EMPLOYMENT TRIBUNALS

Claimant: Mr J Walters

Respondent: Mears Limited

Heard at: London South Employment Tribunal (by CVP)

On: 7, 8 and 9 July 2021 and in chambers on 10 July 2021

Before: Employment Judge Kelly (sitting alone)

Appearances
For the claimant: Mr J Walters
For the respondent: Mr Chapman of counsel

RESERVED JUDGMENT

The decision of the employment tribunal is that:

1. The respondent is ordered to pay the claimant £364.96 as compensation for unfair dismissal.

2. The claimant's claim for notice pay is dismissed.

3. The respondent is ordered to pay the claimant £900 as compensation for detriment for family reasons.

REASONS

1. This hearing was to determine the compensation payable to the claimant following our finding of 31 March 2021 that the claimant was constructively unfairly dismissed and suffered a detriment for family reasons. This Judgment should be read with that of 31 March 2021.

2. At the start of the hearing, the claimant also confirmed he was bringing a new claim for notice pay. We noted that an amendment to his claim would need to be allowed for this. The respondent did not object to the claim being added and so it is considered below.

3. This has been a remote hearing. The parties did not object to a remote hearing format. The form of remote hearing was V. A face to face hearing was not held because it was not practicable and no-one requested it.

4. We heard evidence from the claimant and, for the respondent, from Mark Smith (MS), General Manager. All witnesses were cross examined.

5. We were provided with a supplementary bundle which we refer to as the remedy bundle (RB) in addition to the original bundle which we refer to as the liability bundle (LB), although the LB also contained material relevant to remedy. The RB was 289 pages long, to which further pages were added in the course of the hearing. The respondent had not provided pages 242 to 289 RB to the claimant electronically until the end of the day on 6 July 2021 and the claimant said he had not enough time to consider the additional documents. The claimant said he would need a day to consider them and the respondent did not object. Therefore, after dealing with some preliminary issues, we adjourned to the second day of the hearing, but allowed for a further continuation of the hearing during the afternoon to deal with any other issues arising, during which the claimant asked for clarity on aspects of the evidence.

6. One of the preliminary issues was to arrange for the respondent to send to the claimant by guaranteed delivery before 9.00am the next day a hard copy of the additional pages page 242 to 289 RB of the liability bundle, which took place.

7. At the start of the hearing, we established from the respondent what arguments it would be making in relation to unfair dismissal remedy. The arguments were as follows:

    a. As per *Polkey v AE Dayton Services Ltd [1987] UKHL* ('Polkey'), if the dismissal was procedurally unfair, an adjustment should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed in time anyway.

    b. The awards should be reduced due to the claimant's contribution to his dismissal.

    c. The claimant had failed to mitigate his loss properly.

    d. The injury to feeling for the detriment for family reasons should be in the low band.

8. In preliminary matters on the first day of the hearing, the claimant complained that the respondent had not supplied to him all his phone records and all GPS data on his whereabouts for the days to which the allegations related. The respondent's position was that the phone records in RBp288 were all the outgoing phone records and that the GPS data from p285 was all the GPS data on the claimant's whereabouts on the days in question which had been generated.

What happened

9. We find the relevant facts to be as follows and they should be read with the facts found in our Judgment of 31 March 2021.

10. The disciplinary allegations against the claimant were set out in brief on a notice of disciplinary hearing of 25 February 2020 as set out at para 18 of the Judgment of 31 March 2021.

11. The respondent confirmed that it was not relying on resident complaints against the claimant as alone being reason for a dismissal, and they did not form part of the issues in the hearing. Rather the respondent relied on anomalies identified in the claimant's activities from records from his PDA with which he was issued as a worker who mainly worked alone at residents' properties on repairs. As someone who mainly worked alone, the respondent had to place trust in the claimant to conduct himself appropriately in performing his duties. These anomalies were summarised by MS in the hearing as allegations against the claimant relating to the length of time the claimant took going home for lunch; finishing the job at one time and then going home and signing off the job as completed later; and signing the job as complete for residents.

12. The alleged misconduct relied on by the respondent was as discussed at an investigation meeting with the claimant. The notes of the meeting were annotated by the claimant. The evidence presented at that meeting was from page 85LB which the claimant had responded to by annotating the documents at p138 RB.

13. The claimant's contract of employment gave his working hours as 08.00 to 17.00 with 30 minutes for lunch. He worked 5 days a week. He was paid a salary and had no contractual entitlement to overtime payments (although he occasionally received them by special arrangement but this was not relevant to the issues.) He was not paid to drive to and from his place of work and so the working hours included travel time at the start and end of the day.

14. The claimant was subject to the respondent's disciplinary policy which gave examples of gross misconduct as

    a. Fraud, forgery or other dishonesty, including …submitting incorrect or misleading time sheets and or reporting;

    b. Misconduct likely to prejudice its business or its reputation; and

    c. Bringing the organisation into serious disrepute.

15. Almost all the properties which the claimant attended were in Pollards Hill, Mitcham, Surrey. According to google maps, it took 20 to 50 minutes to drive from the claimant's home to Pollards Hill. The claimant said it took 15 to 20 minutes. On 6 February, according to the claimant's PDA records, it took 36 minutes. We conclude that it took 20 to 40 minutes. Sometimes, the claimant worked at a location roughly on route between his home and Pollards Hill, called Gibson House. It took the claimant 6 – 10 minutes to drive from his home to Gibson House.

16. The claimant had no complaint that he had not received proper training on his duties. He accepted that he had seen training at RBp84 which gave the sequence of events at the end of a job as cleaning up, explaining the work to the resident, getting the work ticket PDA signed by the resident, arranging rubbish collection and finally arranging for any follow on works.

17. The work ticket to be signed by the resident was the 'MearsEnable Work Ticket' which had a space for the resident signature and a space for the operative signature. The point of having the resident sign was so that the completion of the job was independently verified for the ultimate client, 'Moats'. The claimant accepted that the process of getting the resident to sign on the PDA that the works were done did not take much time.

18. After getting the PDA signed by the resident, the operative was supposed to ask the resident whether they wanted to answer survey questions from the operative, have a telephone survey or not participate in a survey. The operative entered this information through the PDA. The point of the survey was to give information about how the respondent was performing its services to the ultimate client. The survey question could not be dealt with until the Work Ticket was signed as completed.

19. The offices of the ultimate client were close to the residents' properties at Pollards Hill and there were facilities there for operatives to have lunch, as recorded by the claimant in his witness statement. At no point prior to the hearing did the claimant suggest it was impractical for him to have lunch at the Moats offices. In the hearing, he said there were only 3 chairs and these were always already taken by Moats staff, so it was impractical for him to have lunch there. He accepted that he regularly had lunch in his van, as well as going home for lunch.

20. A workplace update of May 2019, headed 'Working Hours', at p60RB, signed by the claimant, said that

    a. It was imperative that the PDA was used correctly because it was used to bill the client. The claimant accepted this was true in the hearing;

    b. Operatives were expected to work to their finish time of 17.00;

    c. A primary function of the PDA's was to provide an accurate audit trail that allowed both the contract staff and the client to easily see what, when and why a job was done and to see an accurate reflection of cost;

    d. A purpose of the GPS locator was to aid in the transparency with the client in allowing the respondent to illustrate when a job has been completed and in turn for the client to check themselves.

21. The respondent did not invoice the time spent by operatives visiting suppliers and the tip. The claimant said he had no knowledge of this and thought that this time was all billed. He relied on the above workplace update of May 2019 which said that work included picking up and dropping off hire equipment, attendance at suppliers for materials and attendance at skips.

22. The claimant's first supervisor was RP and he was replaced by DD at some date prior to the incidents in question.

23. The anomalies identified by the respondent in the claimant's activities and on which it relied for the purpose of the hearing were all in the working days 3 to 11 February 2020 and occurred on every working day. They were mainly as illustrated by the following:

    a. On 3 February, the claimant did not get to site until 08.27. We accept that the claimant went to get materials at the start of the day and this explained his apparently late start time.

    b. On and in relation to 3, 4 and 5 February:

        i. The claimant took a photo of the completed works at 14.52, 15.34 and 15.03 respectively but did not sign off the works as completed until 16.53, 16.58 and 16.58 respectively, and then all from his home address with the claimant signing his PDA on behalf of the resident.

ii. Between taking a photo of the final works and signing it off on his PDA, the claimant visited the skip to dispose of rubbish each day. The claimant said it had taken him up to 1.5 hours to clear the heavy rubbish, get caught in traffic and wait for the skip to become accessible.

iii. The claimant said that he did not sign off the work as completed until after taking the rubbish to the skip because this was the instruction he had received from his first supervisor; he understood the work for the resident to include disposing of waste as per p60RB.

iv. He said that, after disposing of the rubbish, he had to make notes on his PDA and then sign off the work as completed, and that he did not do this at the skip because it closed at 17.00 and so he waited until he got home because there was nowhere to park up safely and legally at the skip to do this.

v. He said he called the planner at the skip site at 16.35 on 3 February after putting the rubbish in the skip to ask about any more work and was told there was not any. There was no sign of this call on the claimant's work mobile phone records of this. The claimant said the phone records produced did not show all his calls.

vi. The claimant was asked why he could not have signed off the job as complete at the skip site after or before calling the planner instead of going home first. The claimant could not provide an answer, except that he had always done it this way and had never been told any differently.

c. On 3, 4, and 5 February, the claimant entered on the PDA at 16.53, 16.58 and 16.59 respectively, while at home, that the resident wanted to complete a telephone survey.

d. On 6 February, the claimant took a photo of a completed job at 11.23. He told the hearing that he cleared up from 11.25 to 11.45. He did not then go to the skip as this was not required for the job. Therefore, even on the claimant's case, the work on the job was complete by 11.45. He went home for lunch. At 12.00, at home, he took a photo of a can of WD-40 via the PDA. At 12.07, he signed off the work as complete and signed the Work Ticket on behalf of the resident. His explanation, in the investigation meeting, for failing to sign off the job on site was that, otherwise, it would encroached on his lunch time. He was asked in the hearing for an explanation for failing to sign off the job on site and could not give one, other than to say that this was the way it was done. After having his lunch at home, the claimant returned to the work site IE he drove back to the Pollards Hill area. The claimant denied that it took as long as 1.5 hours to drive home, make and eat his lunch and drive back to Pollards Hill.

24. The claimant's general explanation of the anomalies was that he had been working in this way for 25 months and no-one had picked him up on it. If he was doing something wrong, he should have been told. In particular, he said that he would mention to planners that he was having lunch at home during phone calls so the respondent was well aware of it and did not pick him up on it. The respondent's position on this was that it did not routinely check the GPS data on the PDA records and so had not picked up that the claimant was going home for lunch and signing off the work as completed etc at home. MS said that he had spoken to planners, as part of the disciplinary

investigation, and asked them if the claimant had said he was having lunch at home, and they denied this.

25. We did not go over the other days of the allegations, 7, 10 and 11 Feb 2020, in details as this would have been disproportionate as they raised generally the same issues, but the claimant had the chance to say anything he wished to on those days. A few points were picked up in relation to those days:

    a. The claimant confirmed that he asked the resident to sign the PDA before he left the resident's property on 7 Feb 2020. The resident would not do so and therefore he called his supervisor, DD. It was the claimant's evidence that DD told him to sign on behalf of the resident. It was the respondent's evidence that, if the resident would not sign, the operative should enter 'N/A' rather than signing.

    b. The claimant was working in Pollards Hill in the morning and afternoon of 7 and 11 February, and at Gibson House on the morning of 10 February and Pollards Hill on the afternoon of 10 February. On all 3 days, he went home for lunch. He signed off the work as complete on the PDA at home on 11 February and took a picture of a screw at 12.18.

26. The claimant said that, when he went home for lunch, he made his lunch and ate it.

27. The respondent suggested that the claimant took photos of materials for no other reason than to mislead the respondent into believing he was still at the job site. The claimant said he took the photos as instructed by his first supervisor to demonstrate that its cost should be billed to the client. All materials were invoiced to the client through the procurement process when the claimant bought them from a supplier. The respondent's position was that this demonstrated that the claimant's explanation was not true.

28. In the hearing, MS' evidence was that the respondent did not have a set lunch break policy and mobile employees could go home for lunch if they were in the vicinity of their home; there was a certain amount of flexibility over the 30 minutes for lunch but spending an hour travelling to and from lunch was not acceptable.

29. In the bundles were two sets of telephone records provided by the respondent to the claimant at different times and with some discrepancies in the information shown. No records were provided of calls made by the claimant where he could not get through because the number was engaged or called received by the claimant.

30. The claimant's gross weekly salary was £573.50 and the net weekly salary £439. The respondent's pension contributions were £17.20 per week. The claimant's contractual notice entitlement from the respondent was 2 weeks. His date of birth was 7 Sep 2070 and he was 49 at the date of termination of employment. He did not receive state benefits after the termination of his employment. The respondent did not challenge the calculation of the basic award made by the claimant.

31. After the end of his employment, the claimant started self employed work with 'IPS' from 6 Nov 2020 to 18 Dec 2020 at the rate of £620 net per week, and then from 18 Feb 2021 employment with 'KNK' at the rate of £607 per week, which employment is ongoing. He was made aware that the IPS work would finish two days before it did.

32. The claimant produced no evidence of any job searches prior to August 2020. He said that he could not see any suitable jobs prior to this date and blamed the COVID

lockdown. Although the claimant was employed as a multi skilled operative by the respondent, he decided that he did not wish to do that work again and only looked for work as a carpenter or locksmith. He said this was due to various medical conditions, but also said that he would have physically been capable of continuing to work as a multi skilled operative for the respondent had he not been dismissed. He also said that he had to find work in the vicinity of his home due to child care commitments. He accepted that he was well skilled and experienced and he said he could pick and choose what work he did and confirmed that he was not turned down in any job application which he made.

33. The respondent produced an analysis in relation to multi trader roles from June 2021 (RBp157) showing job postings increasing from April 2020 to November 2020 and those seeking the roles peaked in May 2020 and then became stable into July before they dramatically falling in August.

34. The claimant claimed sums as follows:

    a. £1614 basic award;

    b. £9270.51 loss of earnings to date of hearing. This comprised £23,091 lost income less earnings from 'IPS' from 6 Nov 2020 to 18 Dec 2020 of £5240, and earnings from 'KNK' from 8 Feb 2021 to date of hearing of £9988. He also claimed loss of pension contributions of £1008 and compensation for loss of statutory rights of £400.

    c. No claim for loss of future earnings.

    d. £912.40 notice pay.

35. The respondent did not challenge the sums claimed for loss of earnings between the end of the IPS work and the start of the KNK work. The respondent said that the claimant should have mitigated his loss sooner after his dismissal.

36. In the hearing, the claimant initially claimed £7000 for injury to feelings in relation to the family leave issue, and then, increased his claim to £9000. He justified this as being because he was given a difficult time to get something he was entitled to. He said that the stress of the issue had resulted in his feeling unwell and having raised blood pressure. He relied on a letter from his GP of 5 March 2020 which said 'This gentleman attended the clinic today complaining of feeling very stressed about an ongoing work situation. This is having an impact on sleep, his appetite and his general feeling of well being. His blood pressure was significantly elevated on first testing but settled with retesting over time.'

37. The claimant had emailed DD on 7 Feb 2020 saying he had spoken to HR about his application for parental leave and she said to tell him to book the time off as authorised leave. The claimant accepted that, by 7 February, the issue was done and dusted, but said it was after a big hassle.

38. DD produced a statement saying that he never instructed any operatives to sign off a job on a resident's behalf. We have already concluded at para 49a of the Judgment of 31 Mar 2020 that this statement was false. In notes on this statement (RBp150), the claimant stated that he had not been told to put 'N/A' in the signature. He said he always called his supervisor to get clarity about any circumstance on jobs such as aggressive residents and was told to leave without arguing and to sign off the job himself.

39. The respondent submitted that it would have taken one to two weeks for the respondent to have collated all the evidence properly required for the disciplinary hearing.

Law

Unfair dismissal and notice pay

40. The respondent referred us to the Manchester Employment Tribunal case of *Marsh v First 4 Direct Mail Limited 2402759/2017* and relied on the law set out by the Tribunal in that case. The claimant was provided with a copy of the case. This case sets out the law on unfair dismissal compensation and on notice pay claims.

41. We refer to the Annexe of that case for the relevant law and to paragraphs 17 to 31 for an analysis of that law.

Detriment for family reasons

42. Under s49 ERA, where a complaint of detriment for family reasons is well founded, the tribunal shall make a declaration to that effect and may make an award of compensation in respect of the act to which the complaint relates. The amount of the compensation shall be such as the tribunal considers just and equitable having regard to the infringement and any loss attributable to the infringement. Financial loss is further covered under s49(3). There is a provision allowing for a reduction for contributory fault.

43. It was accepted by the respondent that compensation can cover injury to feelings.

44. Damages for injury to feelings are awarded according to the general guidelines that apply to conventional discrimination claims, which were set out by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police 2003 ICR 318*, and which have subsequently been uplifted to take account of inflation. Under the Third Addendum to Presidential Guidance these guidelines currently provide for a top band of £27,000 to £45,000, a middle band of £9000 to £27,000 and a lower band of £900 to £9,000.

45. In *Vento*, Mummery LJ laid down general guidance including that, in general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings. The reference to £500 would now be to £900.

46. The level of awards for personal injury are set out in The Judicial College Guidelines for assessment of general damages in personal injury cases fifteenth edition. It is appropriate to compare these awards when considering a claim for injury to feelings under *Vento.*

Conclusions

Polkey

47. We refer to the questions set out by Elias J in *Grayson v Paycare* as set out in *Marsh.* We consider the most appropriate of those questions to the current case is: *Whether either party has adduced evidence entitling the Tribunal to conclude (the burden of satisfying the Tribunal being on the employer) that the employee would or might have ceased to be employed in any event had fair procedures been followed.*

48. The respondent's case was that, had it followed a fair procedure to a disciplinary hearing instead of the claimant resigning prior to the hearing, there was 100% chance that the claimant would have been dismissed for gross misconduct as the facts showed dishonesty by him when working in a position of trust in terms of his reporting and acting in a way which was likely to prejudice its reputation with its ultimate client.

49. The claimant did not articulate his case on this but we take it to be, from the arguments he made in the hearing, that he would not have been dismissed because the respondent could not reasonably have concluded that he had committed a gross misconduct, on the basis that he was only doing what he had always done following the instructions on or with the knowledge of his supervisor; there was no dishonesty.

50. The claimant's alleged misconducts were as follows (as per MS' summary in the hearing referred to above):

    a. Taking a wholly inappropriate lunch time.

        i. The allegation was that, instead of taking a half hour for lunch as per his contractual entitlement, the claimant took at least 1.5 hours in driving home, eating lunch at home and driving back to work.

        ii. We find that on 6, 7 and 11 February, it is reasonable to conclude that the claimant did take in the region of 1.5 hours for lunch or more. He spent 40 minutes to an hour just on travelling and we take judicial notice that it is unlikely to take less than 30 minutes to prepare and eat lunch. Therefore, we find he spent an unacceptable amount of time away from his working duties in breach of his contract of employment. We find that he did it regularly, doing it 3 times in the week surveyed.

        iii. We do not consider that his complaints about the inadequacies of the Moats facilities justify this. He ate lunch in his van on several days. If he had a complaint about the Moats facilities, he should have aired that with the respondent which he failed to do, not take excessively long lunch periods.

        iv. Perhaps the claimant should have been given the benefit of the doubt on his explanation that the planners were aware of his actions. Whether or not he should be given that benefit we consider will depend on what the other evidence shows about the likelihood of dishonesty. We consider that below and come back to this issue.

    b. Finishing the job at one time and then going home and signing off the job as completed later.

        i. The claimant admitted that he did this. His explanation was that he had been instructed that going to the tip should be included in the work prior to its completion and so he could not sign off the work as completed at the residents' home. We find that he did this regularly; he did it on 3, 4, 5 and 6 without any suggestion that his supervisor had specifically instructed him to do it.

        ii. However, there were serious discrepancies in the claimant's explanation.

1. Logically, his explanation would have meant he would have signed the job as complete at the tip after disposing of rubbish there. However, the claimant did not do this. He went home first. We do not accept his explanation that there was nowhere to park at the tip to do this; his evidence was that he called the planner on 3 Feb 2020 from the tip after finishing there. If he was able to call the planner, he was able to sign off the job as complete, which he accepted took a short amount of time. Also, the claimant referred to there being nowhere to park at the skip after it closed at 17.00, but he was always there with enough time to drive home before 17.00.

2. Further, on 6 February, the claimant did not need to go to the skip, and yet he did not sign off the work as complete at the resident's premises. Instead, he waited until he was at home. He could give no explanation other that this was what he normally did. The assertion that this was what he normally did was given the lie by his actions on 7 February when he asked the resident to sign the Work Ticket on site and called his supervisor when the resident would not do so. His explanation, given in the investigation meeting, that to do the sign off at the site would encroach on his lunch period was not repeated by him in the hearing, but was unbelievable. He took a photo of the completed job at 11.23 and, on his own evidence, had finished clearing up at 11.45. Also, he accepted that asking the tenant to sign was a short process. An extra 5 minutes asking the resident to sign on his PDA would hardly have encroached on his lunch period, even at 11.45, which would be an early lunch.

iii. We find that there was no good explanation for the claimant's actions in waiting to sign off a job as complete until he got home; he had been trained on the process and from time to time did follow it. In the absence of good explanation, it would be reasonable for the respondent to conclude, and we also conclude that the claimant waited to sign the job as complete at home for dishonest purposes to mislead the respondent into thinking that he was working on site until a later time, when, in fact, he was at home and not working.

iv. This is corroborated by the information provided to the claimant in the May 2019 workplace update. He was told that the PDA had to be used accurately as it was used to bill the client and a primary function of the PDA was to provide an accurate audit trail for contract staff and the client to see when the job was done and an accurate reflection of cost. Even if we accepted the claimant's assertions that he thought that the client was billed for time going to the tip, he never suggested that he thought the client could be billed for his travel time home. That would be absurd given that his working hours with the respondent did not include travel time home. We find that the respondent would have concluded and also we conclude that the claimant knew that by failing to sign the job off as complete until he got home the result would be that the client would be overcharged for the job and mislead over the hours taken on it. He deprived the process of independent sign off on the work the claimant had done and the ultimate client was mislead over this.

v. We further consider that the respondent would reasonably have concluded and we conclude that the claimant taking a photo of a WD-40 can at home at 12.00 on 6 Feb 2020 was done to mislead the respondent into thinking that the claimant was still on site. Even if it were true that he had been instructed by a supervisor to photograph materials, he would logically have photographed it on site while using it, if this were the genuine reason. We also consider that the respondent would have concluded, and we conclude that no such instruction was given to the claimant, it being totally unnecessary when the respondent had much better evidence of the purchase of materials and their cost from the procurement process when the materials were purchased.

c. Signing the job as complete for residents:

i. This is dealt with in b. above.

51. Our findings above are that the claimant was dishonest and, given that, we consider that the respondent would not have given the benefit of the doubt to the claimant over the respondent being aware of his long lunch breaks and nor do we; the claimant dishonestly took in the region of 1.5 hours for lunch or more when he was only entitled to 30 minutes and so deprived the respondent of time when he could have been working for it to rectify residents' issues.

52. The claimant's actions not only impacted on the respondent in terms of its being able to complete work, but also endangered its reputation with its client which was being mislead, through the PDA data available to it, over the time taken on jobs, and whether there was independent sign off on jobs, and being billed for time which was not in fact spent working on the job.

53. Therefore, had it followed a fair procedure to a disciplinary hearing, instead of the claimant resigning prior to the hearing, we find that there was a 100% chance that the claimant would have been dismissed for gross misconduct as the facts showed dishonesty by him when working in a position of trust in terms of his reporting and acting in a way which was likely to prejudice its reputation with its ultimate client.

54. We consider that it would have time for the respondent to collate the evidence in a fair process. Had the respondent acted reasonably, it would have started to collate the evidence which the claimant sought after the claimant first asked for it on 1 March. Given the time taken by the respondent to supply all the records in these proceedings, we take the longest of the period suggested by the respondent for this process, being two weeks. The papers would then have been given to the claimant on Monday 16 March 2020. We consider it would have been reasonable for him to have a week to consider them so that the disciplinary could have proceeded on Monday 23 March 2020 and that the respondent would have spent a couple of days preparing the outcome which would have been delivered to the claimant on Thursday 26 March 2020, making his dismissal effective from that date. The claimant's dismissal was in fact on 11 March, so he is entitled to a further 5 days' pay as compensation.

55. Our conclusions above have been reached without the need to conclude on way or the other on the following issues:

a. Whether the claimant was provided with all relevant phone and GPS records;

b. Whether MS had evidence from the planners that the claimant never told them he was taking lunch at home;

c. Whether DD told the claimant to sign off on the resident's behalf on 7 February 2020.

Contributory fault

56. We are satisfied that, through his dishonest conduct, the claimant contributed to his dismissal. This issue is not so clear cut for a constructive dismissal because his contribution effectively led to the disciplinary process which was then handled in such a way by the respondent that the claimant was justified in resigning. It was the respondent's handling of the disciplinary process which had the biggest impact on the constructive dismissal. Therefore, we find a contributory fault of only 20% in relation to the compensatory award. Further, we will not make a reduction to the basic award given that most of the responsibility for the constructive dismissal lies with the respondent.

Loss

57. Given our findings above it is not necessary to reach findings on the claimant's claimed loss. However, we make the following comments:

    a. We do not consider it right for the claimant to claim loss of pension contributions during the periods of working for IPS and KNK because he was earning far more from them than he lost in pension contributions with the respondent.

    b. We do not consider that the claimant made adequate attempts to mitigate his loss and we consider that the claimant should have found new employment prior to 6 Nov 2020. It was clear from the claimant's evidence that he was choosing to hold out for a job which was not the same as that which he had with the respondent, that is a multi skilled operative, but which was work as a carpenter or locksmith, when he would have been physically able to work as a multi skilled operative. He was very experienced and was not rejected for any job for which he applied. He produced no evidence of any applications prior to August 2020. We take judicial notice that, even during the first COVID lock down, the building trade continued to operate. The respondent's market analysis showed that job postings for multi trade roles were increasing from April to November 2020. It took the claimant the period from about 4 November 2020 to 18 February 2021 to find and start new employment, even in a more specialised and significantly more highly paid role than that of a multi trade role, and we consider that the claimant would have reasonably found new employment in the same time period after his dismissal if he had been properly looking for a multi trade role.

58. We accept that the claimant would be compensated for the period from 19 Dec 2020 to 18 Feb 2021 as this was not challenged by the respondent.

Conclusion on compensation for unfair dismissal

Basic award

59. The respondent did not contest the claimant's basic calculation of the basic award and, as above, we do not consider it appropriate to make a reduction for contribution. Therefore, we award the sum of £1614.00.

Compensatory award

60. We have found that the compensatory award should be subject to a *Polkey* reduction of 100%, except for 5 days pay to complete the summary dismissal in a fair manner.

61. 5 days net salary and pension contributions: As the claimant worked a five day week, this is £439.00 net basic salary and £17.20 pension contributions.

    Total: £456.20.

62. Less 20% for contributory fault (£91.24): £364.96.

63. We note that it would usually be the case that a deduction for contribution would be made prior to the *Polkey* deduction, but given that the *Polkey* deduction has reduced the compensation to five days pay, we do not consider it appropriate or proportionate to deal with the calculation in that way.

Notice pay claim

64. We have found that the claimant committed the following misconducts:

    a. The claimant waited to sign the job as complete at home for dishonest purposes to mislead the respondent into thinking that he was working on site until a later time, when, in fact, he was at home and not working. The claimant knew that by failing to sign the job off as complete until he got home the result would be that the client would be overcharged for the job and mislead over the hours taken on it.

    b. The claimant taking a photo of a WD-40 can at home at 12.00 on 6 Feb 2020 was done to mislead the respondent into thinking that the claimant was still on site.

    c. He deprived the process of independent sign off on the work the claimant had done and the ultimate client was mislead over this.

    d. The claimant dishonestly took in the region of 1.5 hours for lunch or more when he was only entitled to 30 minutes and so deprived the respondent of time when he could have been working for it to rectify residents' issues.

65. We find these were gross misconducts of dishonestly misleading the respondent in his working time reporting, taking excessive lunch breaks and endangering the respondent's reputation with its client which was being mislead.

66. Therefore, the respondent was entitled to dismiss the claimant without notice and we dismiss the claimant's claim.

Compensation for detriment for family reasons

67. The detriment related to DD initially turning a legitimate application down and telling the claimant that if he took the leave requested, everyone would want it; and subsequently rejecting an application again, DD challenging the claimant on site about it on three occasions so that the claimant felt badgered, frustrated and stressed about it. This happened from 14 Jan 2020 to 7 February when the claimant accepted the issue was done and dusted, so it continued for a period of about three weeks.

68. We do not accept that the claimant suffered high blood pressure or was unwell because of the treatment. The only evidence which the claimant produced was a letter from his GP of 5 Mar 2020 relating to an 'ongoing work situation'. The only ongoing work situation at that time was the disciplinary procedure and we consider that this is what the GP was referring to, not the parental leave application which was done and dusted by 7 Feb 2020.

69. Considering awards for personal injury under The Judicial College Guidelines for assessment of general damages in personal injury cases fifteenth edition, we compare the claimant's suffering with:

    d. Minor brain injury with full recovery within a few weeks, where the compensation bracket starts at £2070;

    e. Mental anguish due to fear of the impending death or reduction in expectation of life. For the parent of your children suffering such mental anguish for a period of around 3 months, where the suggested compensation is £4,380;

    f. Less severe psychiatric damage where the suggested compensation bracket starts at £1,440;

    g. A transient eye injury with recovery in a few weeks where the suggested compensation bracket starts at £2,070;

70. We do not consider that the suffering of the claimant in terms of three weeks frustration and stress and badgering on 3 occasions compares in severity with any of these and consider that the compensation should be substantially less than any of these figures.

71. We consider that the injury to feelings suffered by the claimant would fall into the lower *Vento* band; it lasted for only three weeks; the 'badgering' conduct happened three times; it caused the claimant frustration and stress. The conduct was not a personal affront to a protected characteristic as it would have been if it related to a matter under the Equality Act 2010.

72. The claimant was earning a net daily salary of £87.80 and we consider that any award should be considered in that context.

73. Taking all this into account, we would have taken the view that the equivalent of a week's net pay would be adequate compensation, but we are obliged to follow the *Vento* Guidelines and Mummary LJ's guidance that award should not be less than the bottom figure of the band.

74. Therefore, we consider it just and equitable to award £900 as injury to feelings. No suggestion was made that there should be a reduction to that award for contributory fault. The claimant did not make any claim for financial loss in relation to this issue.

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Employment Judge Kelly
Date: 10 July 2021

Sent to the parties on
Date: 21 July 2021