



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Gary Patterson  
**Respondent:** A J Tensile Biogas Systems Limited  
**Heard at:** Cardiff CVP                      **On:** 1<sup>st</sup> and 2<sup>nd</sup> March 2021  
**Before:** Employment Judge A Frazer

**Representation:**

Claimant:  
In person

Respondent:  
Mr G Pollitt of  
Counsel

## JUDGMENT

1. The Claimant's claim for holiday pay is dismissed upon withdrawal.
2. The Claimant's claims for unfair dismissal and notice pay are not well founded and are dismissed.

## REASONS

### Introduction

1. On 24<sup>th</sup> October 2020 the Claimant presented a claim to the employment tribunal for unfair dismissal, notice pay and holiday pay arising out of his summary dismissal by the Respondent on 24<sup>th</sup> June 2020. In its Response

dated 7<sup>th</sup> December 2020 the Respondent asserted that the Claimant was fairly dismissed for gross misconduct and was not entitled to succeed in his claims.

## The Hearing

2. The claim was listed for two days on 1<sup>st</sup> and 2<sup>nd</sup> March 2021. I was provided with a core agreed bundle running to 658 pages and witness statements. Both parties provided written submissions on the second day. I canvassed with the parties at the outset of the hearing whether the time estimate would be sufficient. I timetabled the evidence and submissions so that the case could at least be completed within the two-day timescale with the expectation that I would reserve my decision. I heard oral evidence from the following witnesses: Paul Driscoll, Alan Oates, Kate Matthews and Mark Methuen-Lay for the Respondent and the Claimant, Gary Patterson. I heard oral submissions on the second day. I reserved my decision.

## Issues

### Unfair dismissal

3. Whether the Respondent had a potentially fair reason for the dismissal, namely conduct in accordance with s.98(2)(b) of the Employment Rights Act 1996.
4. Whether in the circumstances the Respondent had acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant, taking into account the equity and substantial merits of the case (s.98(4) Employment Rights Act 1996). As the dismissal was alleged to be a conduct dismissal an employer fairly dismisses an employee if:
  - i) The employer had reasonable grounds for believing that the employee was guilty of misconduct and
  - ii) At the time that it held that belief, it had carried out as much investigation as was reasonable in the circumstances of the case – **BHS Ltd v Burchell [1978] IRLR 379.**
5. Whether the Claimant contributed to his dismissal to the extent that there should be a reduction to any basic award (s.122(2) ERA 1996) and/or compensatory award (s.123(6) ERA 1996)
6. Whether there should be any 'Polkey reduction' to reflect the chance that the Claimant would have been dismissed in any event (**Polkey v A E Dayton Services Ltd [1987] UKHL 8.**)

7. In determining whether the Claimant was unfairly dismissed I remind myself that it is not my role to substitute my judgment for that of the employer. I must consider whether the decision of the employer fell within the band of reasonable responses that was a reasonable employer might have adopted (**Iceland Frozen Food Ltd v Jones [1983] ICR 17; HSBC Bank plc v Madden, Post Office v Foley [2000] EWCA Civ 330**). The
8. The band of reasonable responses test also applies to the investigation – **Sainsburys Supermarkets v Hitt [2002] EWCA Civ 588**

### **Wrongful Dismissal**

9. Whether the Respondent was entitled to summarily dismiss the Claimant.

### **Holiday Pay**

10. I was informed that the holiday pay claim was withdrawn and have issued a judgment upon withdrawal accordingly.

### **Findings**

11. The Claimant was employed as a Contracts and Installation Manager from 2<sup>nd</sup> August 2010 until his dismissal on 24<sup>th</sup> June 2020. The Claimant was also a director of AJ Tensile Biogas Systems Limited. Between January 2015 and June 2018 he was a director and employee of the AJ Tensile Tension Structures Ltd and transferred to the Respondent company in July 2018. The Respondent designs and installs biogas storage solutions related to the anaerobic digestion of food and animal waste. The Respondent is a wholly owned subsidiary of A J Tensile Group Ltd. Andrew Jerrum is the Managing Director. He co-owns the company along with Richard Cherry, Director, who was the Claimant's line manager. Paul Driscoll is the Finance Director for the Group and its subsidiaries. He is outsourced and is engaged by way of a contract for services. He sits on the board with Andrew Jerrum and Richard Cherry. In October 2019 he took on the line management responsibility for the accounts department staff following the departure of the General Manager. Within the accounts department were Lucy Swallow, bookkeeper, and Keely Jerrum, receptionist. The Respondent's office is located at Bentley Green Farm, Crick, Caldicot, Monmouthshire. The Respondent moved to this location in November 2019. The Respondent is a small employer and has no centralised HR department.
12. On 25<sup>th</sup> July 2019 Lucy Swallow raised a grievance about the Claimant and his manner towards her (p.55). Her desired outcome was an improvement in the working relationship. Mr Oates investigated her concerns and compiled a

report. Mr Oates did not make a recommendation but found that the Claimant's attitude towards Ms Swallow had affected her ability to carry out her duties. This was passed to Richard Cherry as the Claimant's line manager, however it does not appear to have been taken further.

13. On 24<sup>th</sup> September 2019 Ms Swallow emailed Paul Driscoll, Richard Cherry and Andrew Jerrum, again complaining of the Claimant's attitude and behaviour towards her. In particular she said that he had instructed staff to send all accounts queries to Paul Driscoll and not her. Ms Driscoll spoke to both Ms Swallow and the Claimant. The Claimant was conciliatory at the meeting and on that basis, it was left that the relationship would carry on.
14. The company relocated its office in November 2019. It was agreed that Ms Swallow would process paperwork for Biogas in that office two and a half days a week. The Claimant was reported to have wanted to ensure that Ms Swallow was present in the office when he was. Mr Driscoll and Mr Cherry informed him that this was not necessary as she needed to be flexible as to her times in order to cover her work for the manufacturing operation. Despite this the Claimant instructed her to attend at scheduled times.
15. On 6<sup>th</sup> February 2020 Ms Swallow rang Mr Driscoll following an incident that she had had with the Claimant. She was reported by Mr Driscoll to have been distressed. She requested that she be allowed to bring her files away from the office. She met Mr Driscoll at the factory and stated that she wished to raise a formal grievance against the Claimant.
16. Mr Driscoll took the decision to suspend the Claimant. His rationale for this is set out in his witness statement. He stated that he wanted to get to the bottom of what was going on and felt suspension was necessary as he thought there was a risk that the Claimant would stifle junior witnesses and potentially frustrate Mr Oakes' investigations. Mr Driscoll had picked up more recently that the Claimant was reported to have shouted at Biogas staff in a meeting. It had also been reported through manufacturing staff that the Claimant had said to Biogas staff that 'Richard might be the company director, but he is not here and it's me that runs this office'. This had not been reported to Mr Cherry and Mr Driscoll was concerned that this might signal that staff were intimidated by him to the extent that they kept quiet. He also felt that the Claimant had gone against the other directors' instructions to him that Ms Swallow should have flexibility in her attendance at the office. The report of this sequence of events is noted in Mr Driscoll's email to the company's HR Consultant, Deborah Jones at 1410 that day at p.61. Mr Driscoll's fears that the Claimant may not accept instruction from the Respondent or that he may intimidate witnesses were ultimately born out by the evidence that he had breached the terms of his suspension.

17. It was reasonably open to Mr Driscoll to suspend in my finding. On this occasion Ms Swallow had been distressed and had asked to move from the office. The Claimant had not co-operated with the other directors' instructions in terms of allowing Ms Swallow some flexibility in her working hours. Mr Driscoll felt that the Claimant may have an influence over members of staff, who could yet be part of the investigation. The Claimant was a senior employee of some influence within the company. It allowed the Respondent to conduct an investigation with employees being able to speak freely.

18. Mr Driscoll wrote to the Claimant to inform him of the terms of his suspension by letter dated 10<sup>th</sup> February 2020 (p.65). By that time he had been informed verbally and sent home. Mr Driscoll informed him that the suspension was not a disciplinary sanction and that it would be kept under review. Mr Driscoll wrote:

*'Unless you have my prior written consent you should not at this stage access the workplace nor contact any of the company's customers, suppliers or your work colleagues. Any attempt to influence colleagues involved in the investigation will be dealt with under the disciplinary process.'*

19. On 7<sup>th</sup> February Ms Swallow submitted her written grievance (p.63). On this occasion the tenor of the complaint was more serious. She complained of *'bullying, harassment and aggressive behaviour'*. She said: *'despite my previous grievances and also my numerous attempts to resolve the issues that Gary has against me the situation has now become unacceptable and unfair'*. She complained that the Claimant's behaviour had escalated to the point that it was affecting her mental health. On the letter she indicated that her desired outcome would be disciplinary on the basis that mediation and other solutions had not worked.

20. Mr Oakes was tasked with investigating the grievance. He interviewed Ms Swallow and two other employees who were present on the day of the incident complained of. He then met with the Claimant. On 20<sup>th</sup> February at 1140 he emailed Mr Driscoll and Mr Cherry with his preliminary thoughts about things as he was away on holiday. In the email he expressed a preliminary view that no foul language, threatening behaviour or personal insults were exchanged. At the bottom of the email he wrote:

*'As GP has never been addressed with ref this issue, this current grievance MAY lead to the FIRST disciplinary of GP, yet to be decided of course. I FIRMLY believe that as NO FOUL LANGUAGE, personal insults threats etc took place, the only thing being questioned is his tone, which while LS is unhappy with this is not grounds for anything more serious than misconduct.'*

*SO, assuming I find in Lucy's favour, which given the company's failure to address her prior Grievance, which is still live but at 5 months duration, is really beyond actioning anyway. I probably will NEED to, the most serious sanction we are likely to be able to justify with GP will fall far short of dismissal.'*

21. The Claimant referred to this as evidence of a pre-existing desire to bring about the Claimant's dismissal on the part of the directors. Mr Oakes' evidence was that his rationale for raising this was because his view was that the conduct in question was more in line with a misdemeanour, which the company would be able to deal with itself rather than having to outsource to external HR consultants. I find that rationale plausible. When the Respondent was later faced with conduct, which it considered to be gross misconduct, it did take the step of instructing HR consultants at cost. It would need to know in advance whether this step was necessary.
22. On his return from holiday Mr Oakes emailed the Claimant on 5<sup>th</sup> March to confirm that his conclusion would be that there should be no further action taken on the grievance but that he thought that there should be some mediation. He also said; *'while you have been away from the office, some issues have arisen internally, Directors Richard Cherry and Paul Driscoll both have points they wish to address with you as a result. Therefore I have asked that you do not return to your duties until they have contacted you'*. This email postdated the discovery of paperwork at the Claimant's office.
23. On 19<sup>th</sup> February and on instruction from Mr Driscoll, Ms Swallow attended the Biogas office to collect any financial paperwork that needed to be processed. Mr Driscoll's evidence was that there was a need for her to do this as there could be supplier invoices which were awaiting payment and owing to the Claimant's absence they may be lying around outstanding. I found this explanation to be plausible.
24. Ms Swallow attended the office in company with Ms Jerrum, Andrew Jerrum's wife, as they had just been to ASDA together. Ms Swallow went to the Claimant's workstation and subsequently discovered a large quantity of receipts and financial paperwork. She took some photographs and then phoned Mr Driscoll and asked what she should do. He advised her to bring the paperwork back to the office for review. Under cross-examination the Claimant asked Kate Driscoll, the disciplinary officer, whether she considered that it was suspicious that she had only taken three photographs. Ms Driscoll did not consider this so. She said that in her evidence Ms Swallow had said that she had begun to take photos but that when she had spoken to Mr Driscoll he had told her to gather up the paper work, which she did instead of photographing it. The issue that was uppermost in her mind when seeing the paperwork was that she had had arguments with the Claimant previously about paperwork, where

he had said that she had lost it, yet the paperwork was then seen to be at his desk.

25. On 20<sup>th</sup> February Mr Driscoll and Ms Swallow reviewed the paperwork. They did so in the context of a situation where they had chased the Claimant for documents in the past and yet he had said that he had submitted them to the accounts department already. Mr Driscoll entrusted the task to Ms Swallow of putting the receipts onto a spreadsheet. Having sought advice from Ms Jones, the company's outsourced HR consultant, Mr Driscoll selected a batch of receipts and proceeded to instigate a disciplinary investigation into these. The advice was that this was the most expeditious way to proceed. The process of collating the receipts was a lengthy one and in the event Mr Driscoll was unable to provide a full report to the board on this issue until August 2020. It was considered appropriate to select some key allegations rather than wait until all the receipts had been itemised.
26. On 9<sup>th</sup> March Mr Driscoll wrote two letters to the Claimant. The first was to inform him that there was to be no further action in relation to the disciplinary investigation resulting from Ms Swallow's grievance and that the suspension would be lifted as concerned that matter. The second letter informed him that the company was to commence a disciplinary investigation into his conduct for the financial matters.
27. There were four allegations. The two allegations which are relevant and for which the Claimant was ultimately dismissed were as follows (the other two having been discontinued at the disciplinary stage):
  1. *Financial misconduct in that you failed to deal with a large amount of (several hundred) financial paperwork and receipts dating back to 2015. Those receipts were found at your workplace following your recent suspension.*
  3. *That whilst suspended from duty on two separate occasions, you contacted a fellow Biogas employee despite specifically being asked not to contact any employees. This is considered serious insubordination.*
28. The Claimant was advised that he was suspended and was again instructed not to contact colleagues. He was warned that any attempt to influence colleagues involved in the investigation would be dealt with under the disciplinary process. The Claimant was provided with the Respondent's disciplinary procedure.
29. Mr Oakes undertook the investigation into the new matters. He relied on Ms Deborah Jones, the Respondent's outsourced HR consultant, for advice. On

20<sup>th</sup> April 2020 he met with Paul Driscoll, Finance Director. Mr Driscoll prepared a statement which Mr Oakes used in relation to the financial matters and which is at p.253 of the bundle. There were receipts that were found which totalled £10,000 according to Mr Driscoll. Mr Oakes found that a large number of receipts were for personal use, therefore he disregarded those and proceeded only with the company's receipts. There were 300 that were presented to the Claimant at the investigatory interview.

30. The Claimant attended an investigatory interview with Mr Oakes on 22<sup>nd</sup> April 2020. Ms Jones was present as a note taker. During that meeting the Claimant accepted that he had visited Dean White's house on 5<sup>th</sup> March 2020. He was asked, 'was it only one time you went to Dean's house?' and he said 'yes'. He was asked directly whether there had been any phone calls, texts or other visits and he said no. At the end of that meeting the Claimant was expressly instructed not to contact any clients, suppliers or colleagues of the Respondent.
31. Mr Oakes met with Dean White on 30<sup>th</sup> April and he said that the Claimant had attempted to call for him on 4<sup>th</sup> March but he did not answer the door or phone to him. He said that he then received some text messages from the Claimant and he attended the house again on 5<sup>th</sup> March. He then said that the Claimant had texted him on 6<sup>th</sup> March to ask if they could meet but Dean had declined. He then relayed to Mr Oakes that the Claimant had messenger messaged him on several subsequent dates.
32. Mr White later contacted Mr Oakes to inform him that the Claimant had visited his home again. Mr Oakes conducted an interview with Mr White on 5<sup>th</sup> May about the Claimant's alleged visit to Mr White's house on 1<sup>st</sup> May. Mr White said that on 1<sup>st</sup> May he had been in his garden when he noticed the Claimant was there too. He said that he offered the Claimant a drink. He said that he felt awkward. While they were in the kitchen, the Claimant had placed his phone on the kitchen table and had said that he knew that Mr White had reported that he had paid him a visit. Mr White said that the Claimant proceeded to discuss the investigation and that he said that he would be as difficult and unco-operative as he possibly could be whilst dragging out his paid absence, and that if an adequate deal was not offered he would be proceeding to a tribunal 'to screw the company for every penny he could get' (p.292).
33. Accordingly, on 6<sup>th</sup> May Mr Driscoll wrote to the Claimant warning him not to contact Dean White again.
34. Mr Oakes compiled a report as part of his investigation (pp 158 to 260). Owing to the large number of receipts found, he selected four examples of circumstances where the Claimant had not accounted for his expenses to the Respondent. These were:



1. Failing to submit receipts for a cash advance for a business trip to the USA in 2015 yet maintaining that these had been submitted.
  2. Failing to provide receipts for an expenses payment of £1, 737.90 on 3<sup>rd</sup> December 2018.
  3. A petty cash inconsistency of £212.90 from December 2018.
  4. The general allegation that the Claimant had claimed that he had passed receipts on to the accounts administrator when the presence of the receipts in his workplace indicated that this was not the case.
35. He found that the Claimant had failed to deal with a large amount of financial paperwork and receipts dating back to 2015, which were found at the Claimant's work station. He noted that the greatest concern was that the Claimant had said that he had submitted these to accounts and that they had been lost, which had not been the case, indicating that he had placed the blame for his own failings on other members of staff. It was found that he had failed to account for company funds for which he had been responsible. Mr Oakes recommended disciplinary action.
36. On 18<sup>th</sup> May through his representatives the Claimant raised the assertion that he may have been set up and asked a number of questions. Accordingly Mr Oakes interviewed Mr Driscoll, Ms Swallow, Mr Jerrum and Mrs Jerrum.
37. The Respondent decided to instruct an external HR consultant, Kate Matthews of EST HR Ltd, to chair the disciplinary hearing. She was referred by Ms Jones, her colleague. Ms Jones works for the Respondent through Dutton Jones Associates but is also an employee of EST on a part time basis. Mrs Matthews was instructed on the basis that it was open to her to make her own decision. Mrs Matthews had had no prior connection to the Respondent. The Respondent is a small company and the Claimant was a senior employee. It was therefore reasonable for the Respondent to have outsourced the disciplinary process.
38. Having heard from Mrs Matthews, I formed the impression that she approached the disciplinary hearing with an open mind, in particular interviewing witnesses with respect to the allegations about the set up as alleged by the Claimant. I do not consider that a dismissal outcome was pre-determined as she stated that she would be putting her reputation on the line if she carried out her work in a manner that was favourable to the client in this way. She had not worked for the Respondent before. I found Mr Methuen Ley to have been professional and meticulous in his approach, making his own enquiries and not taking the case at face value. Both consultants are CIPD qualified professionals.
39. The first disciplinary hearing took place on 29<sup>th</sup> May 2020. The Claimant provided a statement. He disputed that the number of receipts presented had

been found at his desk. His case was that most of the receipts had been submitted to accounts for processing. Once they were processed by Lucy Swallow, they were returned and kept in a blue folder in the Biogas office. He stated that the evidence showed that a credit card statement with annotations and an icloud invoice were found around his desk yet were not his. He asserted that this showed that the evidence had been planted. He produced a spreadsheet to explain any imbalances in the petty cash tin and disputed that there was no petty cash tin, contending that the use of a tin had previously been agreed between Paul Driscoll and Richard Cherry.

40. In relation to the visit to Dean White on 5<sup>th</sup> March, he accepted that he had attended on that date but stated that it was after he had received notification that Lucy Swallow's grievance would be concluded and so assumed the suspension would be lifted. He accepted that he had sent phone messages to Mr White while suspended. He also accepted attending at Dean White's house on 1<sup>st</sup> May but denied the contents of the conversation as outlined by Mr White. His explanation was that he was not thinking straight.
41. Having had the Claimant's explanations Mrs Matthews decided to make some further enquiries about these. To that end she interviewed Lucy Swallow, Paul Driscoll, Richard Cherry, Sharon Jerrum, Andrew Jerrum Alan Oakes, Dean White, Raul Alvarez and Rafael Trinkl. She sent the witness statements to the Claimant on 15<sup>th</sup> June 2020 and asked him to comment by 18<sup>th</sup> June. The Claimant asked for an extension of time to consider the statements. This was granted and a second disciplinary hearing took place on 22<sup>nd</sup> June 2020. The Claimant attended with documentation (p.455 to 475) and was given the opportunity to make representations. I find that the Claimant was given sufficient information as to the evidence that he was facing and had the opportunity to put his case.
42. Mrs Matthews sent her outcome on the disciplinary matters to the Claimant on 24<sup>th</sup> June 2020. She upheld the allegation of financial misconduct. She found that the Claimant's explanations had been inconsistent. At the investigation meeting on 22<sup>nd</sup> April 2020 he had said that he had been busy and this is why he may not have submitted the receipts. At the disciplinary hearing he had told Mrs Matthews that he had found it hard to believe that they were found at his desk area but also stated that he was not saying that they weren't. He had mentioned that he had been busy which was why the procedure hadn't been followed. She noted that in the hearing on 29<sup>th</sup> May he had said that it 'was possible that the receipts may have been there somewhere' but that he 'wasn't aware that they were there'.
43. Mrs Matthews discounted the Claimant's case that the receipts had been planted. She was satisfied from the witness evidence that the receipts had been

found in and around the Claimant's desk. She concluded that the Claimant had not followed established financial procedures over a lengthy period of time, that he was aware of those procedures and that he had been chased to submit receipts but had not done so, resulting in the company not being able to reconcile its accounts and having sustained financial loss. Mrs Matthews concluded that in view of his seniority as a director and his responsibility for handling money, his behaviour was a breach of trust and confidence.

44. As concerned contacting Mr White on suspension, Mrs Matthews noted that despite the letters to the Claimant and the express warning that he had been given in the investigation meeting he had shown a deliberate disregard of an instruction by visiting Mr White on 1<sup>st</sup> May 2020. Mrs Matthews concluded that he went to visit Mr White deliberately in order to talk about the disciplinary matter and to make a threat in the manner alleged. She found that the Claimant made these comments with the intent to influence Mr White and was trying to put him off making any further statements. She found that the Claimant had been dishonest in the meeting on 22<sup>nd</sup> April 2020 in terms of stating that he had not visited Mr White more than once.
45. The Claimant appealed on 1<sup>st</sup> July 2020. The appeal was heard by Mr Methuen Ley, also of EST HR. He had full authority to overturn Mrs Matthews' decision. Mr Methuen Ley met with the Claimant on 11<sup>th</sup> August 2020. Since the Claimant had raised a number of issues in his appeal hearing, Mr Methuen Ley interviewed witnesses on 26<sup>th</sup> August 2020. During his further enquiries he interviewed Mr Driscoll who had presented a report to directors. Mr Methuen Ley sent the Claimant this report and gave him the opportunity to comment on it. The Claimant asserted that this was an attempt to introduce new allegations against him. The Claimant was provided with all witness evidence and given the opportunity to comment on it.
46. Mr Methuen Ley concluded that there was no credible evidence to support the Claimant's assertion that the receipts had been planted. He concluded that neither Ms Swallow or Mrs Jerrum had entered the office that day with anything to carry or conceal such paperwork and no-one had witnessed any behaviour which could suggest furtive activity. He thought that it would have been a difficult task to locate the receipts from where they had been filed. Mr Methuen Ley placed weight on the fact that there were many of the Claimant's personal receipts found amongst the missing company receipts. He had regard to email evidence that Ms Swallow had been chasing the Claimant for paperwork. Mr Methuen Ley accepted the evidence of Mr Driscoll and Ms Swallow that the Claimant had not submitted receipts in accordance with financial procedures and that there had been repeated attempts to chase him. He accepted their evidence that the Claimant had previously accused accounts of losing receipts. He also considered that the Claimant had not returned change from cash

advances made to him. On the basis that this struck at the relationship of trust and confidence Mr Methuen Ley concluded that the Claimant was guilty of gross misconduct. Mr Methuen Ley found that the Claimant had also attended Dean White's house in disregard of instructions given to him by the Respondent and that he had done so with the intention to intimidate and influence him. He also found that this amounted to gross misconduct. Mr Methuen Ley sent his outcome letter to the Claimant on 25<sup>th</sup> September 2020. He dismissed the Claimant's appeal.

## **The Law**

47. The Respondent asserts that it had a potentially fair reason for the Claimant's dismissal, namely conduct further to s.98(2)(b) of the Employment Rights Act 1996. The Claimant's case is that the reason for dismissal was not genuine and that the dismissal was in effect, a sham as he was set up. If the Respondent establishes that it had a potentially fair reason then the question for the tribunal is 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. Since this is a conduct dismissal the employer must have a genuine belief in the employee's misconduct on reasonable grounds after having carried out as much investigation as was reasonable in the circumstances of the case (**BHS v Burchell [1978] IRLR 379**). The tribunal is to consider whether the employer's decision and the disciplinary process itself fell within the band of reasonable responses and is not to substitute its own judgment (**Iceland Frozen Food Ltd v Jones [1983] ICR 17; HSBC Bank plc v Madden, Post Office v Foley [2000] EWCA Civ 330; Sainsburys Supermarkets v Hitt [2002] EWCA Civ 588**).
48. When determining whether the Claimant was wrongfully dismissed, the Tribunal may come to its own conclusions as to whether the Claimant was guilty of gross misconduct such as to be entitled to his notice pay. The conduct must be so serious that it goes to the root of the contract, that is, the conduct must be repudiatory, entitling the employer to dismiss with immediate effect (**Wilson v Racher [1974] ICR 428**).

## **Submissions**

### **Claimant's Submissions**

49. The Claimant contends that he was suspended unjustifiably and only after Ms Swallow raised a grievance. He says that this was disproportionate and unnecessary. By contrast, he was not suspended when she had raised a grievance against him in the previous July. The email from Mr Oakes to Mr

Driscoll on 20<sup>th</sup> February 2020 evinced a pre-determination of the disciplinary process. A director wanted him dismissed in 2018. The person who raised the grievance then discovered a number of receipts around his workplace, which made him suspicious. Mr Driscoll managed the investigation process and added to the indictment at the appeal stage as concerned an allegation relating to £600 expenses, which demonstrated his interest in dismissing the Claimant. The Respondent ignored the evidence which supported the Claimant's belief that there was a set up and failed to have regard to inconsistencies. In particular, the Respondent failed to investigate the presence of an iCloud invoice and a credit card statement on the Claimant's workstation. The Respondent did not have regard to the evidence of Mr Cherry who did not describe the Claimant's desk as chaotic. Ms Swallow only took three photos of the desk area which were only of the receipts that the Claimant accepted he had not submitted. Ms Swallow's evidence that she did not want the Claimant dismissed was in conflict with her desired outcome for the grievance, which said that she wanted disciplinary action. Ms Swallow had said that she had chased for the £1,700 but no evidence was ever provided. The only chasing evidence was three emails from May 2019. The Claimant's line manager was not aware that he had been chased for receipts. The Respondent ought to have satisfied itself that there was a documentary trail. Mr Driscoll was an unreliable witness as his credibility was in issue. There was email evidence that Ms Swallow had put £1, 737.90 onto the system. The Claimant had submitted a spreadsheet and promised receipts. There was then no evidence that she had chased him for them. The disciplinary charge was not clearly framed (**Strouthos v London Underground [2004] EWCA Civ 402** per Pill LJ at paragraph 12). There was a conflict between the reasons given for dismissal by Ms Matthews in her witness statement as compared with those given in the outcome letter. The dismissal was outwith the band of reasonable responses: the Claimant had not gained any personal advantage in terms of expenses and he had a clean disciplinary record and ten years' service. As for contacting a colleague on suspension, the Claimant had not lied about visiting Mr White on 4<sup>th</sup> March as he had only successfully visited him on 5<sup>th</sup> March. He did not attempt to influence him on 1<sup>st</sup> May. He was frustrated and stressed as he believed he was being set up. The suspension letter did not set out that the sanction could be dismissal. Ms Matthews reached a conclusion that dismissal was the only option and appears not to have taken into account the Claimant's length of service and clean disciplinary record (**Brito-Babapulle v Ealing Hospital NHS Trust UKEAT/0358/12**).

### Respondent's Submissions

50. **Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94** made it clear that it is not necessary for an employer to extensively investigate each line of defence advanced by an employee. This would be too narrow an

approach and would add an "unwarranted gloss" to the Burchell test. What is important is the reasonableness of the investigation as a whole. As concerns the breach of suspension, the Claimant was warned not to contact other employees or he would face disciplinary action. At the disciplinary hearing the Claimant admitted to going to visit Dean White on 4<sup>th</sup> March. He accepted that had Mr White opened the door he would have received a 'good kick up the bum'. On 5<sup>th</sup> March he was informed that the investigation into the grievance was concluded but that he was still not to return to work. This should have signalled to him that he was still suspended and should not contact any staff. Despite this, on 5<sup>th</sup> March he went to visit Mr White. The Claimant received a further suspension letter on 9<sup>th</sup> March with an instruction not to contact staff members. He sent Mr White a number of text messages. He was informed at the investigation meeting on 22<sup>nd</sup> April not to contact staff. He contacted Mr White on 1<sup>st</sup> May and discussed the process. He accepted the visit but denied the contents of what he was reported to have said. It is to be noted that prior to the suspension he said he was friends with Mr White but that they did not visit each other's houses. The Claimant's breach of the terms of his suspension was gross insubordination, which is gross misconduct. That alone is sufficient to justify a fair dismissal without notice. As concerned the financial misconduct, this would be a serious breach of trust, which is a species of gross misconduct in the disciplinary policy. The allegation was clearly framed. The Claimant knew what he was facing and was able to respond to it whether it was alleged that he had been incompetent or dishonest. He was able to comment on the evidence and put his case. The Claimant's case that the receipts were planted was denied by all witnesses. No-one observed Ms Swallow to carry anything to the desk or put anything on the desk on the day in question. Only a limited number of people had keys to the office. There were a large number of personal receipts found as well. This begged the question how someone would have got hold of those receipts and planted them as well. Someone would have had to hold onto the receipts for many years and then plant them. The Claimant himself accepted that the receipts could have been on his desk. He accepted that there were receipts at his desk relating to a 2015 business trip. He accepted the company paid him £1, 737.90 for expenses and while he had submitted an excel spreadsheet he had never handed the receipts in. He seemed to accept there was a possibility that he had not given them in. The Claimant placed weight on Mr Cherry's evidence about his desk but then he accepted his memory of such things was not great, that there may have been receipts and that there were scattered files. The Claimant accepted there were bags at his desk. There was no evidence that the Respondent had a motive to dismiss. It had not made the Claimant redundant in a previous redundancy exercise. The Claimant had posted something on facebook but this had not been taken further. Despite there being evidence of the Claimant being rude to Ms Swallow the Respondent dealt with it informally. Ms Swallow did not want the Claimant to be dismissed. The Respondent carried out a fair procedure on

the basis that the suspension was reasonable; the Claimant was given all details of the allegations against him; the Claimant was given time to prepare for the disciplinary hearing; when the Claimant's solicitors requested Mr Driscoll to step back from the process he did so; the Claimant was provided with answers to his questions; the Claimant was given the right of accompaniment; the Respondent instructed independent HR consultants to carry out the disciplinary and appeal hearings; the Claimant was given the opportunity to respond to the new evidence gathered by Ms Matthews; at the appeal stage the Claimant was given the opportunity to respond to new evidence gathered by Mr Methuen-Ley; the appeal was carried out independently and it was reasonable for Respondent to have instructed external consultants.

## **Conclusions**

### **Unfair Dismissal**

51. The Respondent dismissed the Claimant for gross misconduct after finding a large quantity of receipts at his desk. On the basis of the evidence that it found, the Respondent had reason to believe that he had not submitted receipts for expenses so that the company could honour its accounting responsibilities. In particular, there was evidence from Ms Swallow and Mr Driscoll that they had chased him for receipts on numerous occasions. The Claimant contended that there was limited documentary evidence of this but in my finding the Respondent was entitled to rely on the oral evidence of Ms Swallow and Mr Driscoll. In particular, it was their evidence that the Claimant had blamed accounts for losing receipts when the discovery of the paperwork ultimately showed that he had held onto them. That was the reason why Ms Swallow was alerted to the presence of the receipts in the first place.
52. The Respondent carried out investigation through Mr Oakes. Ms Matthews and Ms Methuen Ley also carried their own enquiries in particular as regards the Claimant's defence. The Claimant was informed of the problem. In terms of the allegation of financial misconduct, he knew the nature of the allegation and was able to respond to it as he duly did. I do not consider that it lacked particularity. He knew the case that the Respondent was making against him. He was given the right of accompaniment. He was able to put his case fully. He was given the right of appeal. The disciplinary process as a whole was fair.
53. As for the specific allegations that were put to him, the Claimant accepted that he may have forgotten to hand in the receipts and that it was because he was busy. It was only throughout the course of the investigation that his case developed into one of a set up. He accepted that he had not provided all receipts for the business trip. He said that he had provided a spreadsheet for the £1, 737.90 but there was no evidence of that he had provided receipts. Ms

Matthews found that if the Claimant had not been complying with the procedure to submit receipts for some of the claims, it was likely that he had not done so for others too. Ms Matthews was entitled to reach the conclusion that she did about his evidence.

54. Through Mr Oakes, Ms Matthews and Mr Methuen Ley the Respondent conducted its own enquiries into the Claimant's case that he was set up. This was fair. The authority of **Sainsburys v Hitt** confirms that purpose of the investigation is to establish whether there are reasonable grounds for a belief formed by an employer. The purpose of an employment investigation is not to establish whether or not someone is guilty or not of conduct to the standard applied in a criminal court. For the Respondent to have conducted investigation into why the icloud invoice and credit card statement were there would have been otiose. In addition, it was entitled to weigh the evidence of the accounts of the Claimant's desk against Richard Cherry's evidence and reach a preference that there were carrier bags and boxes around the area. The Claimant accepted that he may have forgotten to hand receipts in so his account did not wholly discount the Respondent's evidence. The level of investigation was reasonable.
55. There was an amount written off by the company, it having given the Claimant the benefit of the doubt in terms of his prior assertions that he had submitted receipts. If he had put his hands up to the lost receipts it would have fallen to him to pay tax on that amount. The Claimant was a director and senior employee and therefore, the failure to account properly and timeously and to have misled the company (as to having already handed them to accounts) struck at the heart of the relationship of trust and confidence. The Respondent was entitled to find that this was a serious breach of trust in the circumstances and its decision that this was gross misconduct and warranted dismissal fell within the band of reasonable responses.
56. In any event, the Respondent was entitled to find on the evidence that the Claimant was guilty of gross insubordination in terms of the manner in which he had breached the terms of the suspension. The evidence was that he had visited Mr White on 4<sup>th</sup> and 5<sup>th</sup> March, albeit Mr White did not answer the door to him on 4<sup>th</sup>. He had also made numerous texts and messenger messages to him. He had attended on 1<sup>st</sup> May at Mr White's house, Mr White discovering him in the garden. He then proceeded to discuss the case and how he was going to drag proceedings out for the company. He had told Mr White that he knew that Mr White had reported him. The Respondent was entitled to consider that was intimidation, having regard to the manner and frequency of contact and what was said. It was entitled to rely on Mr White's evidence. This was not a one off but a repetition of contact including house visits in circumstances where the Claimant was warned by the Respondent on more than one occasion



that disciplinary action would result if he contacted employees. He was warned in the investigatory meeting yet proceeded to visit Mr White again. He was found by Ms Matthews to have lied in the investigatory meeting that he had only attended on 5<sup>th</sup> when he was cleared of the grievance matters. It was open to her to reach this conclusion on the evidence.

## Wrongful Dismissal

57. The Claimant had repeatedly ignored the Respondent's request for him not to contact any employees. He had lied about the extent of his contact with Mr White in his investigatory interview. It was relevant that he had said in his evidence that he had been friends with Mr White previously but not to the extent that they visited each other's houses. The course of conduct in contacting Mr White in breach of the terms of his suspension in this way was undoubtedly gross insubordination and as such, was a repudiatory breach of contract entitling the Respondent to dismiss him summarily.
58. I also found that his claims of being set up were implausible. He had already accepted the possibility that the receipts could have been found at his desk. The theory would have meant that the members of staff involved would have held onto receipts for a significant period of time in order to establish a case against him. Further, it did not explain why a number of his personal receipts were contained in the documents gathered. The process of collating the receipts was long and took up considerable time for the Respondent. I accepted the evidence of Mr Driscoll on this point. The report for the board was not ready until August 2020. Mr Driscoll's evidence was that he had found it time consuming. He is a freelance financial director elsewhere too and in my finding, it would be unlikely he and Ms Swallow would have set themselves such an arduous task in order to get rid of the Claimant. While Ms Swallow had requested that the Claimant be dismissed in her grievance, in her witness evidence she said that she had just wanted to get along with the Claimant. I formed the impression from her two previous grievances that if anything, she was seeking a peaceful life at work and was not the sort of person who would want to bring a vendetta against someone. The Claimant was a senior employee who had breached the Respondent's trust by claiming he had submitted receipts to accounts when they were in fact in his possession. The fact that he had failed to follow the proper financial procedures and had misrepresented the position to the Respondent, either knowingly or not, was a significant breach of trust and confidence.
59. Having reached those findings, the Claimant repudiated the contract of employment and his summary dismissal was a legitimate response. His claim for notice pay is therefore dismissed.

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Employment Judge A Frazer  
Dated: 30<sup>th</sup> March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON 31 March 2021

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FOR THE SECRETARY OF EMPLOYMENT  
TRIBUNALS Mr N Roche