a relaxing few days holiday and to meet his lawyer on 6 July 2020, just days after the travel restrictions with respect to Portugal came into force on 3 July 2020. Whilst it is unclear from the claimant's evidence exactly when he says he decided to go to Spain and meet his lawyer, on any view the claimant made no attempt to book any leave or holiday between 1 July 2020 when on he says he was contacted by his lawyer, and 6 July 2020 when did book leave.

104. I also find that the claimant's intention to travel to Portugal by at the latest 6 July 2020 and his desire to keep Mr Steele effectively *'in the dark'* was the reason that the claimant approached someone other than Mr Steele to authorise his leave and completed the leave form using his full, Portuguese name. I prefer and accept the respondent's evidence (as corroborated by the numerous documents contained in the bundle) that, on balance, the claimant would ordinarily complete such forms using the shorter name, PAULO ABREU. I conclude that the claimant's account regarding the issue as to why he used his full name on the document both in the investigation meeting (see page 91), in evidence and again when I specifically asked him in evidence to clarify the matter, was unclear. The fact that there were *'four Paulos'* at the firm, including people known as *'Paulo Gomes'* as the claimant asserted, did not properly explain why he had used his full name on 6 July when contrasted to the other forms in the bundle he had filled out on previous occasions. If anything, the longer name he used on this occasion including '*Gomes'* when he had not done so previously was more likely, rather than less likely, to cause confusion with the other employees named *'Paulo Gomes'.*

105. Mr Clarke's evidence that he had a discussion with the claimant on 6 July 2020 and that, at that time, the claimant was *"in a panic",* and initially saying he had to travel to Portugal, was not challenged. I accept his evidence. This encounter is not consistent with the claimant's assertion that by that time (6 July) he had already been told (by his lawyer on 1 July) that the Portuguese property matter was resolved, and that no further difficulty arose in respect of it until it arose suddenly whilst he was in Spain on 8 July 2020.

106. Whilst I accept there was a discussion had by the claimant in Portuguese on the telephone during the conversation with Mr Clarke, in light of the claimant's subsequent conduct, I do not accept that the claimant was being truthful when he told Mr Clarke that the issue was *"sorted"* at that stage. Whilst Ms Urquhart characterised the claimant as being *'open'* during that conversation regarding his plans, I disagree with that interpretation. I find that, as outlined above, that the claimant had already by this stage decided to travel to Portugal. I accept Mr Clarke's unchallenged evidence that this was the first time in 6 years the claimant had asked him whether his leave had been approved. The claimant asking Mr Clarke about the leave issue was, as he said in evidence, both unusual and demonstrated an underlying anxiety on the part of the claimant regarding a pressing need to secure leave to allow him to sort out Portugal property issue. It is notable that the claimant agreed that he made no mention to Mr Clarke during that conversation of any intention to meet with his lawyer, instead telling him simply that he wanted to go away to Spain and relax.

107. Whilst I take account of the language difficulties and the other specific matters urged by Ms Urquhart in respect of the disputed 9 July 2020 telephone call, I also prefer Mr Steele's account as to what was said during the call. I assess what took place during the call given my earlier findings regarding the claimant and his intentions prior to his departure, and also the resulting overall context. I find as a fact that whilst the claimant telephoned Mr Steele, the claimant initially asserted that he was in Spain, before being challenged by Mr Steele and quickly admitting that he was in Portugal. I should add in fairness to the claimant that it was apparent on any version, and indeed I find as a fact, that the claimant recanted almost as soon as he was challenged by Mr Steele.

108. On the evidence therefore, I do find it was the claimant's intention to mislead the respondent regarding his trip to Portugal, both before he travelled and briefly, during the telephone call of 9 July 2020 regarding his whereabouts.

109. Finally, I also make a finding with respect to the claimant's conduct generally, with reference to the specific matters alleged against him by the respondent. I conclude that rather than the claimant's main motivation being to avoid any applicable isolation rules, the claimant's primary motivation in misleading his employer was in fact to deal with the obviously considerable difficulties he was having with his Portuguese property. His continued denial during the call of 9 July 2020, I find, was a further, albeit brief attempt to sustain that position. That matter it is plainly relevant to the extent to which it may be just and equitable to reduce any award.

110. In light of the above factual findings therefore, I conclude that there was conduct on the part of the claimant in connection with his unfair dismissal which was culpable or blameworthy, and that the matters to which the complaint relates were caused or contributed to, to some extent, by the action that was culpable or blameworthy. I also find that is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

111. In the circumstances, I find that the basic and compensatory awards should be reduced by 50% to reflect the claimant's culpability. He was equally, with the respondent, to blame for his dismissal.

Employment Judge Rawlinson

25 February 2021