EMPLOYMENT TRIBUNALS

Claimant: **Mr W Wong**

Respondent: **Chan Brothers Limited**

Heard at: **East London Hearing Centre**

On: **6, 7 and 8 April 2021 (with the parties); 9 April 2021 (in chambers)**

Before: **Employment Judge Gardiner**

Representation
Claimant: Mr R Robison (Free Representation Unit)
Respondent: Ms G Cheng (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's automatically unfair dismissal claim under Section 103A Employment Rights Act 1996 is not well founded and accordingly is dismissed.**

2. **The Claimant's ordinary unfair dismissal claim under Section 94 Employment Rights Act 1996 succeeds. There is to be a reduction of 75% to the basic and compensatory awards for the Claimant's contributory conduct.**

3. **The Claimant's contractual claim for notice pay (wrongful dismissal claim) is not well founded and accordingly is dismissed.**

REASONS

1. The Respondent is an importer and wholesaler of frozen seafood to the catering trade. Until his summary dismissal on 6 February 2019, Mr Wong was employed by the Respondent as a salesman. He had been employed in that role from July 2011.

The reasons given by the Respondent for his dismissal were theft, falsification of invoices and bribery. Mr Wong's appeal was partially successful, to the extent that the finding of bribery was removed. The other two findings of misconduct remained, as did the sanction of dismissal.

2. The Claimant alleges that his dismissal was an unfair dismissal, contrary to Section 94 Employment Rights Act 1996. In addition, he alleges that this was an automatically unfair dismissal, contrary to Section 103A Employment Rights Act 1996. He argues that the principal reason for his dismissal was that he had previously made protected disclosures. Finally, the Claimant argues that it was a breach of contract not to pay him the notice pay to which he was entitled.

3. The case was heard at an in person hearing over three days. At the outset, the parties agreed that the issues to be determined were those contained in an Agreed List of Issues [37J]. This listed the unfair dismissal issues to be considered. Paragraph 1.7 was worded as follows:

> "Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?"

4. At the conclusion of the case, Ms Cheng, counsel for the Respondent, argued that it was not open to the Tribunal to consider whether the dismissal was procedurally unfair. Her argument was that this was not included in the Agreed List of Issues, and no particular procedural unfairness had been identified. I had asked the Claimant's representative, Mr Robison, during the initial discussion at the outset of the case, to identify whether his client had any particular procedural unfairness in mind. He had said that the procedural unfairness relied upon was that the Claimant's sanction of dismissal was harsher than the sanction given to other employees also found guilty of the same misconduct.

5. I consider the issue of procedural fairness does need to be determined by the Tribunal. In an 'ordinary' unfair dismissal case, the Tribunal's role is to determine the statutory question set out by Section 98(4) Employment Rights Act 1996. If the dismissal was taken for a potentially fair reason, the issue of whether the dismissal was unfair "depends on whether in the circumstances (including the size and the 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". Far from being conceded in the List of Issues, procedural fairness is clearly in dispute, given the wording of paragraph 1.7. Therefore, the Respondent was on notice, in advance of the Final Hearing, that this issue needed to be addressed. Mr Robison's response to my question does not limit the Tribunal's power or its duty to consider all relevant evidence when deciding whether the dismissal was unfair.

6. The List of Issues alleged that there were two protected disclosures, which were expressed as follows (although I have reordered them so they are now in chronological order):

> "The Claimant alleges that in 2017, the Claimant raised to his manager Bobby Chang that trackers had been put in their vans without their knowledge or consent and he thought this breached their privacy. It is alleged that the company continued to use trackers.
>
> The Claimant alleges that in March 2018 during a staff meeting, the Claimant raised on behalf of all salesmen at the company to managers Peter Wong and Bobby Chang that their rules that forbade overlapping annual leave meant that some salesmen were not getting their statutory annual leave entitlement and were instead being paid money."

7. This was a refinement of the protected disclosure case that the Claimant had originally advanced. In his ET1, the Claimant referred to several complaints he had raised over many years. These were (1) "several years of complaint" about the practice that employees could not take annual leave on the same date; (2) a complaint about whether he had been paid his entitlement to statutory sick pay following a period of sickness absence in 2015; (3) complaints about salesman being excluded from the company canteen; (4) complaints about lack of equipment; (5) complaints about failure to pay salesmen their salaries during annual leave; and (6) complaints about not paying salesmen bonuses, although part time cleaners were given bonuses. The wording of the ET1 implied, though did not expressly state, that the Claimant had also complained about the holiday he had been entitled to take during Christmas 2018, and the installation of a tracker in the vans of all salesmen.

8. By the time of a Preliminary Hearing before Employment Judge Jones on 11 September 2019, the number of alleged protected disclosures had reduced to four, as set out in a draft list of issues, which were identified by the letters A to D. The Claimant confirmed at that point he did not rely on any protected disclosures that were not repeated in the List of Issues. Provision was made for the List of Issues to be finalised and sent to the Tribunal by 2 October 2019. This had been done by the time of a further Preliminary Hearing before Employment Judge Ross held on 10 November 2020. At that hearing, the date of the staff meeting (where the Claimant attempted to raise an issue concerning annual leave) was amended in the list of issues from June 2018 (as originally alleged) to March 2018. In the record of the Preliminary Hearing, in explaining why this amendment was allowed, Employment Judge Ross referred to the List of Issues as being a tool for the parties and the Tribunal, rather than a tablet of stone, and cited the case of *Scicluna v Zippy Stitch* [2018] EWCA Civ 1320.

9. In his closing submissions, Mr Robison sought to argue that there had been protected disclosures on dates other than those in the List of Issues. I do not accept it is open to the Claimant to disregard the Agreed List of Issues in this way. The Agreed List of Issues was a refinement of more general allegations of complaints which had been made at the outset. Given the application made at the

November 2020 Preliminary Hearing to amend the date of the staff meeting in the List of Issues, both parties were well aware of the need for the List of Issues to accurately reflect the case to be determined. There was no application for any further amendment to the List of Issues at any point before the end of the evidence, nor even in closing submissions.

10. Therefore, the protected disclosure issues to be determined remains those set out in the Agreed List of Issues.

11. The Claimant gave evidence himself and called evidence from Ms Hua Yang. The witnesses called by the Respondent were Mr Bobby Chang, who was the Claimant's line manager; Mr Peter Wong, the Respondent's General Manager who took the decision to dismiss him; Ms Donna Chang, who heard the Claimant's appeal; Mr Richard Ng who was another of the Respondent's managers; and Mr Wing Ho, who was Mr Wong's assistant.

12. There was a dispute as to whether the Claimant could rely on a supplementary witness statement from Ms Hua Yang. For reasons given orally at the time, I decided that this supplementary witness statement should not be admitted in evidence. The only evidence from Hua Yang was the evidence in her original witness statement. Other witnesses had prepared supplementary statements that were admitted into evidence without challenge.

13. All witnesses gave their evidence in their native tongue, which was translated into English by an interpreter. For all witnesses apart from Ms Hua Yang, they gave their evidence in Cantonese. Ms Hua Yang gave her evidence in Mandarin. Her evidence was also translated into Cantonese for the benefit of the Claimant and others who would not understand either her Mandarin or its English translation.

14. Reference was made to documents in an agreed bundle of documents. At the outset of the case, Respondent's counsel had prepared a written skeleton argument. At the conclusion, both parties made oral closing submissions. The Claimant's representative had also prepared written closing submissions to which he had attached particular legal authorities.

Factual findings

15. The Respondent trades as a frozen seafood wholesaler. Its staff are deployed across four departments – management, warehouse, accounts and sales. Its customers are typically restaurants. The Claimant's role was to sell the Respondent's products to the existing customers he had been assigned, and to win new customers. By the time of his dismissal, he had around 70 or 80 customers. These customers were spread across a wide geographical area. It was the Claimant's responsibility to deliver the products to the customers, having loaded the items into his van at the Respondent's frozen storage facility in East London.

16. There was no contract of employment or any statement of employment particulars in the bundle of documents. The Claimant's unchallenged evidence was that he

was never given a contract of employment or written particulars of the main terms of his employment. The Claimant was apparently guaranteed £95 per week in basic salary. Most of his earnings came from commission. He was entitled to 2% commission on his sales up to £3000 per week, and 3% on weekly sales in excess of £3000.

17. It does not appear that the Respondent had a disciplinary policy. No such policy was included in the bundle, nor was there any reference to a disciplinary policy during the course of the evidence. As a result, there was no document issued to the Claimant specifying the procedure that would be followed in the event of alleged misconduct. Nor was there a document providing examples of what would be regarded as gross misconduct, for which the normal sanction would be dismissal.

18. In his role, the Claimant reported to Bobby Chang, Sales Manager. Mr Chang, in turn, reported to Peter Wong, the General Manager.

19. Customers would indicate the night before a proposed delivery what items of seafood were required, and in what quantity. Based on this information, salesmen would obtain the necessary frozen produce from the staff in the warehouse. More stock would typically be taken than had been specifically requested, presumably to enable additional sales to be made when at the customers' premises. The produce issued to salesmen would be recorded on a stock requisition form. At the end of each day's deliveries, salesmen would take unsold stock from their vans and place them into personal freezers at the Respondent's premises that they had been given for this purpose. Each salesman was issued with a key to the Respondent's premises, in part so he could access his freezer.

20. As was the case with all salesmen, the Claimant was expected to sell to his customers at the prices published by the Respondent for each of the items sold. However, the Claimant was permitted to reduce the prices by up to 5% for loyal customers and those paying in cash. Authority needed to be obtained to offer this discount to particular customers. Once salesmen were authorised to offer discounted prices, then the discount could continue to be applied to prices until there was a change in the Respondent's price list.

21. Salesmen recorded the goods sold and the price which was due by writing this information on numbered invoices. They were each issued with two books of No Carbon Required (NCR) numbered invoices. Each invoice had a top copy which would be handed to the customer, and a bottom copy which would be retained by the Respondent. Because of the nature of this system of invoicing, writing the invoice on the top copy would create an identically worded bottom copy. In that way, the version retained by the customer and the version retained by the Respondent would correspond exactly.

22. Salesmen were responsible for collecting payment for the goods that they supplied. For those customers who had an account with the Respondent, payment might be

made within 14 days of the delivery of the goods or within 28 days, depending on the credit terms being offered. Where customers paid in cash, then salesmen were responsible for taking the cash to the Respondent's Accounts Department. The Accounts Department also reviewed the bottom copy of the invoice. This was to check that the payment received corresponded to the amount stated on the invoice; and that the price of each item corresponded to the Respondent's list price for that item or was within 5%. A check could also be made, by reference to the invoice, the stock requisition form and the contents of a salesman's freezer, that there was no disparity between the value of the stock issued to a salesman and the revenue generated from the sale of that stock.

23. One member of staff in the Accounts Department was responsible for checking the items on the bottom copy of the invoices. Until about 2000, this was Ms Hua Yang. From then onwards, she became responsible for checking other records, including wholesale invoices and salesmen's wages and commission as well as their petrol and mileage. As a result, she was not directly responsible for checking to see if there were any discrepancies on the Respondent's copies of the invoices at any point during the Claimant's employment.

24. If there was a disparity between the prices or quantities of particular seafood on the customer invoice and the prices or quantities on the bottom copy retained by the Respondent, this would not be immediately apparent to the Respondent. This was because the customer would generally retain their copy of the invoice. There would be no particular reason for a copy of the invoice to be returned to the Respondent. On those rare occasions when a customer did return a copy of their invoice together with payment, there was no standard procedure for checking this version of the invoice against the version retained by the Respondent to ensure that the two were identical.

25. If it was discovered that salesmen had altered the invoices, this was a matter that did lead to disciplinary action, as the evidence of Ms Hua Yang confirms. As she states (paragraph 7), "some salesmen were fired for altering invoices and some were not". One person who was not fired for altering an invoice was Mr Man So. It was discovered that there was a discrepancy of £3 between the figure on the top customer copy and the figure on the bottom company copy. He was issued with a warning but kept his job. Apart from Richard Ng, as discussed below, no specific evidence was advanced by either side as to whether inconsistencies had been noted between invoice entries on the top and bottom copies completed by other salesmen. This is despite an order made by Employment Judge Jones on 11 September 2019, which required the Respondent to disclose top and bottom copies of invoices for November and December 2019 for the following salesmen: Mr L Man, Mr Hon Fun Chan and Mr F K Leung [37D].

26. The Respondent's customers had other potential suppliers to provide the seafood they required for their restaurants. The Respondent's salesmen needed to retain existing business as well as win new business. It was hoped that regular visits from

the same salesman would build a rapport that would lead the customers to continue to provide the Respondent with their business.

27. The Respondent's practice was to provide its loyal customers with a gift on Christmas Day, as a way of thanking them for their custom over the course of the past year. It would issue an amount of stock to each salesman, to be used as Christmas gifts. It did not provide salesmen with stock to enable them to give customers gifts at other times of the year. The Respondent's policy was that gifts were not to be given to customers apart from at Christmastime. On his own evidence, the Claimant was told this when he first joined the Respondent (first witness statement, paragraph 10). In addition, the Claimant's evidence was that gifts given from the Respondent's stock at other times of year would be deducted from his salary (first witness statement, paragraph 20).

28. This was unlike the arrangements at the two companies where the Claimant had worked before starting work with the Respondent. In both organisations, it was common for salesman to give gifts to customers in order to maintain their loyalty. These gifts would tend to be additional seafood items which would then be distributed amongst the customers' staff.

29. The Claimant alleges in his first witness statement he was told by Richard Ng when he started work that "we can change the invoice records so we can use the discount to get gifts". In his second witness statement he gave similar evidence, stating Mr Ng told him "if I wanted to give customers gifts, I could reduce the prices on some items and then include it for free … this is what everyone does and that all the managers are aware of it … it was even encouraged by management". Mr Ng disputes he ever said this, and denies that this was standard practice for other salesmen. This is a factual dispute to which I will return.

30. It is the Claimant's case that by the end of 2018, he was giving gifts to his customers on a regular basis. The gifts had come from the Respondent's stock and would be distributed by the customers to their staff. Gifts tended to be an additional item of seafood – either an item not otherwise ordered or an additional quantity of an item which had been ordered. The gift was not recorded on the customer's copy of the invoice, which made no reference to this item. It was recorded on the Respondent's copy not as a gift but as a sale, at a price in accordance with the Respondent's list prices. In this way the Respondent would not be informed from the information on its invoice that a gift had been given. Rather it would appear that this gift had been an additional sale. Lower prices would be recorded on the Respondent's invoice for many items so that the total listed for all items, including the 'gift', was equivalent to the amount on the customer's invoice.

31. As with the other salesmen, the Claimant was entitled to two weeks holiday in every period of six months. Holiday requests had to be submitted on a Holiday Request Form. The form would record the start and end date as well as the number of holiday days requested. On a section of the form, marked "For Office Use Only", one of the Respondent's managers would record whether the holiday had been

granted or refused. Holiday not taken in a six-month period could not be carried forward to the next six-month period.

32. The Respondent had a policy that no employee could take their holiday at the same time as another employee. Given the number of employees covered by the policy (sixteen in total, on the Claimant's evidence) and the number of weeks available in a six-month period, this had the consequence that all employees would not be able to take their full holiday entitlement. This policy changed at some point in 2018, so that employees could not take holiday at the same time as other employees working in the same department.

33. If an employee did not take their holiday entitlement, then the Respondent would pay them in lieu of untaken holiday. This would only be basic salary and would not include payment for the average commission they would receive during the weeks they had been working. If a salesman took holiday, then Richard Ng would generally deliver to that salesman's customers during their absence. Mr Ng had previously worked as a full-time salesman before he took over the role of Assistant Manager.

34. In around 2016, tracking devices were fitted to the vans used by the salesmen. This was so the Respondent could keep customers informed of salesmen's locations if they were running late. It was also so that vans could be traced more readily in the event that they were stolen. Salesmen were told in advance that the tracking devices were to be fitted to their vans and they were given a short period in which to raise their objections. None of the salesmen objected at that point. The information provided by the tracking devices enabled the Respondent to monitor not just the routes that the salesmen took to travel to their customers but also the amount of time that vans were stationary. I consider it likely that, on occasions, Donna Pang would have queried with the Claimant the amount of time the Claimant appeared to have spent stopped at a particular location; and the Claimant would have resented what he regarded as an intrusion into his privacy. However, I find it is unlikely that the Claimant told Mr Chang that the trackers had been put in the salesmen's vans without their consent or knowledge and he thought that this breached their privacy. It was not mentioned in the Claimant's first witness statement, even though the witness statement referred to other complaints he had apparently made and even though the statement refers to complaints from Ms Pang about the amount of time that the van was stationary. I find that the sales staff were told in advance that trackers would be fitted. They are likely to have been asked to make their vans available so that the trackers could be installed.

35. In March 2018, there was a staff meeting at the Respondent's offices, attended by the Respondent's managers and salesmen. This was an unusual event in that it was apparently the first time that the managers and the salesmen had all assembled for a group meeting. Unbeknown to the Respondent, the Claimant covertly recorded what was said during this meeting. There is an agreed transcript of the relevant part in the bundle of documents.

36. The purpose of the meeting was to discuss a proposal to introduce a bonus scheme for salesman. Speeches were given by Mr Wong, by Mr Chang, and by Ms Pang. When these three speeches had concluded, the Claimant attempted to raise his concern about the requirement that only one member of staff could take their annual leave at the same time. I find that the Claimant stated, as recorded in the transcript of this meeting:

> "Peter I want to mention one thing, about the annual leave. I think it's very, even though you said it is the company's policy, but I think they're some problems with the policy. I want to mention it. Right now, we have eight salesmen, 4 cold store staff, 4 managers and now 1 new manager, 5 people …".

37. At that point, the Claimant was interrupted by Mr Wong. Mr Wong said that he had spoken to Mr Chang about the annual leave policy but would not be changing it specifically because the Clamant had chosen to raise a complaint about it. Mr Peter Wong interrupted him because the general meeting had not been called to discuss the annual leave policy and he did not regard it as appropriate for the Claimant to raise his concerns in this forum. As a result, the Claimant made no further reference to the annual leave policy on this occasion.

38. As already stated, the procedure for booking annual leave was subsequently relaxed to allow employees working in different departments to book holiday on the same dates.

39. In October 2018, Man So, another of the Respondent's salesmen, retired. The Claimant was allocated some of his customers.

40. On 13 December 2018, Tai Pan Chinese Restaurant, one of the Respondent's customers for whom the Claimant was the assigned salesman, queried an item on its invoice. It sent a copy of its invoice to the Respondent. Upon investigation, it was noted that there were differences between the version supplied by the customer and the version retained by the Respondent. This was raised with Donna Pang, who in turn referred it to Mr Chang.

41. The following Monday, 17 December 2018, Bobby Chang spoke to the Claimant about the discrepancies which had been noted between the top copy and the bottom copy of the invoice. Mr Chang warned him that no decision had been taken as to how the issue may be progressed, but that disciplinary action may follow.

42. On 19 December 2018, the Claimant asked to speak to Peter Wong, the General Manager. The Claimant admitted he had made changes to the invoice and asked to be given a second chance.

43. Between 22 December 2018 and 6 January 2019, the Claimant was away from work on annual leave.

44. By 15 January 2019, it was noted that there were discrepancies with other invoices issued by the Claimant. It was decided that he should be suspended, pending further investigations. Because of this impending suspension, Mr Chang counted the stock in the Claimant's freezer, to ensure that it tallied with the Respondent's records. Mr Chang believed that there was a shortfall equivalent to about £1000. His evidence was that the Claimant made up the shortfall by writing the Respondent a cheque for this amount. He says a further £400 was noted to be missing when a further cheque of the Claimant's freezer was made later that day, which related to the van stock after his deliveries the previous day.

45. The Claimant disputes this version. His position is that the shortfall was explained by the delay in collecting payments for deliveries to those customers with accounts. His evidence was that this shortfall was collected by the colleagues covering for him during his suspension.

46. On 15 January 2019, the Claimant was handed a typed letter, written by Peter Wong, informing him he would be suspended pending a disciplinary investigation. The letter told him he would continue to be paid whilst he was suspended, at a weekly amount equivalent to his average weekly pay over the past 12 working weeks.

47. The investigation was conducted by Bobby Chang. The initial focus of the investigation was on six invoices for deliveries to three customers. These were Thai Rack, Chef Peking, and Tai Pan.

48. On 28 January 2019, he wrote to the Claimant inviting him to an investigation meeting on 30 January at 2pm. The meeting proceeded as scheduled. Tim Lo attended as notetaker, although the meeting was also recorded. The meeting was conducted in Cantonese. A transcript was produced of the audio recording in English. In cross examination, the Claimant confirmed he agreed that the transcript in the bundle was accurate. During the investigatory meeting, the Claimant admitted he was at fault: "it is really not correct to do this thing". When asked for an explanation, he said he said that there were two purposes to invoicing as he did. The first was to have higher commission for himself so he could have a higher commission. The second was to help protect the flow of business from the customers. Mr Chang repeated stated it had always been company policy not to give gifts. At no point did the Claimant dispute this or suggest he had been taught from the outset that the prices and quantities on the invoices could be manipulated to create regular gifts for customers. He said he was not stealing or cheating but the additional items had been given as gifts. There was no discussion during the investigatory meeting about any potential misconduct in the apparent shortfall in the value of items in the Claimant's personal freezer.

49. Following the investigatory meeting, Mr Chang prepared an investigation report in which he concluded that the Claimant did fabricate invoices. It was not suggested that the Claimant had been engaged in theft or bribery. Five potential mitigating

factors were recorded in the report, based on what the Claimant had said during the investigatory meeting.

50. The Claimant was sent a letter inviting him to a disciplinary meeting to be held on 5 February 2019. The date was subsequently rearranged for the following day, 6 February 2019. The invitation to the disciplinary meeting described the misconduct as "irregularities found with customer invoicing and payment for goods sold". Invoices were enclosed for Thai Rack, Chef Peking and Tai Pan. The letter warned him that one potential outcome of the meeting was that he would be dismissed.

51. The disciplinary meeting was also conducted in Cantonese. Again, the Claimant confirmed he agreed the typed English transcript of the disciplinary meeting. Mr Peter Wong stated that that there were differences between invoices and their duplicates written by the Claimant on 17 December 2018 and on 18 December 2018, even after Mr Chang had raised the issue with the Claimant. The Claimant suggested that Mr Chang had allowed him until after Christmas to "sort this out". Mr Tim Lo, who was present as notetaker, asked the Claimant if there were any mitigating factors. He admitted he had made a mistake and said that if the company gave him a second chance he believed he would do better. He did not suggest that Mr Richard Ng had taught him to manipulate the invoices when he was first hired or suggest that this was common practice across the company.

52. No decision was taken at the end of the meeting as to whether there was misconduct by the Claimant and if so, on the appropriate sanction. He was told he continued to be suspended on full pay until the outcome was communicated to him. After the disciplinary hearing but before a decision was taken, Peter Wong consulted with Tim Lo, Wing Ho, and with Bobby Chang. By this point, more irregularities had apparently come to light apart from the six invoices that were the subject of Mr Chang's investigation report. These further irregularities were taken into account in deciding on the outcome of disciplinary process, although the invoices had not been provided to the Claimant. Following this discussion, it was decided the Claimant was guilty of gross misconduct and the appropriate sanction was dismissal.

53. On 7 February 2019, the Respondent wrote a letter to the Claimant informing him he would be summarily dismissed. The letter stated that the Claimant had admitted misconduct during the disciplinary hearing. Taking all relevant factors into account, the Respondent had no alternative but to summarily dismiss him. The letter stated that the reasons for his dismissal were:

    (1) Receiving money for goods sold, not reporting the sale of said goods and withholding this money paid by customer from Chan Brothers Ltd. This can be considered as theft.

    (2) Falsifying invoice book records resulting in a loss for Chan Brothers Ltd. This can be considered as fraud.

(3) Using part of these proceeds to give goods to chefs/managers/owners for free or unreasonably low prices. This can be considered a bribery offence.

54. The letter concluded by warning him that the investigation would be continuing to gather further evidence which "may be used to claim against you in order to recover any losses and legal fees Chan Brothers Ltd have incurred". He was informed of his right of appeal.

55. In his evidence, Mr Peter Wong stated that part of the reason for the Claimant's dismissal was the stock discrepancy of £1000 noted in the Claimant's personal freezer. He said that this formed part of the first allegation found against the Claimant, that of theft. He accepted this issue had not been discussed during the disciplinary hearing.

56. The Claimant had made an emergency trip to Hong Kong immediately after the disciplinary meeting. As a result, he did not receive notice that he had been dismissed until 17 February 2019. He exercised his right of appeal, by sending an appeal letter dated 19 February 2019. He said that he had only admitted to falsifying invoice records and not the other misconducts that the company had imposed on him. He said he believed that dismissing him for reasons he did not admit to was unreasonable and unfair. He sent a further letter dated 25 February 2019 in which he denied he was guilty of theft, fraud or bribery and gave his reasons. He said he thought he had been dismissed because he did not get along with management and "because I am not afraid to speak my mind". He said that it was a longstanding tradition at the Respondent to give a gift of Mooncakes for each customer during the Mid-Autumn Festival, and at least a packet of prawns at Christmas. He stated, for the first time, that "Chans were aware of this practice, and condoned the actions of their salesmen by instructing and encouraging this tradition, and by assisting in the preparing of these gifts to their customers". He also said that a manager had taught him how to falsify invoices on his first day at work, and that all the other salesmen operated that way. He indicated that if he was guilty of bribery, then the Respondent was also guilty of this charge for giving gifts to their customers. It appears that this letter was written, at least in part, as part of a counter-offer to a settlement offer from the Respondent.

57. An appeal meeting was held on 1 March 2019 and was conducted by Donna Pang. Again, Mr Tim Lo attended to take notes and again the meeting was recorded. The Claimant was accompanied at the meeting by a work colleague, Mr Hon Fun Chan. He was another of the Respondent's salesmen. The Claimant accepts that the transcript of the appeal hearing is accurate. During the hearing, the Claimant argued he had been taught to falsify invoices by a manager when he first worked at the company. He refused to disclose the name of the manager who had taught him to do this. There was a discussion about how other employees had been sanctioned if found guilty of falsifying emails. The Claimant's representative, Hon Fun Chan indicated that some employees had been dismissed for falsifying invoices [entry 59, page 59]. The Claimant continued to claim that all salesmen falsified invoices. The Claimant repeated his general position that he converted the

5% discount potentially available to a customer into a gift worth 5% of the total value of the order. He described this as a "Win-Win situation" in which the Respondent gained more accounts and he gained more commission. At the end of the meeting the Claimant said this: "If you feel that I need to be fired because of falsifying invoices, then like what Fun said you can fire me. But you should not wrongly accuse me of so many other matters, right?". I interpret this comment as the Claimant accepting it would have been reasonable to have dismissed him for falsifying invoices, but not reasonable to dismiss him for the other two allegations found against him, namely theft and bribery.

58. There was no specific discussion during the appeal meeting about the finding of theft made against the Claimant. Nor was there any discussion about the apparent shortfall in relation to the value of the stock in the Claimant's freezer, which formed part of Mr Peter Wong's conclusion that the Claimant was guilty of theft.

59. On 4 March 2019, the Claimant wrote to the Respondent arguing that the sanction applied in his case was inconsistent with verbal warnings given to other employees who had falsified invoice book records. He said that he had not falsified the invoice book records since he had returned from his Christmas and New Year holiday on 7 February 2019. He asked that the Respondent would reinstate him to his employment.

60. On 15 March 2019, the Claimant hand delivered a letter offering to resign as of 7 February 2019. As a matter of law this letter had no effect. By that point the Claimant's employment had already ended as a result of the Respondent's letter informing him he was being summarily dismissed.

61. On 21 March 2019, the Claimant was sent a letter informing him of the outcome to his appeal. The letter stated that his appeal against the finding of bribery was successful, but the appeal against the finding of theft and fraud was unsuccessful. The decision that he should be summarily dismissed remained valid. Ms Pang stated she believed he had committed theft and fraud based on the evidence available to her. She stated that the Claimant's situation was significantly different from that of Man So. His case involved a discrepancy of £3 in relation to one invoice, whereas in the Claimant's case there were "multiple invoices from multiple customers".

62. These proceedings were issued on 6 May 2019, following a period of Early Conciliation from 11 April 2019 to 17 April 2019.

63. In October and November 2019, in response to the Tribunal's 11 September 2019 order, the Respondent contacted its customers to carry out what it referred to as an internal audit check. In the course of the evidence, I was not taken to any of the invoices that may have been disclosed as a result of this audit. As a result, it is unclear whether the audit revealed, as the Claimant alleged, that his practice in relation to invoices was a common practice across the salesteam.

Legal principles

Automatically unfair dismissal – Section 103A ERA 1996

64. In order to succeed in a claim for automatically unfair dismissal under Section 103A Employment Rights Act 1996 ("ERA 1996"), the Tribunal must conclude that the reason or the principal reason for his dismissal is that the Claimant had previously made a protected disclosure.

65. Protected disclosures are qualifying disclosures made in circumstances that are deemed to be protected by the ERA 1996. Disclosures made by the Claimant to the Respondent, as his employer, will be protected if they are qualifying disclosures.

66. So far as is relevant to the present case, qualifying disclosures are defined as follows, under Section 43B:

> (1) In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:
>
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

67. The starting point is that the disclosure must be a "*disclosure of information*" made by the worker bringing the claim. That disclosure must have two features. Both are based on the belief of the worker, and in both cases that belief must be a reasonable belief. The first is that at the time of making the disclosure the worker reasonably believed the disclosure tended to show wrongdoing in one of five specified respects in Section 43B(1); or deliberate concealment of that wrongdoing. The second is that at the time of making the disclosure, the worker reasonably believed the disclosure was made in the public interest.

68. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 Sales LJ noted that allegations could amount to disclosures of information depending on their content and on the surrounding context. He set out the following test for determining whether the information threshold had been met so as to potentially amount to a qualifying disclosure: the disclosure has to have *"sufficient factual content and specificity such as is capable of tending to show"* one of the five wrongdoings or deliberate concealment of the same. It is a matter *"for the evaluative judgment of the tribunal in the light of all the facts of the case"* (paras 35-36).

69. The Tribunal needs to assess whether, given the factual context, it is appropriate to analyse a particular communication in isolation or in connection with others. In *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540 (EAT), Slade J (at para 22) said that *"an earlier communication can be read together with a later one as embedded in it, rendering the later communication a protected disclosure, even if*

taken on their own they would not fall within Section 43B(1)(d)". Whether or not it is correct to do so is a question of fact.

70. In *Kilraine*, one of the alleged protected disclosures was made using these words : *"There have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented*". In itself, this lacked sufficient factual content and specificity. The oblique reference to other documented instances did not incorporate other documents by reference. In *Simpson v Cantor Fitzgerald Europe* [2020] ICR 236, the EAT upheld the ET's decision not to aggregate 37 communications to different recipients in order to assess whether there was a protected disclosure.

71. So far as the reasonable belief that the disclosure tends to show wrongdoing, there are two separate requirements. Firstly, a genuine belief that the disclosure tends to show wrongdoing in one of the five respects (or deliberate concealment of that wrongdoing). Secondly, that belief must be a reasonable belief. If the disclosure has a sufficient degree of factual content and specificity, then that belief is likely to be regarded as a reasonable belief (*Kilraine* at paragraph 36).

72. The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing (*Soh v Imperial College of Science, Technology and Medicine* EAT 0350/14). What is reasonable within Section 43B involves an objective standard and its application to the personal circumstances of the discloser. A whistleblower must exercise some judgment on his own part consistent with the evidence and the resources available to him (*Darnton v University of Surrey* [2003] IRLR 615, EAT). So a qualified medical professional is expected to look at all the material including the records before stating that the death of a patient during an operation was because something had gone wrong (*Korashi v Abertawe Bro Morgannwg University Health Board* [2012] IRLR 4 at paragraph 62). However, the disclosure may still be a qualifying disclosure even if the information is incorrect, in that a belief may be a reasonable belief even if it is wrong: *Babula v Waltham Forest College* [2007] ICR 1026.

73. In relation to each of the five prescribed types of wrongdoing, there is a potential past, present or future dimension. For instance, in relation to breach of a legal obligation, the reasonable belief must be that the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation. So far as future wrongdoing is concerned the phrase "is likely to" has been interpreted as meaning more than a mere possibility. In *Kraus v Penna* [2004] IRLR 260 the EAT held that to be a qualifying disclosure, the information disclosed should tend to show, in the claimant's reasonable belief, that failure to comply with a legal obligation was "*probable or more probable than not*".

74. So far as criminal offences under Section 43B(1)(a) are concerned, it is not necessary that the criminal offence believed by the worker to have been committed even exists, let alone has been breached. It is sufficient that the worker reasonably believes that a criminal offence has been committed: *Babula*. In that case the claimant reasonably believed that the subject of the disclosure had committed an offence of incitement to religious hatred, when there was no such offence at the

time. For the same reason, to amount to a qualifying disclosure, it is not necessary that the worker spells out the precise criminal offence that they have in mind.

75. So far as breaches of a legal obligation under Section 43B(1)(b) are concerned, any legal obligation potentially suffices, including breach of an employment contract: *Parkins v Sodexo* [2002] IRLR 109]. Employment Tribunal cases have held that a wide range of legal obligations are potentially applicable. A belief that particular conduct amounts to discrimination is a *"breach of a legal obligation"*.

76. In assessing whether a worker believed that there has been a breach of a legal obligation and whether that belief is a reasonable belief, potentially relevant evidential considerations are whether the concern about actual or potential breaches of legal obligation is stated or obvious or apparent as a matter of common sense. However, there is no rule requiring that one or more of these features need to be present: *Twist DX Limited v Armes* UKEAT/0020/20/JOJ at paragraph 97.

77. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, the disclosure in issue related to an occasion when the worker had raised a child safeguarding issue and claimed to have received an inadequate response. The tribunal held that this did not tend to show breach of a legal obligation, and this was upheld in the Court of Appeal. As the Court of Appeal noted, nothing in the Particulars of Claim or the witness statement indicated that the claimant had a particular legal obligation in mind. It was only later that her representative suggested a potential breach of the Children Act 2004 and the Education Act 2002.

78. Section 43B(1) also requires a claimant to have a reasonable belief that the disclosure was in the public interest. This requirement has two components – first a subjective belief, at the time, that that the disclosure was in the public interest; and secondly, that the belief was a reasonable one.

79. What amounts to a reasonable belief that disclosure was in the public interest element was considered by the Court of Appeal in *Chesterton Global Limited v Nurmohamed* [2018] ICR 731. The Court of Appeal considered that a disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker reasonably believed disclosure was in the public interest in additional to his own personal interest. So long as workers reasonably believed that disclosures were in the public interest when making the disclosure, they could justify the public interest element by reference to factors that they did not have in mind at the time.

80. Underhill LJ, giving the leading judgment, refused to define "public interest" in a mechanistic way, based merely on whether it impacted anyone other than the claimant or whether it impacted those beyond the workforce. Rather a Tribunal would need to consider all the circumstances, although the following fourfold classification of relevant factors was potentially a "useful tool":

    a. The numbers in the group whose interests the disclosure served – although numbers by themselves would often be an insufficient basis for establishing public interest;

b. The nature and the extent of the interests affected – the more important the interest and the more serious the effect, the more likely that public interest is engaged;

c. The nature of the wrongdoing – disclosure about deliberate wrongdoing is more likely to be regarded as in the public interest than inadvertent wrongdoing;

d. The identity of the wrongdoer – the larger or more prominent the wrongdoer, the more likely that disclosure would be in the public interest.

81. Underhill LJ said that Tribunals should be cautious about concluding that the public interest requirement is satisfied in the context of a private workplace dispute merely from the numbers of others who share the same interest. In practice, the larger the number of individuals affected by a breach of the contract of employment, the more likely it is that other features of the situation will engage the public interest.

82. If the Tribunal finds that the Claimant has made protected disclosures, then it needs to identify whether the fact that the Claimant had made protected disclosure was the reason or the principal reason for the dismissal. If it was part of the reason for dismissal, but not the sole or the major part of the reason for dismissal, then the automatically unfair dismissal claim must fail.

Ordinary unfair dismissal – Section 98 ERA 1996

83. Section 94 Employment Rights Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

84. Section 98 ERA provides so far as relevant:

> "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.
>
> 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.

85. The starting-point in misconduct cases is the well-known guidance in *Burchell v British Home Stores* [1980] ICR 303 at 304:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

86. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held:

> '"… 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."

87. It is not 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 they did. The Tribunal must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.

88. 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).

89. In cases where there is a procedural defect, the question that remains to be answered is whether the employer's procedure constituted a fair process. A dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair (*Fuller v Lloyds Bank plc* [1991] IRLR 336; see also *Slater v Leicestershire Health Authority* [1989] IRLR 16).

90. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness, according to the decision of the Court of Appeal in *Taylor v OCS Group Ltd* [2006] IRLR 613.

91. If the Tribunal decides that the dismissal was an unfair dismissal, then it must go on to consider what would have happened had a fair procedure been followed. This often requires the Tribunal to consider the percentage chance that the Claimant would have kept his job had a fair procedure been followed, given the nature of the alleged misconduct, and the evidence before the employer about misconduct. This issue is sometimes referred to as the *Polkey* issue, after the House of Lords case where the issue was discussed, that of *Polkey v AE Dayton Services Limited*.

92. It is also appropriate for the Tribunal to consider whether any conduct on the part of the Claimant contributed to the dismissal. If so, then the Tribunal has a discretion to reduce both the basic and the contributory awards to reflect that contributory fault, to the extent to which it considers it would be just and equitable to do so (Section 122(2) and Section 123(6) ERA 1996). It is only appropriate to make a reduction for contributory conduct if the Claimant's conduct is morally culpable.

Breach of contract

93. For an employer to be entitled to summarily dismiss an employee, that is dismiss him without notice, the employee's conduct must amount to gross misconduct. A definition of gross misconduct is found in paragraph 22 of *Neary v Dean of Westminster* [1999] IRLR 288:

> "…conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

94. Unlike in a claim for unfair dismissal, where the Tribunal will not substitute its own view for the employer's, the question for the Tribunal here is whether the Claimant is guilty on the facts of the gross misconduct alleged.

Conclusions

(1) Automatically unfair dismissal – Section 103A Employment Act 1996

95. The Claimant has failed to establish he made a protected disclosure in either of the two respects alleged.

96. In relation to the first alleged protected disclosure, about vehicle trackers, I have not found that the Claimant raised any specific complaint about the use of vehicle trackers during 2017 as he alleges.

97. In relation to the second alleged protected disclosure, concerning booking of annual leave, the Claimant did not make a qualifying disclosure to the Respondent. He was interrupted before he could complete what he was intending to say. The words used did not contain sufficient factual specificity such to be capable of showing any breach of a legal obligation by the Respondent. The Claimant had said no more than there were problems with the annual leave policy, given the number of employees. It therefore did not amount to a sufficient disclosure of information by the Claimant. Furthermore, whilst the Claimant genuinely believed that he was raising the issue on behalf of the other staff, I do not consider that he believed it was in the public interest, in the sense of applying more widely that the specific employees affected. Even if he did, then this belief in the public interest was not a reasonable belief. It affected only those who were were employees of the Respondent, a relatively small business. Further, it did not prevent all employees from taking their full holiday entitlement, only those who were late in booking or unwilling or unable to be flexible. Therefore, the employees who, in practice, were denied their holiday entitlement was likely to be well under ten, and the extent of holiday denied may well only be a handful of days. Applying the factors listed in *Chesterton*, the Claimant did not have a reasonable belief it was in the public interest.

98. Therefore, because the Claimant had not made any protected disclosures, his dismissal cannot be automatically unfair on the ground that such protected disclosures were the reason or the principal reason for his dismissal.

(2) Ordinary unfair dismissal

Reason for dismissal

99. The reason for the Claimant's dismissal was a genuine belief that the Claimant was guilty of gross misconduct. He was not dismissed because of previous complaints. The Respondent's investigation had uncovered disparities between the customer copy and the Respondent's copy of several invoices completed by the Claimant. Peter Wong did not consider that the Claimant's practice was a widespread practice or one that was condoned by the Respondent. Furthermore, it appeared to Peter Wong that the Claimant had continued to write different entries on the top and bottom invoices on two occasions after Mr Chang had raised the issue with him on 17 December 2019 and warned him he may face disciplinary action.

Reasonableness of Respondent's investigation

100. The Respondent conducted a reasonable investigation into inconsistencies in the Claimant's invoices. The extent of the investigation required depends on the extent to which the alleged misconduct is disputed. In the present case, the Claimant admitted that there were inconsistencies between the customer invoices and the duplicate invoices retained by the Respondent. He was given a full opportunity to explain the inconsistencies at an investigatory meeting conducted by Mr Chang and at a disciplinary meeting conducted by Mr Peter Wong. It was not necessary, as part of a reasonable investigation, to carry out an audit of all invoices issued by all salesman over a similar time period to that for which the Claimant was under investigation. It would be awkward to do so, if this would require customers to be approached and asked to provide a copy of the invoices that they had received. Apart from a general allegation made by the Claimant, there was no specific evidence implicating other salesmen in such a practice. Even if there had been, then this would not have lessened the Claimant's misconduct, unless the Claimant could produce specific evidence that the practice had been condoned by management both in his case and that of other salesmen.

101. The Claimant had not suggested, before he was dismissed, that he had been taught by a manager to manipulate the invoices in this way, or that it was a common practice across the salesforce. Therefore, this was not a matter that could reasonably be investigated further at that point.

Reasonable belief in the Claimant's guilt of misconduct

102. Given the extent of the Respondent's investigation and the extent of the Claimant's admissions during the two meetings, the Respondent had a reasonable belief in the Claimant's guilt of misconduct at the time of the dismissal decision.

Reasonableness of the sanction of dismissal

103. Given Claimant's admitted misconduct in manipulating the invoices to record a different amount and price of frozen produce on the bottom invoice to that on the top invoice – a practice with several customers which he apparently continued even after Mr Chang had raised it with him on 17 December 2018, warning him he may face a disciplinary investigation - the sanction of dismissal was within the band of reasonable responses. The Claimant was deliberately submitting inaccurate invoices to the Respondent. In so doing, he was misleading the Respondent about the prices that had been charged to the customers and the quantities of goods that had been purchased. He was hiding from the Respondent the fact that a gift had been given from the Respondent's stock, without the Respondent's permission, and contrary to the Respondent's rule that gifts should only be given at Christmastime. The customers had apparently been willing to pay full price for the items sold. They may have been willing to pay for the items given as gifts if they had not been offered as gifts and may have continued to buy from the Respondent even if gifts

had not been offered. The particular seafood items offered as gifts could potentially have been sold to other customers. If so, then this would have generated additional revenue for the Respondent. The Respondent was deprived of the opportunity of realising such revenue by the Claimant's invoicing practice.

104. It is significant that the Claimant apparently accepted at the conclusion of the appeal meeting that it would be appropriate to dismiss him for falsifying invoices. This confirms my view that dismissal for this misconduct was within the band of reasonable responses.

Procedural fairness

105. There were several features on the evidence which individually and cumulatively were procedurally unfair. As a result, the procedure followed by the Respondent was outside the band of reasonable procedures that a reasonable employer could have adopted:

    a. Firstly, the Claimant was also found guilty of matters that had not been clearly identified as disciplinary charges in the letter inviting the Claimant to the disciplinary meeting – namely findings of theft and bribery. The latter finding was overturned on appeal, but the finding of theft was upheld. As a result, this procedural defect was not cured on appeal;

    b. Secondly, the finding of theft related in part to an issue not discussed with the Claimant during either the investigatory or the disciplinary meetings. This was the contention that the Claimant had mislaid at least £1000 of stock that had not been sold to customers and was not in the Claimant's freezer. As a result, the Claimant did not have the opportunity to gather any evidence to defend his conduct in that respect, and in particular to show he had not personally profited. On the evidence before the Tribunal, there was no reasonable investigation into the theft issue, and therefore no reasonable basis for a finding of theft, particularly where the Claimant's general defence was he had given gifts to customers;

    c. Thirdly, the Respondent took into account further invoices which had not been supplied to the Claimant in advance of the disciplinary meeting. They were therefore not invoices on which the Claimant had the opportunity to comment during the disciplinary meeting;

    d. Fourthly, the person chairing the disciplinary meeting, Peter Wong, consulted with other managers before deciding on the outcome of the disciplinary process. Those other managers had not been present during the disciplinary meeting and were not part of any panel hearing the disciplinary charges.

Unfair dismissal conclusion

106. As a result, the Claimant's dismissal was an unfair dismissal because the procedure followed by the Respondent fell outside the band of reasonable procedures that a reasonable employer could follow in these circumstances.

What would have happened had a fair procedure been followed?

107. If a fair procedure had been followed, I consider it was inevitable that the Respondent would still have dismissed the Claimant. This was because of the duration of the Claimant's misconduct, which appeared to have been going on over a prolonged period; the extent to which there were deliberate discrepancies between the customer top copy and the Respondent's bottom copy of the invoices; the total value of the goods that the Claimant had gifted to customers contrary to the Respondent's prohibition on gifts; and the fact that the Claimant continued to manipulate the invoices even after Mr Chang had raised the issue with him.

Contributory fault – Section 123(6) ERA 1996

108. I reject the Claimant's evidence that he had been specifically told by Mr Richard Ng to falsify invoices on his first day of employment back in 2011. It is inherently improbable that a manager would have encouraged a new recruit to behave in this way on his first day in the role, particularly in circumstances where he was not the Claimant's line manager, and such a practice would be contrary to the Respondent's policy that gifts should only be given at Christmastime. I accept the evidence of Mr Ng in disputing that he had taught the Claimant to behave in this way. Had this been the case, the Claimant would have chosen to refer to this in the investigatory or in the disciplinary meetings. It is telling that this is a point only raised by the Claimant during his appeal meeting.

109. I also reject the Claimant's contention that the practice of manipulating invoices was a practice widely followed by other salesmen and condoned by management. There is no evidence to corroborate such an allegation.

110. On the evidence before the Tribunal, I do not find that the Claimant was guilty of theft. There is no evidence that the "gift items" were retained by the Claimant, rather than given to customers. I accept the Claimant's evidence that he adopted the practice in order to foster goodwill with his customers and so retain their business in a highly competitive market. I do not find that the apparent discrepancy between the expected and the actual stock in the Claimant's freezer amounts to theft of the items by the Claimant. There is insufficient evidence to enable me to make any such finding.

111. I do not find that the Claimant's conduct amounted to bribery of customers, noting that the Claimant was successful on appeal in relation to this allegation. It was withdrawn in the appeal outcome letter.

112. Given the extent of the Claimant's fault, I consider it would be appropriate to make a discount of 75% to the basic and contributory awards.

(3) Wrongful dismissal

113. I reject the Claimant's wrongful dismissal claim. Given the extent of the Claimant's fault, I consider that his conduct did amount to a fundamental breach of contract, entitling the Respondent to terminate the Claimant's contract without notice. The Claimant was in a position of trust, entrusted with keys to the Respondent's premises and with significant sums of cash which would be provided by customers to pay for goods purchased. In circumstances where the Claimant had been misleading the Respondent as to the precise purchases made by its customers over a substantial period of time, and acting contrary to the Respondent's gift policy, the Claimant's misconduct destroyed or seriously damaged the relationship of mutual trust and confidence. This breach of the implied term of mutual trust and confidence was a repudiatory breach of contract, which entitled the Respondent to summarily dismiss him.

(4) Section 38 Employment Rights Act 2002

114. At the conclusion of the case, I raised with the parties the potential application of this statutory section, given that it appeared on the unchallenged evidence that the Claimant had not been provided with a statement of employment particulars. Ms Cheng, counsel for the Respondent, regarded this as a remedy issue, which would not need to be determined until the issue of liability had been decided. It was agreed that I would make no findings in relation to whether the Claimant had been provided with a statement of employment particulars complying with the requirements of Section 1 Employment Rights Act 1996. This would be a matter to be considered at a Remedy Hearing if the Claimant succeeded.

(5) Next steps

115. Given the limited extent to which the Claimant has succeeded, I am hopeful that the parties will be able to agree the appropriate sum which is due to the Claimant by way of remedy. If not, then this will need to be listed for a short remedy hearing. The sole issues on the remedy hearing will be to determine any disputed calculation as to 25% of the Claimant's basic award; to decide whether the Claimant was provided with the statement of employment particulars required by Section 1 Employment Rights Act 1996; and if not, to consider whether the Claimant should be entitled to an award equivalent to either two or four weeks' pay under Section 38 Employment Act 2002.

116. The parties are to indicate to the Tribunal by 31 May 2021 at the latest whether they require a Remedy Hearing. If they do, then a two-hour Remedy Hearing will be listed at the earliest opportunity.

117. At one point, there was reference to other proceedings that may be live or may be contemplated between the parties. I was not provided with any details of those proceedings. If an issue in those actual or potential proceedings is whether the Claimant has stolen goods from the Respondent, then this issue has been decided in these proceedings, or could have been decided in these proceedings, as part of the Tribunal's determination of the issue of contributory fault, and its decision on the wrongful dismissal claim. I have found that the Claimant did not steal goods from the Respondent.

Employment Judge Gardiner
Date: 14 April 2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr W Wong**

Respondent: **Chan Brothers Limited**

Heard at: **East London Hearing Centre**

On: **6, 7 and 8 April 2021 (with the parties); 9 April 2021 (in chambers)**

Before: **Employment Judge Gardiner**

Representation
Claimant: Mr R Robison (Free Representation Unit)
Respondent: Ms G Cheng (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's automatically unfair dismissal claim under Section 103A Employment Rights Act 1996 is not well founded and accordingly is dismissed.**

2. **The Claimant's ordinary unfair dismissal claim under Section 94 Employment Rights Act 1996 succeeds. There is to be a reduction of 75% to the basic and compensatory awards for the Claimant's contributory conduct.**

3. **The Claimant's contractual claim for notice pay (wrongful dismissal claim) is not well founded and accordingly is dismissed.**

REASONS

1. The Respondent is an importer and wholesaler of frozen seafood to the catering trade. Until his summary dismissal on 6 February 2019, Mr Wong was employed by the Respondent as a salesman. He had been employed in that role from July 2011.

The reasons given by the Respondent for his dismissal were theft, falsification of invoices and bribery. Mr Wong's appeal was partially successful, to the extent that the finding of bribery was removed. The other two findings of misconduct remained, as did the sanction of dismissal.

2. The Claimant alleges that his dismissal was an unfair dismissal, contrary to Section 94 Employment Rights Act 1996. In addition, he alleges that this was an automatically unfair dismissal, contrary to Section 103A Employment Rights Act 1996. He argues that the principal reason for his dismissal was that he had previously made protected disclosures. Finally, the Claimant argues that it was a breach of contract not to pay him the notice pay to which he was entitled.

3. The case was heard at an in person hearing over three days. At the outset, the parties agreed that the issues to be determined were those contained in an Agreed List of Issues [37J]. This listed the unfair dismissal issues to be considered. Paragraph 1.7 was worded as follows:

> "Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?"

4. At the conclusion of the case, Ms Cheng, counsel for the Respondent, argued that it was not open to the Tribunal to consider whether the dismissal was procedurally unfair. Her argument was that this was not included in the Agreed List of Issues, and no particular procedural unfairness had been identified. I had asked the Claimant's representative, Mr Robison, during the initial discussion at the outset of the case, to identify whether his client had any particular procedural unfairness in mind. He had said that the procedural unfairness relied upon was that the Claimant's sanction of dismissal was harsher than the sanction given to other employees also found guilty of the same misconduct.

5. I consider the issue of procedural fairness does need to be determined by the Tribunal. In an 'ordinary' unfair dismissal case, the Tribunal's role is to determine the statutory question set out by Section 98(4) Employment Rights Act 1996. If the dismissal was taken for a potentially fair reason, the issue of whether the dismissal was unfair "depends on whether in the circumstances (including the size and the 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". Far from being conceded in the List of Issues, procedural fairness is clearly in dispute, given the wording of paragraph 1.7. Therefore, the Respondent was on notice, in advance of the Final Hearing, that this issue needed to be addressed. Mr Robison's response to my question does not limit the Tribunal's power or its duty to consider all relevant evidence when deciding whether the dismissal was unfair.

6. The List of Issues alleged that there were two protected disclosures, which were expressed as follows (although I have reordered them so they are now in chronological order):

> "The Claimant alleges that in 2017, the Claimant raised to his manager Bobby Chang that trackers had been put in their vans without their knowledge or consent and he thought this breached their privacy. It is alleged that the company continued to use trackers.
>
> The Claimant alleges that in March 2018 during a staff meeting, the Claimant raised on behalf of all salesmen at the company to managers Peter Wong and Bobby Chang that their rules that forbade overlapping annual leave meant that some salesmen were not getting their statutory annual leave entitlement and were instead being paid money."

7. This was a refinement of the protected disclosure case that the Claimant had originally advanced. In his ET1, the Claimant referred to several complaints he had raised over many years. These were (1) "several years of complaint" about the practice that employees could not take annual leave on the same date; (2) a complaint about whether he had been paid his entitlement to statutory sick pay following a period of sickness absence in 2015; (3) complaints about salesman being excluded from the company canteen; (4) complaints about lack of equipment; (5) complaints about failure to pay salesmen their salaries during annual leave; and (6) complaints about not paying salesmen bonuses, although part time cleaners were given bonuses. The wording of the ET1 implied, though did not expressly state, that the Claimant had also complained about the holiday he had been entitled to take during Christmas 2018, and the installation of a tracker in the vans of all salesmen.

8. By the time of a Preliminary Hearing before Employment Judge Jones on 11 September 2019, the number of alleged protected disclosures had reduced to four, as set out in a draft list of issues, which were identified by the letters A to D. The Claimant confirmed at that point he did not rely on any protected disclosures that were not repeated in the List of Issues. Provision was made for the List of Issues to be finalised and sent to the Tribunal by 2 October 2019. This had been done by the time of a further Preliminary Hearing before Employment Judge Ross held on 10 November 2020. At that hearing, the date of the staff meeting (where the Claimant attempted to raise an issue concerning annual leave) was amended in the list of issues from June 2018 (as originally alleged) to March 2018. In the record of the Preliminary Hearing, in explaining why this amendment was allowed, Employment Judge Ross referred to the List of Issues as being a tool for the parties and the Tribunal, rather than a tablet of stone, and cited the case of *Scicluna v Zippy Stitch* [2018] EWCA Civ 1320.

9. In his closing submissions, Mr Robison sought to argue that there had been protected disclosures on dates other than those in the List of Issues. I do not accept it is open to the Claimant to disregard the Agreed List of Issues in this way. The Agreed List of Issues was a refinement of more general allegations of complaints which had been made at the outset. Given the application made at the

November 2020 Preliminary Hearing to amend the date of the staff meeting in the List of Issues, both parties were well aware of the need for the List of Issues to accurately reflect the case to be determined. There was no application for any further amendment to the List of Issues at any point before the end of the evidence, nor even in closing submissions.

10. Therefore, the protected disclosure issues to be determined remains those set out in the Agreed List of Issues.

11. The Claimant gave evidence himself and called evidence from Ms Hua Yang. The witnesses called by the Respondent were Mr Bobby Chang, who was the Claimant's line manager; Mr Peter Wong, the Respondent's General Manager who took the decision to dismiss him; Ms Donna Chang, who heard the Claimant's appeal; Mr Richard Ng who was another of the Respondent's managers; and Mr Wing Ho, who was Mr Wong's assistant.

12. There was a dispute as to whether the Claimant could rely on a supplementary witness statement from Ms Hua Yang. For reasons given orally at the time, I decided that this supplementary witness statement should not be admitted in evidence. The only evidence from Hua Yang was the evidence in her original witness statement. Other witnesses had prepared supplementary statements that were admitted into evidence without challenge.

13. All witnesses gave their evidence in their native tongue, which was translated into English by an interpreter. For all witnesses apart from Ms Hua Yang, they gave their evidence in Cantonese. Ms Hua Yang gave her evidence in Mandarin. Her evidence was also translated into Cantonese for the benefit of the Claimant and others who would not understand either her Mandarin or its English translation.

14. Reference was made to documents in an agreed bundle of documents. At the outset of the case, Respondent's counsel had prepared a written skeleton argument. At the conclusion, both parties made oral closing submissions. The Claimant's representative had also prepared written closing submissions to which he had attached particular legal authorities.

Factual findings

15. The Respondent trades as a frozen seafood wholesaler. Its staff are deployed across four departments – management, warehouse, accounts and sales. Its customers are typically restaurants. The Claimant's role was to sell the Respondent's products to the existing customers he had been assigned, and to win new customers. By the time of his dismissal, he had around 70 or 80 customers. These customers were spread across a wide geographical area. It was the Claimant's responsibility to deliver the products to the customers, having loaded the items into his van at the Respondent's frozen storage facility in East London.

16. There was no contract of employment or any statement of employment particulars in the bundle of documents. The Claimant's unchallenged evidence was that he

was never given a contract of employment or written particulars of the main terms of his employment. The Claimant was apparently guaranteed £95 per week in basic salary. Most of his earnings came from commission. He was entitled to 2% commission on his sales up to £3000 per week, and 3% on weekly sales in excess of £3000.

17. It does not appear that the Respondent had a disciplinary policy. No such policy was included in the bundle, nor was there any reference to a disciplinary policy during the course of the evidence. As a result, there was no document issued to the Claimant specifying the procedure that would be followed in the event of alleged misconduct. Nor was there a document providing examples of what would be regarded as gross misconduct, for which the normal sanction would be dismissal.

18. In his role, the Claimant reported to Bobby Chang, Sales Manager. Mr Chang, in turn, reported to Peter Wong, the General Manager.

19. Customers would indicate the night before a proposed delivery what items of seafood were required, and in what quantity. Based on this information, salesmen would obtain the necessary frozen produce from the staff in the warehouse. More stock would typically be taken than had been specifically requested, presumably to enable additional sales to be made when at the customers' premises. The produce issued to salesmen would be recorded on a stock requisition form. At the end of each day's deliveries, salesmen would take unsold stock from their vans and place them into personal freezers at the Respondent's premises that they had been given for this purpose. Each salesman was issued with a key to the Respondent's premises, in part so he could access his freezer.

20. As was the case with all salesmen, the Claimant was expected to sell to his customers at the prices published by the Respondent for each of the items sold. However, the Claimant was permitted to reduce the prices by up to 5% for loyal customers and those paying in cash. Authority needed to be obtained to offer this discount to particular customers. Once salesmen were authorised to offer discounted prices, then the discount could continue to be applied to prices until there was a change in the Respondent's price list.

21. Salesmen recorded the goods sold and the price which was due by writing this information on numbered invoices. They were each issued with two books of No Carbon Required (NCR) numbered invoices. Each invoice had a top copy which would be handed to the customer, and a bottom copy which would be retained by the Respondent. Because of the nature of this system of invoicing, writing the invoice on the top copy would create an identically worded bottom copy. In that way, the version retained by the customer and the version retained by the Respondent would correspond exactly.

22. Salesmen were responsible for collecting payment for the goods that they supplied. For those customers who had an account with the Respondent, payment might be

made within 14 days of the delivery of the goods or within 28 days, depending on the credit terms being offered. Where customers paid in cash, then salesmen were responsible for taking the cash to the Respondent's Accounts Department. The Accounts Department also reviewed the bottom copy of the invoice. This was to check that the payment received corresponded to the amount stated on the invoice; and that the price of each item corresponded to the Respondent's list price for that item or was within 5%. A check could also be made, by reference to the invoice, the stock requisition form and the contents of a salesman's freezer, that there was no disparity between the value of the stock issued to a salesman and the revenue generated from the sale of that stock.

23. One member of staff in the Accounts Department was responsible for checking the items on the bottom copy of the invoices. Until about 2000, this was Ms Hua Yang. From then onwards, she became responsible for checking other records, including wholesale invoices and salesmen's wages and commission as well as their petrol and mileage. As a result, she was not directly responsible for checking to see if there were any discrepancies on the Respondent's copies of the invoices at any point during the Claimant's employment.

24. If there was a disparity between the prices or quantities of particular seafood on the customer invoice and the prices or quantities on the bottom copy retained by the Respondent, this would not be immediately apparent to the Respondent. This was because the customer would generally retain their copy of the invoice. There would be no particular reason for a copy of the invoice to be returned to the Respondent. On those rare occasions when a customer did return a copy of their invoice together with payment, there was no standard procedure for checking this version of the invoice against the version retained by the Respondent to ensure that the two were identical.

25. If it was discovered that salesmen had altered the invoices, this was a matter that did lead to disciplinary action, as the evidence of Ms Hua Yang confirms. As she states (paragraph 7), "some salesmen were fired for altering invoices and some were not". One person who was not fired for altering an invoice was Mr Man So. It was discovered that there was a discrepancy of £3 between the figure on the top customer copy and the figure on the bottom company copy. He was issued with a warning but kept his job. Apart from Richard Ng, as discussed below, no specific evidence was advanced by either side as to whether inconsistencies had been noted between invoice entries on the top and bottom copies completed by other salesmen. This is despite an order made by Employment Judge Jones on 11 September 2019, which required the Respondent to disclose top and bottom copies of invoices for November and December 2019 for the following salesmen: Mr L Man, Mr Hon Fun Chan and Mr F K Leung [37D].

26. The Respondent's customers had other potential suppliers to provide the seafood they required for their restaurants. The Respondent's salesmen needed to retain existing business as well as win new business. It was hoped that regular visits from

the same salesman would build a rapport that would lead the customers to continue to provide the Respondent with their business.

27. The Respondent's practice was to provide its loyal customers with a gift on Christmas Day, as a way of thanking them for their custom over the course of the past year. It would issue an amount of stock to each salesman, to be used as Christmas gifts. It did not provide salesmen with stock to enable them to give customers gifts at other times of the year. The Respondent's policy was that gifts were not to be given to customers apart from at Christmastime. On his own evidence, the Claimant was told this when he first joined the Respondent (first witness statement, paragraph 10). In addition, the Claimant's evidence was that gifts given from the Respondent's stock at other times of year would be deducted from his salary (first witness statement, paragraph 20).

28. This was unlike the arrangements at the two companies where the Claimant had worked before starting work with the Respondent. In both organisations, it was common for salesman to give gifts to customers in order to maintain their loyalty. These gifts would tend to be additional seafood items which would then be distributed amongst the customers' staff.

29. The Claimant alleges in his first witness statement he was told by Richard Ng when he started work that "we can change the invoice records so we can use the discount to get gifts". In his second witness statement he gave similar evidence, stating Mr Ng told him "if I wanted to give customers gifts, I could reduce the prices on some items and then include it for free … this is what everyone does and that all the managers are aware of it … it was even encouraged by management". Mr Ng disputes he ever said this, and denies that this was standard practice for other salesmen. This is a factual dispute to which I will return.

30. It is the Claimant's case that by the end of 2018, he was giving gifts to his customers on a regular basis. The gifts had come from the Respondent's stock and would be distributed by the customers to their staff. Gifts tended to be an additional item of seafood – either an item not otherwise ordered or an additional quantity of an item which had been ordered. The gift was not recorded on the customer's copy of the invoice, which made no reference to this item. It was recorded on the Respondent's copy not as a gift but as a sale, at a price in accordance with the Respondent's list prices. In this way the Respondent would not be informed from the information on its invoice that a gift had been given. Rather it would appear that this gift had been an additional sale. Lower prices would be recorded on the Respondent's invoice for many items so that the total listed for all items, including the 'gift', was equivalent to the amount on the customer's invoice.

31. As with the other salesmen, the Claimant was entitled to two weeks holiday in every period of six months. Holiday requests had to be submitted on a Holiday Request Form. The form would record the start and end date as well as the number of holiday days requested. On a section of the form, marked "For Office Use Only", one of the Respondent's managers would record whether the holiday had been

granted or refused. Holiday not taken in a six-month period could not be carried forward to the next six-month period.

32. The Respondent had a policy that no employee could take their holiday at the same time as another employee. Given the number of employees covered by the policy (sixteen in total, on the Claimant's evidence) and the number of weeks available in a six-month period, this had the consequence that all employees would not be able to take their full holiday entitlement. This policy changed at some point in 2018, so that employees could not take holiday at the same time as other employees working in the same department.

33. If an employee did not take their holiday entitlement, then the Respondent would pay them in lieu of untaken holiday. This would only be basic salary and would not include payment for the average commission they would receive during the weeks they had been working. If a salesman took holiday, then Richard Ng would generally deliver to that salesman's customers during their absence. Mr Ng had previously worked as a full-time salesman before he took over the role of Assistant Manager.

34. In around 2016, tracking devices were fitted to the vans used by the salesmen. This was so the Respondent could keep customers informed of salesmen's locations if they were running late. It was also so that vans could be traced more readily in the event that they were stolen. Salesmen were told in advance that the tracking devices were to be fitted to their vans and they were given a short period in which to raise their objections. None of the salesmen objected at that point. The information provided by the tracking devices enabled the Respondent to monitor not just the routes that the salesmen took to travel to their customers but also the amount of time that vans were stationary. I consider it likely that, on occasions, Donna Pang would have queried with the Claimant the amount of time the Claimant appeared to have spent stopped at a particular location; and the Claimant would have resented what he regarded as an intrusion into his privacy. However, I find it is unlikely that the Claimant told Mr Chang that the trackers had been put in the salesmen's vans without their consent or knowledge and he thought that this breached their privacy. It was not mentioned in the Claimant's first witness statement, even though the witness statement referred to other complaints he had apparently made and even though the statement refers to complaints from Ms Pang about the amount of time that the van was stationary. I find that the sales staff were told in advance that trackers would be fitted. They are likely to have been asked to make their vans available so that the trackers could be installed.

35. In March 2018, there was a staff meeting at the Respondent's offices, attended by the Respondent's managers and salesmen. This was an unusual event in that it was apparently the first time that the managers and the salesmen had all assembled for a group meeting. Unbeknown to the Respondent, the Claimant covertly recorded what was said during this meeting. There is an agreed transcript of the relevant part in the bundle of documents.

36. The purpose of the meeting was to discuss a proposal to introduce a bonus scheme for salesman. Speeches were given by Mr Wong, by Mr Chang, and by Ms Pang. When these three speeches had concluded, the Claimant attempted to raise his concern about the requirement that only one member of staff could take their annual leave at the same time. I find that the Claimant stated, as recorded in the transcript of this meeting:

> "Peter I want to mention one thing, about the annual leave. I think it's very, even though you said it is the company's policy, but I think they're some problems with the policy. I want to mention it. Right now, we have eight salesmen, 4 cold store staff, 4 managers and now 1 new manager, 5 people …".

37. At that point, the Claimant was interrupted by Mr Wong. Mr Wong said that he had spoken to Mr Chang about the annual leave policy but would not be changing it specifically because the Clamant had chosen to raise a complaint about it. Mr Peter Wong interrupted him because the general meeting had not been called to discuss the annual leave policy and he did not regard it as appropriate for the Claimant to raise his concerns in this forum. As a result, the Claimant made no further reference to the annual leave policy on this occasion.

38. As already stated, the procedure for booking annual leave was subsequently relaxed to allow employees working in different departments to book holiday on the same dates.

39. In October 2018, Man So, another of the Respondent's salesmen, retired. The Claimant was allocated some of his customers.

40. On 13 December 2018, Tai Pan Chinese Restaurant, one of the Respondent's customers for whom the Claimant was the assigned salesman, queried an item on its invoice. It sent a copy of its invoice to the Respondent. Upon investigation, it was noted that there were differences between the version supplied by the customer and the version retained by the Respondent. This was raised with Donna Pang, who in turn referred it to Mr Chang.

41. The following Monday, 17 December 2018, Bobby Chang spoke to the Claimant about the discrepancies which had been noted between the top copy and the bottom copy of the invoice. Mr Chang warned him that no decision had been taken as to how the issue may be progressed, but that disciplinary action may follow.

42. On 19 December 2018, the Claimant asked to speak to Peter Wong, the General Manager. The Claimant admitted he had made changes to the invoice and asked to be given a second chance.

43. Between 22 December 2018 and 6 January 2019, the Claimant was away from work on annual leave.

44. By 15 January 2019, it was noted that there were discrepancies with other invoices issued by the Claimant. It was decided that he should be suspended, pending further investigations. Because of this impending suspension, Mr Chang counted the stock in the Claimant's freezer, to ensure that it tallied with the Respondent's records. Mr Chang believed that there was a shortfall equivalent to about £1000. His evidence was that the Claimant made up the shortfall by writing the Respondent a cheque for this amount. He says a further £400 was noted to be missing when a further cheque of the Claimant's freezer was made later that day, which related to the van stock after his deliveries the previous day.

45. The Claimant disputes this version. His position is that the shortfall was explained by the delay in collecting payments for deliveries to those customers with accounts. His evidence was that this shortfall was collected by the colleagues covering for him during his suspension.

46. On 15 January 2019, the Claimant was handed a typed letter, written by Peter Wong, informing him he would be suspended pending a disciplinary investigation. The letter told him he would continue to be paid whilst he was suspended, at a weekly amount equivalent to his average weekly pay over the past 12 working weeks.

47. The investigation was conducted by Bobby Chang. The initial focus of the investigation was on six invoices for deliveries to three customers. These were Thai Rack, Chef Peking, and Tai Pan.

48. On 28 January 2019, he wrote to the Claimant inviting him to an investigation meeting on 30 January at 2pm. The meeting proceeded as scheduled. Tim Lo attended as notetaker, although the meeting was also recorded. The meeting was conducted in Cantonese. A transcript was produced of the audio recording in English. In cross examination, the Claimant confirmed he agreed that the transcript in the bundle was accurate. During the investigatory meeting, the Claimant admitted he was at fault: "it is really not correct to do this thing". When asked for an explanation, he said he said that there were two purposes to invoicing as he did. The first was to have higher commission for himself so he could have a higher commission. The second was to help protect the flow of business from the customers. Mr Chang repeated stated it had always been company policy not to give gifts. At no point did the Claimant dispute this or suggest he had been taught from the outset that the prices and quantities on the invoices could be manipulated to create regular gifts for customers. He said he was not stealing or cheating but the additional items had been given as gifts. There was no discussion during the investigatory meeting about any potential misconduct in the apparent shortfall in the value of items in the Claimant's personal freezer.

49. Following the investigatory meeting, Mr Chang prepared an investigation report in which he concluded that the Claimant did fabricate invoices. It was not suggested that the Claimant had been engaged in theft or bribery. Five potential mitigating

factors were recorded in the report, based on what the Claimant had said during the investigatory meeting.

50. The Claimant was sent a letter inviting him to a disciplinary meeting to be held on 5 February 2019. The date was subsequently rearranged for the following day, 6 February 2019. The invitation to the disciplinary meeting described the misconduct as "irregularities found with customer invoicing and payment for goods sold". Invoices were enclosed for Thai Rack, Chef Peking and Tai Pan. The letter warned him that one potential outcome of the meeting was that he would be dismissed.

51. The disciplinary meeting was also conducted in Cantonese. Again, the Claimant confirmed he agreed the typed English transcript of the disciplinary meeting. Mr Peter Wong stated that that there were differences between invoices and their duplicates written by the Claimant on 17 December 2018 and on 18 December 2018, even after Mr Chang had raised the issue with the Claimant. The Claimant suggested that Mr Chang had allowed him until after Christmas to "sort this out". Mr Tim Lo, who was present as notetaker, asked the Claimant if there were any mitigating factors. He admitted he had made a mistake and said that if the company gave him a second chance he believed he would do better. He did not suggest that Mr Richard Ng had taught him to manipulate the invoices when he was first hired or suggest that this was common practice across the company.

52. No decision was taken at the end of the meeting as to whether there was misconduct by the Claimant and if so, on the appropriate sanction. He was told he continued to be suspended on full pay until the outcome was communicated to him. After the disciplinary hearing but before a decision was taken, Peter Wong consulted with Tim Lo, Wing Ho, and with Bobby Chang. By this point, more irregularities had apparently come to light apart from the six invoices that were the subject of Mr Chang's investigation report. These further irregularities were taken into account in deciding on the outcome of disciplinary process, although the invoices had not been provided to the Claimant. Following this discussion, it was decided the Claimant was guilty of gross misconduct and the appropriate sanction was dismissal.

53. On 7 February 2019, the Respondent wrote a letter to the Claimant informing him he would be summarily dismissed. The letter stated that the Claimant had admitted misconduct during the disciplinary hearing. Taking all relevant factors into account, the Respondent had no alternative but to summarily dismiss him. The letter stated that the reasons for his dismissal were:

    (1) Receiving money for goods sold, not reporting the sale of said goods and withholding this money paid by customer from Chan Brothers Ltd. This can be considered as theft.

    (2) Falsifying invoice book records resulting in a loss for Chan Brothers Ltd. This can be considered as fraud.

(3) Using part of these proceeds to give goods to chefs/managers/owners for free or unreasonably low prices. This can be considered a bribery offence.

54. The letter concluded by warning him that the investigation would be continuing to gather further evidence which "may be used to claim against you in order to recover any losses and legal fees Chan Brothers Ltd have incurred". He was informed of his right of appeal.

55. In his evidence, Mr Peter Wong stated that part of the reason for the Claimant's dismissal was the stock discrepancy of £1000 noted in the Claimant's personal freezer. He said that this formed part of the first allegation found against the Claimant, that of theft. He accepted this issue had not been discussed during the disciplinary hearing.

56. The Claimant had made an emergency trip to Hong Kong immediately after the disciplinary meeting. As a result, he did not receive notice that he had been dismissed until 17 February 2019. He exercised his right of appeal, by sending an appeal letter dated 19 February 2019. He said that he had only admitted to falsifying invoice records and not the other misconducts that the company had imposed on him. He said he believed that dismissing him for reasons he did not admit to was unreasonable and unfair. He sent a further letter dated 25 February 2019 in which he denied he was guilty of theft, fraud or bribery and gave his reasons. He said he thought he had been dismissed because he did not get along with management and "because I am not afraid to speak my mind". He said that it was a longstanding tradition at the Respondent to give a gift of Mooncakes for each customer during the Mid-Autumn Festival, and at least a packet of prawns at Christmas. He stated, for the first time, that "Chans were aware of this practice, and condoned the actions of their salesmen by instructing and encouraging this tradition, and by assisting in the preparing of these gifts to their customers". He also said that a manager had taught him how to falsify invoices on his first day at work, and that all the other salesmen operated that way. He indicated that if he was guilty of bribery, then the Respondent was also guilty of this charge for giving gifts to their customers. It appears that this letter was written, at least in part, as part of a counter-offer to a settlement offer from the Respondent.

57. An appeal meeting was held on 1 March 2019 and was conducted by Donna Pang. Again, Mr Tim Lo attended to take notes and again the meeting was recorded. The Claimant was accompanied at the meeting by a work colleague, Mr Hon Fun Chan. He was another of the Respondent's salesmen. The Claimant accepts that the transcript of the appeal hearing is accurate. During the hearing, the Claimant argued he had been taught to falsify invoices by a manager when he first worked at the company. He refused to disclose the name of the manager who had taught him to do this. There was a discussion about how other employees had been sanctioned if found guilty of falsifying emails. The Claimant's representative, Hon Fun Chan indicated that some employees had been dismissed for falsifying invoices [entry 59, page 59]. The Claimant continued to claim that all salesmen falsified invoices. The Claimant repeated his general position that he converted the

5% discount potentially available to a customer into a gift worth 5% of the total value of the order. He described this as a "Win-Win situation" in which the Respondent gained more accounts and he gained more commission. At the end of the meeting the Claimant said this: "If you feel that I need to be fired because of falsifying invoices, then like what Fun said you can fire me. But you should not wrongly accuse me of so many other matters, right?". I interpret this comment as the Claimant accepting it would have been reasonable to have dismissed him for falsifying invoices, but not reasonable to dismiss him for the other two allegations found against him, namely theft and bribery.

58. There was no specific discussion during the appeal meeting about the finding of theft made against the Claimant. Nor was there any discussion about the apparent shortfall in relation to the value of the stock in the Claimant's freezer, which formed part of Mr Peter Wong's conclusion that the Claimant was guilty of theft.

59. On 4 March 2019, the Claimant wrote to the Respondent arguing that the sanction applied in his case was inconsistent with verbal warnings given to other employees who had falsified invoice book records. He said that he had not falsified the invoice book records since he had returned from his Christmas and New Year holiday on 7 February 2019. He asked that the Respondent would reinstate him to his employment.

60. On 15 March 2019, the Claimant hand delivered a letter offering to resign as of 7 February 2019. As a matter of law this letter had no effect. By that point the Claimant's employment had already ended as a result of the Respondent's letter informing him he was being summarily dismissed.

61. On 21 March 2019, the Claimant was sent a letter informing him of the outcome to his appeal. The letter stated that his appeal against the finding of bribery was successful, but the appeal against the finding of theft and fraud was unsuccessful. The decision that he should be summarily dismissed remained valid. Ms Pang stated she believed he had committed theft and fraud based on the evidence available to her. She stated that the Claimant's situation was significantly different from that of Man So. His case involved a discrepancy of £3 in relation to one invoice, whereas in the Claimant's case there were "multiple invoices from multiple customers".

62. These proceedings were issued on 6 May 2019, following a period of Early Conciliation from 11 April 2019 to 17 April 2019.

63. In October and November 2019, in response to the Tribunal's 11 September 2019 order, the Respondent contacted its customers to carry out what it referred to as an internal audit check. In the course of the evidence, I was not taken to any of the invoices that may have been disclosed as a result of this audit. As a result, it is unclear whether the audit revealed, as the Claimant alleged, that his practice in relation to invoices was a common practice across the salesteam.

Legal principles

Automatically unfair dismissal – Section 103A ERA 1996

64. In order to succeed in a claim for automatically unfair dismissal under Section 103A Employment Rights Act 1996 ("ERA 1996"), the Tribunal must conclude that the reason or the principal reason for his dismissal is that the Claimant had previously made a protected disclosure.

65. Protected disclosures are qualifying disclosures made in circumstances that are deemed to be protected by the ERA 1996. Disclosures made by the Claimant to the Respondent, as his employer, will be protected if they are qualifying disclosures.

66. So far as is relevant to the present case, qualifying disclosures are defined as follows, under Section 43B:

> (1) In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:
>
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

67. The starting point is that the disclosure must be a "*disclosure of information*" made by the worker bringing the claim. That disclosure must have two features. Both are based on the belief of the worker, and in both cases that belief must be a reasonable belief. The first is that at the time of making the disclosure the worker reasonably believed the disclosure tended to show wrongdoing in one of five specified respects in Section 43B(1); or deliberate concealment of that wrongdoing. The second is that at the time of making the disclosure, the worker reasonably believed the disclosure was made in the public interest.

68. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 Sales LJ noted that allegations could amount to disclosures of information depending on their content and on the surrounding context. He set out the following test for determining whether the information threshold had been met so as to potentially amount to a qualifying disclosure: the disclosure has to have *"sufficient factual content and specificity such as is capable of tending to show"* one of the five wrongdoings or deliberate concealment of the same. It is a matter *"for the evaluative judgment of the tribunal in the light of all the facts of the case"* (paras 35-36).

69. The Tribunal needs to assess whether, given the factual context, it is appropriate to analyse a particular communication in isolation or in connection with others. In *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540 (EAT), Slade J (at para 22) said that *"an earlier communication can be read together with a later one as embedded in it, rendering the later communication a protected disclosure, even if*

taken on their own they would not fall within Section 43B(1)(d)". Whether or not it is correct to do so is a question of fact.

70. In *Kilraine*, one of the alleged protected disclosures was made using these words : *"There have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented*". In itself, this lacked sufficient factual content and specificity. The oblique reference to other documented instances did not incorporate other documents by reference. In *Simpson v Cantor Fitzgerald Europe* [2020] ICR 236, the EAT upheld the ET's decision not to aggregate 37 communications to different recipients in order to assess whether there was a protected disclosure.

71. So far as the reasonable belief that the disclosure tends to show wrongdoing, there are two separate requirements. Firstly, a genuine belief that the disclosure tends to show wrongdoing in one of the five respects (or deliberate concealment of that wrongdoing). Secondly, that belief must be a reasonable belief. If the disclosure has a sufficient degree of factual content and specificity, then that belief is likely to be regarded as a reasonable belief (*Kilraine* at paragraph 36).

72. The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing (*Soh v Imperial College of Science, Technology and Medicine* EAT 0350/14). What is reasonable within Section 43B involves an objective standard and its application to the personal circumstances of the discloser. A whistleblower must exercise some judgment on his own part consistent with the evidence and the resources available to him (*Darnton v University of Surrey* [2003] IRLR 615, EAT). So a qualified medical professional is expected to look at all the material including the records before stating that the death of a patient during an operation was because something had gone wrong (*Korashi v Abertawe Bro Morgannwg University Health Board* [2012] IRLR 4 at paragraph 62). However, the disclosure may still be a qualifying disclosure even if the information is incorrect, in that a belief may be a reasonable belief even if it is wrong: *Babula v Waltham Forest College* [2007] ICR 1026.

73. In relation to each of the five prescribed types of wrongdoing, there is a potential past, present or future dimension. For instance, in relation to breach of a legal obligation, the reasonable belief must be that the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation. So far as future wrongdoing is concerned the phrase "is likely to" has been interpreted as meaning more than a mere possibility. In *Kraus v Penna* [2004] IRLR 260 the EAT held that to be a qualifying disclosure, the information disclosed should tend to show, in the claimant's reasonable belief, that failure to comply with a legal obligation was "*probable or more probable than not*".

74. So far as criminal offences under Section 43B(1)(a) are concerned, it is not necessary that the criminal offence believed by the worker to have been committed even exists, let alone has been breached. It is sufficient that the worker reasonably believes that a criminal offence has been committed: *Babula*. In that case the claimant reasonably believed that the subject of the disclosure had committed an offence of incitement to religious hatred, when there was no such offence at the

time. For the same reason, to amount to a qualifying disclosure, it is not necessary that the worker spells out the precise criminal offence that they have in mind.

75. So far as breaches of a legal obligation under Section 43B(1)(b) are concerned, any legal obligation potentially suffices, including breach of an employment contract: *Parkins v Sodexo* [2002] IRLR 109]. Employment Tribunal cases have held that a wide range of legal obligations are potentially applicable. A belief that particular conduct amounts to discrimination is a *"breach of a legal obligation"*.

76. In assessing whether a worker believed that there has been a breach of a legal obligation and whether that belief is a reasonable belief, potentially relevant evidential considerations are whether the concern about actual or potential breaches of legal obligation is stated or obvious or apparent as a matter of common sense. However, there is no rule requiring that one or more of these features need to be present: *Twist DX Limited v Armes* UKEAT/0020/20/JOJ at paragraph 97.

77. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, the disclosure in issue related to an occasion when the worker had raised a child safeguarding issue and claimed to have received an inadequate response. The tribunal held that this did not tend to show breach of a legal obligation, and this was upheld in the Court of Appeal. As the Court of Appeal noted, nothing in the Particulars of Claim or the witness statement indicated that the claimant had a particular legal obligation in mind. It was only later that her representative suggested a potential breach of the Children Act 2004 and the Education Act 2002.

78. Section 43B(1) also requires a claimant to have a reasonable belief that the disclosure was in the public interest. This requirement has two components – first a subjective belief, at the time, that that the disclosure was in the public interest; and secondly, that the belief was a reasonable one.

79. What amounts to a reasonable belief that disclosure was in the public interest element was considered by the Court of Appeal in *Chesterton Global Limited v Nurmohamed* [2018] ICR 731. The Court of Appeal considered that a disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker reasonably believed disclosure was in the public interest in additional to his own personal interest. So long as workers reasonably believed that disclosures were in the public interest when making the disclosure, they could justify the public interest element by reference to factors that they did not have in mind at the time.

80. Underhill LJ, giving the leading judgment, refused to define "public interest" in a mechanistic way, based merely on whether it impacted anyone other than the claimant or whether it impacted those beyond the workforce. Rather a Tribunal would need to consider all the circumstances, although the following fourfold classification of relevant factors was potentially a "useful tool":

    a. The numbers in the group whose interests the disclosure served – although numbers by themselves would often be an insufficient basis for establishing public interest;

b. The nature and the extent of the interests affected – the more important the interest and the more serious the effect, the more likely that public interest is engaged;

c. The nature of the wrongdoing – disclosure about deliberate wrongdoing is more likely to be regarded as in the public interest than inadvertent wrongdoing;

d. The identity of the wrongdoer – the larger or more prominent the wrongdoer, the more likely that disclosure would be in the public interest.

81. Underhill LJ said that Tribunals should be cautious about concluding that the public interest requirement is satisfied in the context of a private workplace dispute merely from the numbers of others who share the same interest. In practice, the larger the number of individuals affected by a breach of the contract of employment, the more likely it is that other features of the situation will engage the public interest.

82. If the Tribunal finds that the Claimant has made protected disclosures, then it needs to identify whether the fact that the Claimant had made protected disclosure was the reason or the principal reason for the dismissal. If it was part of the reason for dismissal, but not the sole or the major part of the reason for dismissal, then the automatically unfair dismissal claim must fail.

Ordinary unfair dismissal – Section 98 ERA 1996

83. Section 94 Employment Rights Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

84. Section 98 ERA provides so far as relevant:

> "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.
>
> 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.

85. The starting-point in misconduct cases is the well-known guidance in *Burchell v British Home Stores* [1980] ICR 303 at 304:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

86. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held:

> '"… 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."

87. It is not 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 they did. The Tribunal must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.

88. 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).

89. In cases where there is a procedural defect, the question that remains to be answered is whether the employer's procedure constituted a fair process. A dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair (*Fuller v Lloyds Bank plc* [1991] IRLR 336; see also *Slater v Leicestershire Health Authority* [1989] IRLR 16).

90. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness, according to the decision of the Court of Appeal in *Taylor v OCS Group Ltd* [2006] IRLR 613.

91. If the Tribunal decides that the dismissal was an unfair dismissal, then it must go on to consider what would have happened had a fair procedure been followed. This often requires the Tribunal to consider the percentage chance that the Claimant would have kept his job had a fair procedure been followed, given the nature of the alleged misconduct, and the evidence before the employer about misconduct. This issue is sometimes referred to as the *Polkey* issue, after the House of Lords case where the issue was discussed, that of *Polkey v AE Dayton Services Limited*.

92. It is also appropriate for the Tribunal to consider whether any conduct on the part of the Claimant contributed to the dismissal. If so, then the Tribunal has a discretion to reduce both the basic and the contributory awards to reflect that contributory fault, to the extent to which it considers it would be just and equitable to do so (Section 122(2) and Section 123(6) ERA 1996). It is only appropriate to make a reduction for contributory conduct if the Claimant's conduct is morally culpable.

Breach of contract

93. For an employer to be entitled to summarily dismiss an employee, that is dismiss him without notice, the employee's conduct must amount to gross misconduct. A definition of gross misconduct is found in paragraph 22 of *Neary v Dean of Westminster* [1999] IRLR 288:

> "…conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

94. Unlike in a claim for unfair dismissal, where the Tribunal will not substitute its own view for the employer's, the question for the Tribunal here is whether the Claimant is guilty on the facts of the gross misconduct alleged.

Conclusions

(1) Automatically unfair dismissal – Section 103A Employment Act 1996

95. The Claimant has failed to establish he made a protected disclosure in either of the two respects alleged.

96. In relation to the first alleged protected disclosure, about vehicle trackers, I have not found that the Claimant raised any specific complaint about the use of vehicle trackers during 2017 as he alleges.

97. In relation to the second alleged protected disclosure, concerning booking of annual leave, the Claimant did not make a qualifying disclosure to the Respondent. He was interrupted before he could complete what he was intending to say. The words used did not contain sufficient factual specificity such to be capable of showing any breach of a legal obligation by the Respondent. The Claimant had said no more than there were problems with the annual leave policy, given the number of employees. It therefore did not amount to a sufficient disclosure of information by the Claimant. Furthermore, whilst the Claimant genuinely believed that he was raising the issue on behalf of the other staff, I do not consider that he believed it was in the public interest, in the sense of applying more widely that the specific employees affected. Even if he did, then this belief in the public interest was not a reasonable belief. It affected only those who were were employees of the Respondent, a relatively small business. Further, it did not prevent all employees from taking their full holiday entitlement, only those who were late in booking or unwilling or unable to be flexible. Therefore, the employees who, in practice, were denied their holiday entitlement was likely to be well under ten, and the extent of holiday denied may well only be a handful of days. Applying the factors listed in *Chesterton*, the Claimant did not have a reasonable belief it was in the public interest.

98. Therefore, because the Claimant had not made any protected disclosures, his dismissal cannot be automatically unfair on the ground that such protected disclosures were the reason or the principal reason for his dismissal.

(2) Ordinary unfair dismissal

Reason for dismissal

99. The reason for the Claimant's dismissal was a genuine belief that the Claimant was guilty of gross misconduct. He was not dismissed because of previous complaints. The Respondent's investigation had uncovered disparities between the customer copy and the Respondent's copy of several invoices completed by the Claimant. Peter Wong did not consider that the Claimant's practice was a widespread practice or one that was condoned by the Respondent. Furthermore, it appeared to Peter Wong that the Claimant had continued to write different entries on the top and bottom invoices on two occasions after Mr Chang had raised the issue with him on 17 December 2019 and warned him he may face disciplinary action.

Reasonableness of Respondent's investigation

100. The Respondent conducted a reasonable investigation into inconsistencies in the Claimant's invoices. The extent of the investigation required depends on the extent to which the alleged misconduct is disputed. In the present case, the Claimant admitted that there were inconsistencies between the customer invoices and the duplicate invoices retained by the Respondent. He was given a full opportunity to explain the inconsistencies at an investigatory meeting conducted by Mr Chang and at a disciplinary meeting conducted by Mr Peter Wong. It was not necessary, as part of a reasonable investigation, to carry out an audit of all invoices issued by all salesman over a similar time period to that for which the Claimant was under investigation. It would be awkward to do so, if this would require customers to be approached and asked to provide a copy of the invoices that they had received. Apart from a general allegation made by the Claimant, there was no specific evidence implicating other salesmen in such a practice. Even if there had been, then this would not have lessened the Claimant's misconduct, unless the Claimant could produce specific evidence that the practice had been condoned by management both in his case and that of other salesmen.

101. The Claimant had not suggested, before he was dismissed, that he had been taught by a manager to manipulate the invoices in this way, or that it was a common practice across the salesforce. Therefore, this was not a matter that could reasonably be investigated further at that point.

Reasonable belief in the Claimant's guilt of misconduct

102. Given the extent of the Respondent's investigation and the extent of the Claimant's admissions during the two meetings, the Respondent had a reasonable belief in the Claimant's guilt of misconduct at the time of the dismissal decision.

Reasonableness of the sanction of dismissal

103. Given Claimant's admitted misconduct in manipulating the invoices to record a different amount and price of frozen produce on the bottom invoice to that on the top invoice – a practice with several customers which he apparently continued even after Mr Chang had raised it with him on 17 December 2018, warning him he may face a disciplinary investigation - the sanction of dismissal was within the band of reasonable responses. The Claimant was deliberately submitting inaccurate invoices to the Respondent. In so doing, he was misleading the Respondent about the prices that had been charged to the customers and the quantities of goods that had been purchased. He was hiding from the Respondent the fact that a gift had been given from the Respondent's stock, without the Respondent's permission, and contrary to the Respondent's rule that gifts should only be given at Christmastime. The customers had apparently been willing to pay full price for the items sold. They may have been willing to pay for the items given as gifts if they had not been offered as gifts and may have continued to buy from the Respondent even if gifts

had not been offered. The particular seafood items offered as gifts could potentially have been sold to other customers. If so, then this would have generated additional revenue for the Respondent. The Respondent was deprived of the opportunity of realising such revenue by the Claimant's invoicing practice.

104. It is significant that the Claimant apparently accepted at the conclusion of the appeal meeting that it would be appropriate to dismiss him for falsifying invoices. This confirms my view that dismissal for this misconduct was within the band of reasonable responses.

Procedural fairness

105. There were several features on the evidence which individually and cumulatively were procedurally unfair. As a result, the procedure followed by the Respondent was outside the band of reasonable procedures that a reasonable employer could have adopted:

    a. Firstly, the Claimant was also found guilty of matters that had not been clearly identified as disciplinary charges in the letter inviting the Claimant to the disciplinary meeting – namely findings of theft and bribery. The latter finding was overturned on appeal, but the finding of theft was upheld. As a result, this procedural defect was not cured on appeal;

    b. Secondly, the finding of theft related in part to an issue not discussed with the Claimant during either the investigatory or the disciplinary meetings. This was the contention that the Claimant had mislaid at least £1000 of stock that had not been sold to customers and was not in the Claimant's freezer. As a result, the Claimant did not have the opportunity to gather any evidence to defend his conduct in that respect, and in particular to show he had not personally profited. On the evidence before the Tribunal, there was no reasonable investigation into the theft issue, and therefore no reasonable basis for a finding of theft, particularly where the Claimant's general defence was he had given gifts to customers;

    c. Thirdly, the Respondent took into account further invoices which had not been supplied to the Claimant in advance of the disciplinary meeting. They were therefore not invoices on which the Claimant had the opportunity to comment during the disciplinary meeting;

    d. Fourthly, the person chairing the disciplinary meeting, Peter Wong, consulted with other managers before deciding on the outcome of the disciplinary process. Those other managers had not been present during the disciplinary meeting and were not part of any panel hearing the disciplinary charges.

Unfair dismissal conclusion

106. As a result, the Claimant's dismissal was an unfair dismissal because the procedure followed by the Respondent fell outside the band of reasonable procedures that a reasonable employer could follow in these circumstances.

What would have happened had a fair procedure been followed?

107. If a fair procedure had been followed, I consider it was inevitable that the Respondent would still have dismissed the Claimant. This was because of the duration of the Claimant's misconduct, which appeared to have been going on over a prolonged period; the extent to which there were deliberate discrepancies between the customer top copy and the Respondent's bottom copy of the invoices; the total value of the goods that the Claimant had gifted to customers contrary to the Respondent's prohibition on gifts; and the fact that the Claimant continued to manipulate the invoices even after Mr Chang had raised the issue with him.

Contributory fault – Section 123(6) ERA 1996

108. I reject the Claimant's evidence that he had been specifically told by Mr Richard Ng to falsify invoices on his first day of employment back in 2011. It is inherently improbable that a manager would have encouraged a new recruit to behave in this way on his first day in the role, particularly in circumstances where he was not the Claimant's line manager, and such a practice would be contrary to the Respondent's policy that gifts should only be given at Christmastime. I accept the evidence of Mr Ng in disputing that he had taught the Claimant to behave in this way. Had this been the case, the Claimant would have chosen to refer to this in the investigatory or in the disciplinary meetings. It is telling that this is a point only raised by the Claimant during his appeal meeting.

109. I also reject the Claimant's contention that the practice of manipulating invoices was a practice widely followed by other salesmen and condoned by management. There is no evidence to corroborate such an allegation.

110. On the evidence before the Tribunal, I do not find that the Claimant was guilty of theft. There is no evidence that the "gift items" were retained by the Claimant, rather than given to customers. I accept the Claimant's evidence that he adopted the practice in order to foster goodwill with his customers and so retain their business in a highly competitive market. I do not find that the apparent discrepancy between the expected and the actual stock in the Claimant's freezer amounts to theft of the items by the Claimant. There is insufficient evidence to enable me to make any such finding.

111. I do not find that the Claimant's conduct amounted to bribery of customers, noting that the Claimant was successful on appeal in relation to this allegation. It was withdrawn in the appeal outcome letter.

112. Given the extent of the Claimant's fault, I consider it would be appropriate to make a discount of 75% to the basic and contributory awards.

(3) Wrongful dismissal

113. I reject the Claimant's wrongful dismissal claim. Given the extent of the Claimant's fault, I consider that his conduct did amount to a fundamental breach of contract, entitling the Respondent to terminate the Claimant's contract without notice. The Claimant was in a position of trust, entrusted with keys to the Respondent's premises and with significant sums of cash which would be provided by customers to pay for goods purchased. In circumstances where the Claimant had been misleading the Respondent as to the precise purchases made by its customers over a substantial period of time, and acting contrary to the Respondent's gift policy, the Claimant's misconduct destroyed or seriously damaged the relationship of mutual trust and confidence. This breach of the implied term of mutual trust and confidence was a repudiatory breach of contract, which entitled the Respondent to summarily dismiss him.

(4) Section 38 Employment Rights Act 2002

114. At the conclusion of the case, I raised with the parties the potential application of this statutory section, given that it appeared on the unchallenged evidence that the Claimant had not been provided with a statement of employment particulars. Ms Cheng, counsel for the Respondent, regarded this as a remedy issue, which would not need to be determined until the issue of liability had been decided. It was agreed that I would make no findings in relation to whether the Claimant had been provided with a statement of employment particulars complying with the requirements of Section 1 Employment Rights Act 1996. This would be a matter to be considered at a Remedy Hearing if the Claimant succeeded.

(5) Next steps

115. Given the limited extent to which the Claimant has succeeded, I am hopeful that the parties will be able to agree the appropriate sum which is due to the Claimant by way of remedy. If not, then this will need to be listed for a short remedy hearing. The sole issues on the remedy hearing will be to determine any disputed calculation as to 25% of the Claimant's basic award; to decide whether the Claimant was provided with the statement of employment particulars required by Section 1 Employment Rights Act 1996; and if not, to consider whether the Claimant should be entitled to an award equivalent to either two or four weeks' pay under Section 38 Employment Act 2002.

116. The parties are to indicate to the Tribunal by 31 May 2021 at the latest whether they require a Remedy Hearing. If they do, then a two-hour Remedy Hearing will be listed at the earliest opportunity.

117. At one point, there was reference to other proceedings that may be live or may be contemplated between the parties. I was not provided with any details of those proceedings. If an issue in those actual or potential proceedings is whether the Claimant has stolen goods from the Respondent, then this issue has been decided in these proceedings, or could have been decided in these proceedings, as part of the Tribunal's determination of the issue of contributory fault, and its decision on the wrongful dismissal claim. I have found that the Claimant did not steal goods from the Respondent.

Employment Judge Gardiner
Date: 14 April 2021