



EMPLOYMENT TRIBUNALS

Claimant: Mr S Smallwood

Respondent: Barrie Jones (Upholsterers) Ltd

Heard at: Liverpool **On:** 28 May 2021;
5 July 2021.

Before: Employment Judge Ord

Representation:

Claimant: Mr S Proffit (Counsel)
Respondent: Mr J Searle (Counsel)

JUDGMENT

1. The claimant's complaint of unfair dismissal is well-founded.
2. The claimant's conduct contributed to his dismissal and the tribunal orders a reduction in both the basic award and the compensatory award of 50%.
3. The tribunal awards an uplift in compensation of 15% due to breaches of the ACAS Code of Practice.
4. The claimant's complaint of wrongful dismissal is well-founded.

Reasons

Claim

1. By a claim dated 22 January 2021 the claimant brought complaints of unfair dismissal and wrongful dismissal.

Issues

2. The issues were agreed at the hearing as being:

(A) *Unfair Dismissal*

- What was the reason for the claimant's dismissal?
- If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant? In particular:
 - Did the respondent genuinely believe that the claimant had committed the misconduct?
 - If so, was this based on reasonable grounds?
 - At the time the belief was formed, had the respondent carried out a reasonable investigation?
 - Was the procedure within the band of reasonable responses?
 - Did the respondent act reasonably in treating the misconduct as sufficient to dismiss the claimant?
 - Was dismissal within the band of reasonable responses?

(B) *Wrongful Dismissal*

- Did the claimant fundamentally breach the contract of employment so as to justify the respondent treating the contract as at an end?

Evidence

3. The tribunal had before it a joint bundle of documents of 354 pages. It also had witness statements from the claimant, Ian Walker (Managing Director) and Jane Mothersdale (Independent HR Consultant), who all gave oral evidence on oath.

Findings of Fact

Background

4. The nature of the respondent's business was to provide upholstery services, largely to commercial customers including pubs and restaurants, although there was an element of domestic work as well. The respondent was a small undertaking and employed about seven staff at the relevant time. During the pandemic, the respondent relied more on the domestic market than previously due to closure of the hospitality industry.
5. The claimant joined the respondent company as an apprentice in January 1990. He left the company in 1995 and re-joined on 1 January 1997. His job at the material time was Lead Upholstery, which was a senior position in the company. At the time of his dismissal the claimant had worked continuously for the respondent for over 23 years, and over 28 years altogether, taking his earlier period into account.

6. The claimant's contract of employment contained a restrictive covenant, the pertinent parts of which read:–

Clause 18 – Restrictive Covenants

“..you agree that you will not (without prior written consent of the Company) undertake any business in competition with the business of providing upholstery services.....”

7. The covenant period applied for three months immediately following termination of employment.
8. There was also a provision limiting the right to undertake other employment whilst employed by the respondent. It read:

Clause 26 – Restriction on Further Employment

“You may not (whether inside or outside your normal hours of work) engage in any employment other than that with the Company referred to in this agreement, unless you have received the prior consent of your manager.”

Timeline

9. In 2017 the claimant set up his own company “*Project Upholstery Ltd*” (PUL). Ian Walker, the respondent's Managing Director was aware of this and he and the claimant spoke about it at the time. Mr Walker wanted to understand the nature of PUL and whether it would be in competition with the respondent.
10. The claimant told Mr Walker that PUL would be a small-scale affair, run from home, concerned with buying second hand furniture, refurbishing it and selling it on. On that basis, Mr Walker was satisfied that PUL would not compete with the respondent's business and agreed that the claimant could operate it whilst working for the respondent. In 2018 the respondent purchased some chairs from PUL.
11. Mr Walker's evidence was that he limited his authority to buying and selling furniture on e-bay. The claimant's evidence was that he never agreed it would be restricted to e-bay and he had told Mr Walker that he would use e-bay, markets and other such outlets. Whilst it is not disputed that Mr Walker gave the claimant permission to run the business, there is dispute over the nature and extent of the business he allowed. There was nothing in writing and there was room for misinterpretation.
12. The respondent had no significant issues with the claimant operating PUL for about the first 3 years of its existence. However, things changed in September 2020 and Mr Walker became concerned.
13. The Covid pandemic had hit the respondent and the claimant was placed on furlough between 30 March 2020 and 15 June 2020, along with all the respondent's other staff, including Mr Walker. On 15 June the claimant returned to work along with Mr Walker, the Office Manager and two other staff members. The rest remained on furlough.

14. Upon his return the claimant asked Mr Walker if closure of the business or redundancies were expected, and Mr Walker replied that he did not know. Thereafter, six staff were made redundant. The claimant expressed his concerns about the state of the respondent's business and the possibility of more redundancies, to other staff who were asking him what was happening.
15. On 21 August 2020 there was an incident in which Ian Walker called the claimant to his office and told him to keep his opinions about the business to himself because it was affecting staff morale. The claimant was worried about his job and was in an emotional state and frustrated and raised his voice and shouted.
16. At the time, he was standing near to Mr Walker's desk by the office door and his voice was sufficiently loud to be heard in the adjoining office by Tracey Broome, the office manager. She went over to the claimant and asked him to leave the office and he did so. The claimant saw Mr Walker later that day and they spoke as normal without reference to the earlier meeting.
17. From the week commencing 24 August, the claimant took two weeks' annual leave. On 1 September the claimant received a text message from Mr Walker saying that he was going to put the claimant on furlough again from the week commencing 7 September. Specifically, it said:

“Scott hope you had a good holiday, I had to furlough some of the lads and I'm going to have to do the same to you. I don't need you this Monday 7th. I will be in touch when I do, any questions get back to me.”

18. There was no mention of the meeting on 21 August.
19. Thereafter, Mr Walker was contacted by a former director of the respondent company, who informed him that the claimant had an industrial unit. Mr Walker checked this out by carrying out desk-based searches, such as looking on Google. He discovered that the claimant had some sort of unit for his business.

Disciplinary action

20. On the basis of this information, Mr Walker decided to take disciplinary action against the claimant, and on 19 September he sent a letter to the claimant inviting him to a disciplinary hearing on 25 September.
21. The letter made reference to the claimant establishing a company in direct competition with the respondent without the express permission of the respondent, in breach of clauses 18 and 26 of his employment contract. It also referred to his *“unacceptable behaviour at work”* in that he became rude and aggressive with Mr Walker on 21 August 2020 when Mr Walker asked him not to spread rumours about the company to other members of staff.

22. Specifically, the allegations read as follows

:

- “ *Unauthorised work outside the company or on company premises, which would be prejudicial to the company or the employee’s duties.*”
- “*Insubordination, including but not limited to such breaches of discipline as rudeness to a person of superior authority and refusal to carry out a reasonable instruction*”

23. The letter enclosed the respondent’s Disciplinary Policy and Procedure and advised the claimant of his right to be accompanied. It warned that, if proven, the allegations would amount to gross misconduct, which could result in summary dismissal. It did not provide the claimant with any evidence in support of the allegations.

24. The claimant produced a written statement dated 22 September. With respect to the first allegation, he said that he had entered into a lengthy discussion with Mr Walker about PUL and that Mr Walker was satisfied that the nature of PUL would not affect the claimant’s performance within the respondent company and would not compete with the respondent. He referred to the respondent buying furniture from PUL. He requested a copy of any evidence supporting the allegation.

25. With respect to the second allegation, the most pertinent points the claimant made were, that everyone was extremely worried about the economy and their job situation. He was worried. He had worked almost continuously for the company for over 30 years, and had been involved in a lot of company changes. He considered himself to play a major role in the establishment and the day to day running of the workshop, but he felt that he and the team were being kept in the dark, especially with regards to redundancies. He suggested that a regular briefing could avoid speculation or “rumours”. He said that he had a right to an opinion and was merely frustrated and expressing that right.

26. The claimant then changed the SIC code (Standard Industrial Classification) of PUL from “*Manufacture of Soft Furnishings*” to “*Other Manufacturing*” and this was discovered by Mr Walker.

27. On 25 September the claimant attended the disciplinary hearing. The disciplinary officer was Ian Walker, and also present was Kathy Walker (HR Advisor and Mr Walker’s sister-in-law).

Disciplinary Hearing 25 September

28. The minutes of the meeting set out the exchanges, and the essence of the most pertinent parts are summarised below.

Allegation of breach of contract

29. The claimant protested to Mr Walker that Mr Walker knew about the claimant’s business three years ago, and he did not understand why it was being raised now. Mr Walker responded by saying that the claimant had misrepresented the nature of his business in that he informed Mr Walker

that he was buying and selling from home. He also raised the change of SIC code.

30. The claimant explained that he was operating from home but that he had recently acquired a workshop from which he did some work, but it was not a business premises. He had moved there from his home garage, which he had converted to a bar during lockdown, and he used it mainly for his own private collection of furniture. His business address was his home address. He did not have a business vehicle. Mr Walker raised concerns that the claimant had never told him about the workshop, and the claimant responded that he had never been asked.
31. The claimant said the business had not been active for 18 months and all he had been doing was buying and selling on e-bay, and running a market stall doing up 1960s furniture to sell at antique shows. He had recently changed the SIC code so that he could make anything, not just soft furnishings, and this was a generic code. He insisted that it did not affect his job with the respondent and that he was not taking work from the respondent or touting for its clients.

Allegation of insubordination

32. Mr Walker put it to the claimant that on 21 August the claimant had raised his voice, and his behaviour and language were aggressive towards Mr Walker. Also, he had refused a direct management instruction.
33. The claimant responded that he was shouting loudly to get his point across and was not aggressive. He said that he was making an off-the-cuff remark that was his opinion. Mr Walker said again that the claimant was aggressive towards him.

New allegation

34. Mr Walker then raised a third allegation that had not been mentioned previously to the claimant. It related to dashcam files, which he had discovered over the past 48 hours, and he wanted the claimant to view and discuss them with him. The claimant viewed this dash-cam footage for the first time at the meeting.
35. Mr Walker said the first clip showed that the claimant had somebody with him and they were talking about furniture when that person said the camera was on and the claimant referred to Mr Walker changing the settings. The claimant said he normally turned the sound off as he did not like being listened to, and someone had turned it back on again, which he presumed was Mr Walker because Mr Walker had the van the day before.
36. Mr Walker then challenged the claimant about pulling the camera off the windscreen and putting it on the dashboard, which he said could cancel or invalidate the insurance. The claimant admitted removing the Dashcam when driving for personal use, indicating that he did not want his personal life to be monitored.
37. Mr Walker pointed out to the claimant that the second video recorded him on route to his industrial unit, outside of which there was a sign containing

a slogan and telephone number advertising the business. Mr Walker accused the claimant of using the respondent's van to run his own business.

38. The claimant denied this and said the unit was a hidden workshop/shed and he used the respondent's van to collect his own van, which was apparent from previous records. He removed the dashcam when taking the respondent's van for personal use.
39. Mr Walker told the claimant that he had also heard a rumour that the claimant had been wiping the dashcam card. There was no evidence presented of this.
40. Kathy Walker intervened and explained that the matter of the dashcam had not been included in the invitation letter. The meeting was therefore adjourned until 29 September to allow the claimant time to consider the evidence. However, the allegation was not put in writing to the claimant.

Claimant's written submission

41. On 26 September the claimant produced a written submission which he requested be added to the disciplinary minutes. This was in response to the evidence he had asked for and had now received regarding the first allegation. In brief he noted that he did not have an industrial unit. He had a 20ft by 20ft porter cabin used mainly to store his private collection of mid-century furniture. He bought furniture from different sources, including from the respondent.
42. His business address was his home address, as stated at Companies House, and this had not changed. The SIC Code of the business was for "Soft Furnishings" until 24 September 2020 when the claimant changed it to "Other Manufacturing". The business had not been active since November 2019.
43. The logo and slogan for PUL had been in place since day one, and they were the same as on the invoices submitted to the respondent in 2018.
44. With respect to vehicle use, the claimant indicated that he had always been able to use the van and previous vehicles for personal use as long as he used his own fuel. The only time he had used it for alleged business was when he had purchased furniture from the respondent, of which he had purchased a substantial amount over the last few years.
45. As for the video cameras/cards, he said he had never been made aware of any legal obligation to keep the dashcam in the company vehicles at all times. He said he had driven the Luton vans on many occasions without one even being present.
46. With respect to removing data from cards, he made clear he had not done this and would not know how to do it. He had, however, been instructed by Tracey Broom to remove and discard of a previous card, which was replaced by a new one.

Disciplinary hearing 29 September

47. On 29 September the disciplinary hearing was reconvened to discuss the third allegation, although its scope was not made clear in writing.
48. Mr Walker agreed that personal use of the van was not in dispute and not an issue in the disciplinary. He confirmed that the issue around the dashcam was unauthorised removal of the dashcam. He asked whether the claimant had anything more to add. The claimant said he was a bit miffed that, after three years, the issue of his business was brought up during a pandemic and uncertain times for everyone's jobs.
49. The outcome was given orally at the meeting, which was that the allegations were upheld.
50. With respect to the first allegation, Mr Walker reasoned his decision by saying he had been unaware of the significance of the SIC code when he authorised the business in 2017; the claimant had been inconsistent with his timescales concerning dormancy; regarding the unit, the claimant had used the term "business premises" in answer to a question; the unit was in an industrial/leisure area with a prominent advertising sign outside; the claimant said that he had no business vehicle but also that he had a van; there was dashcam evidence that the claimant had used the respondent's vehicle for his business; he never told the respondent that the venture was with someone else.
51. With regard to the second allegation, Mr Walker noted Tracy Broom's statement and the claimant's admission that he was shouting loudly, which Mr Walker found was confrontational and aggressive behaviour. Mr Walker said that the claimant had been issued with a management instruction that he refused to follow and this was insubordination.
52. As for the third allegation, Mr Walker found that the claimant tampered with and removed equipment without authorisation, to prevent monitoring of his personal, unauthorised use of the vehicle.
53. Mr Walker went further and added that the claimant carried an unknown and unauthorised passenger in the respondent's vehicle, and that the claimant was speeding. These allegations had not been raised previously.
54. As a consequence of the above, Mr Walker stated that the relationship of trust and confidence between the respondent and the claimant had irretrievably broken down. The claimant was therefore dismissed for gross misconduct with immediate effect. The claimant was told of his right of appeal and that Mr Walker would hear any appeal.
55. The disciplinary outcome letter sent on 29 September confirmed dismissal for gross misconduct, with the effective date of termination being 29 September 2020.

Appeal

56. The claimant appealed the decision by letter dated 30 September, although it was not posted until 12 October.

57. The grounds of appeal were that there had been no prior investigation into the allegations before the disciplinary hearing; evidence in support of the first allegation was only produced at the disciplinary hearing and had only been gathered together 48 hours beforehand; it felt like the evidence had been fabricated based on hearsay or speculation; he felt intimidated, victimised and pressured during the disciplinary hearing, and upset that after 30 years' service this was the desired cause of action, which he believed from the offset had a predetermined outcome.
58. The claimant asked for the appeal to be dealt with by an impartial third party. He was sent an invitation to appeal letter dated incorrectly 22 November 2020 (should be 2 November), in which he was told that the appeal officer was Jane Mothersdale, an Independent HR consultant, who had been engaged by Kathy Walker. The appeal hearing was to take place remotely on 5 November via Microsoft Teams and the claimant was informed of right to be accompanied.

Summary of Appeal Hearing

59. The claimant told Ms Mothersdale that he had dyslexia and he had found the appeal bundle of documents daunting so appreciated being accompanied by his wife. He expressed the view that, following his production of paid invoices sent by PUL to the respondent, Mr Walker had been on a fishing expedition to find further evidence against him. He told her that he had left the respondent company for a while in 1995 because he had "a bit of a thing" with Mr Walker. He explained that six people had recently been made redundant and another head of department had been threatened with the sack by Mr Walker and had resigned.

First allegation

60. The first allegation was put like this:

Breach of contract, we have reason to believe that you have established a company engaged in the manufacture of soft furnishings in direct competition with Beejay and Co without the express permission of this company in breach of clauses 18 and 26.

61. The claimant said he used the unit as a storage facility for PUL. He explained that he repaired furniture and sold it through Face Book, E-bay, word of mouth and through his friend's shop. It was just pocket money for him, but he hadn't made any money. The last transaction he had made was in November 2019. He had stock bought previously that was stacking up. He did not do any commercial work and he did not do much upholstery. The unit was to house his own collection, as well as items to sell, after his garage was converted into a bar/summerhouse.
62. With respect to the invoices, the claimant explained that he sold two lots of 1940s chairs to the respondent in March 2018, sourced at Mr Walker's request. He also said he had bought a lot of furniture from Mr Walker, but generally this had been swapped for materials such as fabric or foam. They had done a lot of favours for each other on a swapping basis. Sometimes the claimant took a whole pub's worth of furniture from the respondent.

63. The claimant had not told Mr Walker about the unit because it was just a lock-up building with a small workshop and he had not understood that he needed to tell him. He was not using the respondent's vehicle for PUL and had never done so. He had bought his own van in 2016 to move things around. Over the last three months a retired friend had started helping him and they had a market stall and sold via antique fairs.
64. The claimant was shown the dashcam footage. He said that whilst he had the camera on, he never had the sound on because he had never agreed to be recorded. On this occasion he had removed the camera because the journey was for personal use and he did not think there was any need for the camera. There had been no training or discussion about dashcam use and at the time he thought it was just a trend.
65. The claimant did not consider himself to be in competition with the respondent in any way, shape or form. He mainly repaired and personally collected 1950s and 1960s retro swivel chairs and this did not affect the respondent. Furniture was a passion of his.

Second allegation

66. The second allegation was put like this:

Insubordination and unacceptable behaviour at work. On 21 August you became rude and aggressive and refused to carry out a reasonable instruction during a conversation with [Mr Walker] in [his] office when [he] asked you not to spread rumours about the company to other members of staff.

67. The claimant explained that, after being furloughed, he was the first person in and it was a strange situation being in a massive building by himself. Mr Walker then got a couple of other people in. There did not seem to be any work coming in or out. Some weeks before 21 August, there was an exchange of words between the claimant and Mr Walker where Mr Walker accused the claimant of spreading rumours about redundancies and told him to keep his opinions to himself. Mr Walker then made six people redundant.
68. The claimant continued by saying that on 19 or 20 August, Mr Walker asked him to weed the garden and he refused because of back problems. Mr Walker then took two of his team and got them to weed the garden. On 21 August the claimant heard about Mr Walker cleaning out some rooms in the building. A friend of the claimant's also told him about Mr Walker having a building full of pub furniture that he needed to sell off.
69. On the 21 August, the claimant explained that he made an off-the-cuff remark to Mr Walker, to the effect of "*in my opinion it looks like you are cleaning up or cleaning out to sell the place.*" About an hour later Mr Walker called him into his office to ask why he was spreading rumours. The rest, he said, was documented in the disciplinary minutes. He confirmed that he was loud and frustrated but not aggressive.

70. The claimant said that another reason for his frustration was that a couple of weeks before, he was going to have a party for his wife's 40th and they had done the garden for this. Three days before the party, he was told by Kathy Walker that if he went ahead with it, he would have to self-isolate for two weeks and disciplinary action might be taken. The party was cancelled despite government advice at the time being for no more than 30 people in a garden.
71. He went on to say that he had worked with Mr Walker for 30 years and they had had issues on many occasions and it was not a new thing. When asked whether he had previously been disciplined, he indicated that he had not. He felt that recently he was being goaded.

Third allegation

72. From the minutes of the meeting, this appeared to be "*Tampering with and unauthorised removal of company property from a company vehicle*".
73. The claimant stated that some of the minutes from the disciplinary were missing but he wanted to talk about one thing. He had been asked why he had removed the camera and he had replied "*so that I didn't have this situation where you thought I was using it for my business*" but the words had been switched around to say "*so you didn't know that I was going to my business premises*". The claimant was adamant that he did not say the latter.
74. He went on to say that he thought it very unprofessional of Mr Walker to say he had heard a rumour that the claimant was wiping the dashcam card. He said he would not know how to do this. The claimant thought the dashcams were for general protection, but they had originally been installed after two drivers were suspected of fraudulently claiming for hours they had not done. He had never previously been told they were for insurance purposes.

Other matters

75. The claimant questioned why allegations were made against him now and wondered why the respondent had not just made him redundant, but realised that he would be one of the highest paid staff to be paid out. He felt the allegations had been exaggerated and fabricated and that Mr Walker had known about his business since 2017. He also complained that he had not received the disciplinary hearing minutes, and not had the chance to comment on them. Also, he had not been allowed to confer with his companion, Andrew Mundell, at the disciplinary meeting.

After the appeal hearing

76. After the appeal hearing, Ms Mothersdale sent some written questions to Mr Walker and to Ms Broom and received written responses. Ms Broom's evidence was that the claimant was aggressive on 21 August. Ms Mothersdale did not make a note of any interview she had with these witnesses, and there is no evidence that she tested their replies.

Appeal outcome letter

77. By letter dated 13 November 2020 the claimant's appeal was dismissed.
78. The first allegation was upheld broadly for the following reasons: it was found that the claimant had not sought permission for his most recent business activities. He had a friend helping him. The claimant had a market stall and sold via antiques fairs and through a friend's shop. He rented a unit and there was an advertising sign outside. The SIC code had been changed. The claimant had the expertise to compete with the respondent. The fact that he had not taken any income from the business did not prove that he did not have the intention to compete. He should not have been using the respondent's van for a personal journey.
79. The second allegation was upheld and it was confirmed that the claimant's behaviour on 21 August was both aggressive and intimidating. The most pertinent parts of the reasoning were that the claimant admitted he was talking loudly on 21 August and he was standing up whilst Mr Walker was sitting down. Mr Walker said that what the claimant was saying was affecting staff morale. Ms Broom could hear the conversation and intervened as she thought it was getting out of hand
80. Other reasons were also relied upon, which either had not been put as allegations or not raised at all. Ms Mothersdale took into account what she considered to be a derogatory comment made by the claimant, which was recorded on the dashcam. She referred to the claimant saying he had not been disciplined. She had reviewed his personnel file and discovered that he was issued with a Final Written Warning in March 2017 for using abusive language and threatening behaviour. This remained on file for 18 months and had now expired, but showed a pattern of sustained behaviour.
81. The third allegation was upheld. The main reasons given for this were that there were two views as to whether the claimant had permission to use the respondent's vehicle for personal use, but there was no permission to use it for business use. Ms Mothersdale said she did not understand the claimant's mitigation for removing the dashcam and could only assume he wanted to keep his use of the respondent's vehicle to complete a task confidential. She believed that he knew the dashcam was for insurance purposes
82. The scope of the allegation was broadened to include the claimant's unsafe driving practices with reference to health and safety standards and the Driving at Work Policy. Another new matter introduced was her finding that he was not declaring personal use of the company vehicle in his P11D. She accepted however that he had not been speeding.

Evidence at the tribunal hearing

83. The claimant was questioned about his spent Final Written Warning at the tribunal hearing. His unchallenged evidence was that he was attacked at work and he defended himself. The person who attacked him was fired, and on this basis the claimant did not appeal his Final Written Warning.

Law

84. Section 98 of ERA provides, so far as is relevant:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

a)

b) Relates to the conduct of the employee

98(4) whether the dismissal is fair or unfair

(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 **ACAS Code of Practice no.1** on Disciplinary and Grievance Procedures 2015 applies to the procedure followed.

86. The main propositions that the tribunal took account of are set out in the caselaw below.

87. It was held in ***Abernethy v Mott, Hay & Anderson*** [1974] ICR 323 that: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee."

88. ***British Home Stores Ltd. Burchell*** [1980] ICR 303 held that "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, 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."

89. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer – ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, EAT.

90. The test to be applied in determining reasonableness is whether the employer's decision to dismiss fell within the range of reasonable

responses available to it – (1) **Post Office v Foley** (2) **HSBC Bank plc v Madden** [2000] ICR 1283, CA.

91. In **J Sainsbury plc v. Hitt** [2003] ICR 111, the Court of Appeal said that, in applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere.
92. The tribunal must have regard to the appeal process when considering the unfair dismissal claim. It should examine the fairness of the disciplinary process as a whole and each case will depend on its own facts – **Taylor v OCS Group Ltd** [2006] ICR 1602, [2006] IRLR 613.
93. The respondent referred the tribunal to **Stratford v Auto Trail VR Ltd** UKEAT/0116/16/JOJ for the proposition that a warning can be taken into account as part of the overall circumstances under section 98(4) Employment Rights Act 1996 when the Employment Tribunal is considering whether a dismissal was fair or unfair.

Conclusions

Unfair Dismissal

What was the reason or principal reason for dismissal?

94. Towards the end of August 2020, Mr Walker was alerted by a former director of the respondent company to the fact that the claimant occupied, what he described as, an industrial unit. Whilst Mr Walker knew that the claimant carried on his own small-scale furniture business and had authorised this, he had not authorised the claimant to work out of business premises, but only from home. After carrying out some brief, desk-based research, Mr Walker reached the conclusion that the claimant was running a business in competition with the respondent. This was the principal reason he dismissed the claimant and the dismissal was therefore related to conduct.
95. Whilst the claimant suggested that the real reason was redundancy, there is insufficient evidence to support such a finding.

Did the respondent genuinely believe that the claimant had committed misconduct? Was this belief based on reasonable grounds, following a reasonable investigation? Was this within the band of reasonable responses?

Allegation 1

96. Due to the information Mr Walker received from the company's former director and as a result of his brief research, he formed the belief that the claimant was running a business in competition with the respondent. There is little to suggest that this was not a genuine belief, and therefore the tribunal finds that the respondent genuinely believed that the claimant had committed the alleged misconduct.

97. However, the grounds upon which this belief were based were problematic. There was insufficient evidence upon which to base the belief and little investigation had been undertaken into what the claimant was doing. Only a proper investigation would establish whether what the claimant was doing came within what had been agreed.
98. Mr Walker carried out a superficial desk-based exercise without interviewing the claimant or giving him an opportunity to comment and without visiting the unit and going inside to ascertain what it was used for. On this basis he could not have known the nature or extent of what the claimant was doing and whether it was really something he should be concerned about.
99. There was no evidence that the claimant was actually doing anything in competition with the respondent and the conclusions reached were based on supposition. There was no evidence that, with respect to the nature and scale of the business, the claimant was doing any more than was authorised. Consequently, the respondent did not act within the band of reasonable responses.
100. Mr Walker alleged in the disciplinary letter that the claimant was in breach of clauses 18 and 26 of his employment contract. However, clause 18 related to a time period post termination of employment and so did not apply in this case. Clause 26 related to engagement in employment outside the respondent company and the claimant was not employed by anybody else.

Allegation 2

101. Whilst it is common ground that the claimant was frustrated at the meeting on 21 August and raised his voice, despite Tracy Broom's apparent concerns, it is unlikely that Mr Walker felt threatened or intimidated. This is evidenced by the fact he was talking normally to the claimant hours later as though nothing had happened, with no mention of the incident.
102. Furthermore, there was almost a month between the incident and the disciplinary letter being sent out and there was no indication from the respondent in the interim that it was considering disciplinary action. In fact, the text message from Mr Walker to the claimant on 1 September had a friendly tone to it.
103. With respect to the breach of a management instruction, there was no evidence that, after 21 August when he had been warned, the claimant actually breached the instruction.
104. On this basis it seems that it was only after Mr Walker became aware of the claimant's changes to his business and decided on disciplinary action, that he re-visited the 21 August incident and used it as a make-weight.
105. At appeal, relying on the 2017 incident to attempt to prove a pattern of behaviour was unreasonable. Ms Mothersdale never questioned the

reasons for the warning and could not have known what the incident was about. She jumped to conclusions without understanding the circumstances. The incident could not reasonably have been relied on to establish a pattern of behaviour.

106. Consequently, the tribunal finds that the respondent did not hold a genuine belief in the alleged conduct, and there were no reasonable grounds for holding such a belief. Therefore, it did not act within the band of reasonable responses.

Allegation 3

107. In reality, this was another strand of the first allegation in that Mr Walker thought that the claimant had removed the dashcam to hide what he was doing in his business. There was no proper investigation carried out and the issue was not discussed with the claimant prior to the disciplinary. At appeal stage, the claimant gave evidence that he had never been told the dashcam was for insurance purposes.

108. There was insufficient evidence upon which to base an allegation of tampering. Accordingly, whilst the respondent held a genuine belief in the alleged conduct, there were no reasonable grounds to base this on and no proper investigation. Therefore, the respondent did not act within the band of reasonable responses.

Was the procedure within the band of reasonable responses?

109. Whilst the respondent was a small company with limited resources, it nonetheless had a relationship with an HR consultant (Kathy Walker), and it had access to other external HR consultants, which it used on appeal. Despite this, it was Ian Walker who played the main role in the disciplinary process rather than someone more independent. This was problematic for several reasons.

110. Mr Walker was the victim of the alleged behaviour as he was the sole director of the company with which the claimant was allegedly in competition, and he was the subject of the alleged aggression. He was the main witness as to crucial disputed facts, namely, what discussions took place in 2017 about the claimant's business and what was authorised. He was also the person who investigated and decided on what information was relevant to the allegations. He then conducted the disciplinary hearing and decided the outcome, including the sanction. He even intended to conduct the appeal, although in the end he did not.

111. Mr Walker was worried about his company and thought that it was being damaged by the claimant. In that situation, he would have relied on his own perceptions and it would have been extremely difficult for him to be independent. He was too close to the situation to be perceived as open minded and fair, and in the circumstances, he was potentially prone to bias.

112. This was a hearing for gross misconduct with potentially serious consequences for the claimant and therefore it was not within the band of reasonable responses to proceed with Mr Walker as the decision maker.
113. There were significant faults at each stage of the procedure.
114. There was no proper investigation. Mr Walker moved straight to a disciplinary hearing without giving the claimant a chance to comment on the allegations. This suggests that Mr Walker had already made up his mind that the claimant was guilty of misconduct.
115. It took a month to alert the claimant that the happenings of 21 August were the subject of an alleged disciplinary offence.
116. The extent of the allegations was increased at each stage of the procedure, and without warning. This indicates that the respondent was looking for additional evidence to support a decision to dismiss that had already been made.
117. At the disciplinary stage, the dashcam footage was put before the claimant for the first time and he was asked to comment on it. Whilst the hearing was later adjourned to give the claimant time to consider the new evidence, the minutes of the disciplinary still unfairly record the claimant's initial comments. Moreover, unreasonably the dashcam allegation was not put to the claimant in writing.
118. Again, there was no adequate investigation into this allegation. Mr Walker did not explore whether the claimant had been given proper guidance, direction or training into the use of the dashcam and did not check whether there were any relevant policy provisions in place.
119. The new allegations of carrying an unknown and unauthorised passenger in the respondent's vehicle, and speeding were also unfairly raised at the hearing. During the hearing, the claimant was not permitted to confer with his companion, and he was not sent the minutes of the meeting and had no opportunity to comment on their accuracy.
120. The failings were not cured at the appeal stage as there were several faults with the process.
121. Ms Mothersdale seems to have conducted proceedings partly as a review and partly as a rehearing, which demonstrates confusion as to her remit. Also, the additional matters of speeding, invalidating the respondent's insurance, operating PUL with another person, and making a derogatory comment on the dashcam footage were addressed, which were not part of the initial allegations.
122. She took no notes of any verbal evidence she obtained from Mr Walker or Ms Broom, and there is no evidence that their replies to written questions were tested, despite there being disputes of fact. This is in contrast to the testing undertaken with the claimant, and this demonstrates an inequality in approach. Furthermore, the claimant was not given a

reasonable opportunity to comment on the additional information Ms Mothersdale gathered, thereby prejudicing the possibility of disputed facts being found in his favour.

123. Ms Mothersdale's outcome letter, despite the significant procedural failings outlined above, found that there was no inappropriate or unfair process. She declared that there were two views about whether the claimant had permission to use the company vehicle, despite Mr Walker having agreed that personal use was not an issue. She also widened the allegations in the following ways.
124. She relied on the claimant's expired warning to show that he had been dishonest with her when asked about his disciplinary record. However, she had never given him the opportunity to explain what the warning was about and she had little information on it. Had she understood the circumstances under which it was given, she may not have made the unreasonable finding of a pattern of sustained behaviour.
125. Ms Mothersdale found that the claimant undertook unsafe driving practices, referring to health and safety standards and the Driving at Work Policy, which had not previously been raised. She also criticised the claimant for not declaring personal use of the company vehicle in his P11D, despite never having put this to him.
126. For the reasons given above, the respondent breached the ACAS Code of Practice. It did not carry out the necessary investigations to establish the facts of the case; it did not inform the claimant of the basis of the problem before making a decision to proceed to a disciplinary; it did not provide sufficient information about the alleged misconduct in writing, nor did it provide all the written evidence with the notification.
127. In conclusion, the procedure was not within the band of reasonable responses.
- Did the respondent act reasonably in treating the misconduct as sufficient to dismiss the claimant? Was dismissal within the band of reasonable responses?*
128. There was no indication that a lesser sanction was considered, and mitigating factors were not reasonably taken into account. Little regard appears to have been given to whether there had been a misunderstanding over what the claimant believed he was authorised to do with his business. Nor does it appear that any weight was given to the claimant's concern and fear of redundancy when addressing Mr Walker on 21 August. Moreover, little regard seems to have been given to the lack of evidence of the claimant being given instruction about the dashcam.
129. At the time of dismissal, the claimant had worked continuously for the respondent for over 23 years, or over 28 years if his earlier work was included. He had a good disciplinary record and there was only one incident recorded relating to a spent offence. A warning had previously worked and there was no reason to believe it would not work again. Moreover, the respondent could have put formal limitations on the extent of the business

he authorised to ensure the claimant was clear about what he could do.

130. Under these circumstances, summary dismissal was not an appropriate sanction.

Overall Conclusion

131. The tribunal finds that the respondent did not act fairly in dismissing the claimant. Accordingly, in accordance with equity and the substantial merits of the case, the claimant's complaint of unfair dismissal is well-founded.

Polkey/Contributory Conduct/ACAS uplift

Polkey

132. The tribunal finds that there is no evidence that there was a chance the claimant would have been dismissed anyway if a fair procedure had been followed. Consequently, it makes no *Polkey* reduction.

Contributory conduct

First allegation

133. When the claimant decided that he wanted to move to a workshop he should have told the respondent and asked for authorisation, given that his previous agreement was that he would work from home. Similarly, when he decided to change the business SIC code from "Soft Furnishings" to "Other Manufacturing", he should have sought the respondent's approval as this could have indicated a change in the scale and nature of the business. This was blameworthy conduct.

Second allegation

134. The claimant admits that he raised his voice to Mr Walker and was shouting at him. This demonstrates an element of fault in terms of the claimant's attitude.

Third allegation

135. The claimant did remove the dashcam without telling the respondent and should have checked before doing so. This demonstrated some culpability on behalf of the claimant.

Conclusion

136. Overall, taking these three matters into account, the tribunal finds that the claimant contributed to his dismissal by blameworthy conduct. Accordingly, it orders that a 50% reduction be made to both the basic award and the compensatory award.

ACAS uplift

137. There were significant breaches of the ACAS Code of Practice. Therefore, the tribunal awards a 15% uplift.

Wrongful Dismissal

138. For the purposes of the wrongful dismissal claim, the tribunal has considered its own view of events and finds its own facts as follows.
139. In 2017 Mr Walker gave the claimant authority to run his own, small-scale, non-competing business from home. The exact parameters of the authority were never properly established and nothing was committed to writing. The claimant ran this business from his garage and this involved some trading and interaction with the respondent.
140. During lockdown the claimant converted his garage to a bar/summerhouse and therefore he needed somewhere else for his furniture business. He rented a modest portacabin nearby, into which he moved his collection of furniture. His business address at Companies House remained as his home address. He also changed the SIC code of his company to make it more generic.
141. Mr Walker was told by a former director of the respondent company that the claimant had an industrial unit and he took this to mean that the claimant was in competition with the respondent. Without properly investigating the allegation or speaking to the claimant about it, Mr Walker instigated disciplinary proceedings.
142. No evidence was presented to demonstrate that the claimant was competing with the respondent or that he was carrying out work that was not authorised. However, the claimant had moved his furniture into a unit, and therefore he was no longer working from home as previously agreed. Nonetheless, this was not sufficient to amount to a repudiatory breach of contract.
143. With respect to the incident on 21 August 2020, the claimant was called into Mr Walker's office to be told not to spread rumours about the state of the respondent's business. The claimant was worried for his job and was concerned that Mr Walker was not keeping the workforce informed. There was an interchange of words and the claimant raised his voice and shouted, but this did not amount to aggression. The claimant did not spread rumours thereafter. This behaviour was not sufficient to amount to a repudiatory breach of contract.
144. Mr Walker had authorised the claimant to use the respondent's vehicle for personal use. During a personal trip he removed its dashcam because he did not want his movements in his own time being monitored. He did not tell Mr Walker he was removing it.
145. The claimant had not received any training or instruction on the purpose of the dashcam and did not know he was expected to keep it in place when the vehicle was in personal use. Whilst the respondent alleged that this would invalidate the vehicle's insurance, this had never previously been explained to the claimant. Removal of the dashcam under these

circumstances was not a repudiatory breach of contract on the part of the claimant.

146. In conclusion, the claimant was not guilty of gross misconduct and his actions did not amount to a repudiatory breach of contract that entitled the respondent to summarily dismiss him. Therefore, the claimant's complaint of wrongful dismissal is well founded.

Employment Judge Liz Ord

Date: 30 July 2021

JUDGMENT SENT TO THE PARTIES ON

27 August 2021

FOR THE TRIBUNAL OFFICE

Notes

1. Neither party objected to the hearing taking place on a remote video platform.