EMPLOYMENT TRIBUNALS

Claimant: Mr P Dixon

Respondents: N Sign Trading Limited

Heard: Remotely (by video link) **On:** 3 September 2021

Before: Employment Judge S Shore
NLM – Mr S Wykes
NLM – Ms S Mee

Appearances

For the claimant: Mr J Wilkins, Solicitor
For the respondent: Mr A Richards, Accountant for the respondent

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 1996) was well-founded. The principal reason for his dismissal was conduct.

2. The principal reason for dismissal was not that the clamant made a protected disclosure. The claim of automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 therefore fails.

3. Following the guidance in the case of **Polkey v AE Dayton Services Ltd** [1987] UKHL 8, we find that the evidence did not show any chance that the claimant would have been fairly dismissed if the respondent had followed a fair procedure.

4. We find that there were matters that we considered to constitute contributory conduct on the part of the claimant which should reduce the compensatory award made in his favour by a factor of 80%.

5. We find that it would be just and equitable to reduce the claimant's basic award by a factor of 80% because of the claimant's conduct before dismissal.

6. The claimant's claim of breach of contract (failure to pay notice pay) fails.

7. Directions will be sent under separate cover concerning the remedy hearing in this case.

REASONS

Introduction

1. The claimant was employed by the respondent, a signage and engraving company, as a Sign Fitter and Joiner, from 28 February 2014 until 10 July 2020. Early conciliation started on 22 September 2020 and ended on 22 October 2020. The claim form was presented on 20 November 2020.

2. The claimant presented claims of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996).

    2.2. Automatic unfair dismissal for the reason or principal reason that he made a protected disclosure (contrary to section 103A of the Employment Rights Act 1996).

    2.3. Breach of contract (failure to pay notice pay contrary to Article 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994).

3. The claims were case managed by me on 12 April 2021 in a private telephone preliminary hearing at which I and the parties identified and agreed the claims and issues and made orders for the case management of the case to today's hearing.

Issues

4. My case management order dated 12 April 2021 set out the following issues:

1. Unfair dismissal

1.1 Was the claimant dismissed? The respondent agrees that the claimant was dismissed.

1.2 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 What did the claimant say or write? When? To whom? The claimant says he made a disclosure on this occasion:

1.2.1.1 13 June 2020 at 12:47 (page 61 of the bundle) – in a text message to Alun Pearson in which the claimant wrote:

"But your breaking them [the CJRS rules] by having people work everyones unhappy and if u get caught well all have no jobs as" (sic);

1.2.2 Did he disclose information?

1.2.3 Did he believe the disclosure of information was made in the public interest?

1.2.4 Was that belief reasonable?

1.2.5 Did he believe it tended to show that:

1.2.5.1 a criminal offence had been, was being or was likely to be committed;

1.2.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

1.2.5.3 a miscarriage of justice had occurred, was occurring or was likely to occur;

1.2.5.4 the health or safety of any individual had been, was being or was likely to be endangered;

1.2.5.5 the environment had been, was being or was likely to be damaged;

1.2.5.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

1.2.6 Was that belief reasonable?

1.3 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

1.4 Was the reason or principal reason for dismissal that the claimant made a protected disclosure etc?

If so, the claimant will be regarded as unfairly dismissed. If not;

1.5 The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.6 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.6.1 there were reasonable grounds for that belief;

1.6.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

1.6.3 the respondent otherwise acted in a procedurally fair manner;

1.6.4 dismissal was within the range of reasonable responses.

1.7 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

1.8 If so, should the claimant's compensation be reduced? By how much?

1.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

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

2 ***Remedy for unfair dismissal***

2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.1.1 What financial losses has the dismissal caused the claimant?

2.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.1.3 If not, for what period of loss should the claimant be compensated?

2.1.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.1.5 Did the respondent or the claimant unreasonably fail to comply with?

2.1.6 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.1.7 Does the statutory cap of fifty-two weeks' pay apply?

2.2 What basic award is payable to the claimant, if any?

3 ***Notice Pay***

3.1 What was the claimant's notice period?

3.2 Was the claimant paid for that notice period?

3.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Law

5. For the purposes of the unfair dismissal claim, the relevant section of the Employment Rights Act 1996 is section 98.

"Section 98 Employment Rights Act 1996

(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) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

6. Section 103A of the Employment Rights Act 1996 states:

103A Protected disclosure.

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

7. A 'protected disclosure" is defined by section 43B of the Employment Rights Act 1996:

Disclosures qualifying for protection.

"(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

8. Breach of contract is a concept that has developed over a very long period of time by precedent in the common law.

9. We were referred to a number of precedent cases by the representatives, which we have quoted in this decision where appropriate:

    9.1. **Credit Capital Corporation Limited v Watson** [2021] EWHC 466;
    9.2. **Sainsbury's Supermarkets Ltd v Hitt** [2002] EWCA Civ 1588;
    9.3. **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ 979:
    9.4. **Ibrahim v HCA International Ltd** [2019] EWCA Civ 2007; and
    9.5. **Polkey v AE Dayton Services Ltd** [1987] UKHL 8.

Housekeeping

10. The parties produced a joint bundle of 101 pages. If we refer to a document in the bundle, we will note its page number(s) in square brackets [ ]. Mr Wilkin pointed out that page 84 of the bundle appeared twice.

11. Mr Richards drew our attention to an email that Alun Pearson, Director of the respondent, had sent to the Tribunal on 1 September 2021, to which he had attached an email exchange between himself and Craig Ewert. It was submitted that the exchange should be added to the bundle as evidence that the claimant was undertaking "cash jobs' and that this was relevant to our assessment of the claimant's honesty and integrity.

12. Mr Richards also asked us to note an email from Mr Pearson to the Tribunal dated 27 August 2021 to which were attached:

    12.1. A second witness statement of Mr Pearson dated 27 August 2021;

    12.2. A letter of Final Written warning from the respondent to the claimant dated 1 October 2018;

    12.3. Notes of a disciplinary hearing attended by the claimant on 1 October 2018; and

    12.4. A summary of charges made to the respondent's Lloyds Bank Business Chargecard between 11 November 2019 and 19 December 2019.

13. Mr Richards asked that the second witness statement be allowed to be submitted in evidence and that the document be added to the bundle. The importance of the documents was that they evidenced the claimant's disciplinary history with the

respondent. The claimant's evidence in chief was that he had a clean disciplinary record.

14. The second witness statement from Mr Pearson was a rebuttal of the claimant's witness statement.

15. Mr Richards also advised us that Mr Pearson was not available for the hearing because he had a medical appointment to attend. We advised Mr Richards that the Tribunal can give little weight to the statement of a witness who does not attend the hearing to affirm that their evidence is true or make themselves available to be asked questions about their evidence.

16. My colleagues had not received a copy of all the witness statements, so copies were provided to them and we took a short break to read them, and for Mr Richards to make enquiries of Mr Pearson about his availability. We also considered the application to add documents.

17. On the resumption of the hearing, we advised Mr Richards that the application to add the WhatsApp conversation between Mr Pearson and Mr Ewert was refused, as we could not see that it had any relevance to the issues in the case.

18. The second witness statement of Mr Pearson was not needed, as the points could be put to the claimant in cross-examination. The disciplinary documents, however, may be relevant and were added to the bundle.

19. Mr Pearson joined the hearing on the resumption and said that he was able to give evidence.

20. The claimant gave evidence in person and produced two witness statements: the first was dated 1 April 2021, and ran to 33 paragraphs. The second was dated 2 June 2021. It ran to 14 paragraphs.

21. Evidence was given in person on behalf of the respondent by:

    14.1. Alun Pearson, who is the owner and sole director of the respondent. His witness statement dated 10 May 2021 consisted of 21 paragraphs.

    14.2. Andrew Richards, the Accountant for the respondent. He produced two witness statements, both dated 25 March 2021 that consisted of a total of 6 paragraphs. Mr Richards investigated the disciplinary offence and heard the claimant's disciplinary hearing. He was the dismissing officer.

15. The respondent also produced a witness statement from Martin Harvey dated 25 March 2021, which consisted of two paragraphs. Mr Harvey is General Manager of the respondent and heard the claimant's appeal against dismissal. Mr Richards said that Mr Harvey was on a family holiday. No application for adjournment was made.

16. We advised the parties that we would only deal with liability in the first instance. That would include dealing with any issues of deductions for **Polkey** and/or contributory conduct reasons.

17. At the end of the evidence, we heard closing submissions from Mr Wilkin and Mr Richards. The case was listed for one day, to include remedy, but we only finished hearing closing submissions on liability at 4:00pm. We indicated that we did not think we could make a decision on liability, prepare a decision for the parties and deliver it in the remaining time available to us on the day, so indicated that our decision on liability would be reserved.

18. We provisionally agreed with the parties to return to deal with remedy (if it was required) on 22 October 2021. That date will now be used for the remedy hearing and a separate notice of hearing will be sent to the parties together with some brief case management orders.

19. The hearing was conducted by video on the CVP application and ran reasonably well, with some technical issues. We are grateful to all who attended the hearing for their patience and in the face of the technical glitches.

Findings of Fact

20. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents produced to us. We make the following findings.

Background and General Findings

21. We find that the respondent is a private limited company formed in 2008 that provides signage, engraving and vehicle graphics services to commercial customers. It employs approximately 12 staff. It was agreed that the claimant began working for the respondent on 28 February 2014 as a Sign Fitter and Joiner. It was also agreed that he was dismissed on 10 July 2020.

22. We find that the witness statements of Messrs Richards and Harvey were almost entirely inadequate for the purposes of this hearing, as none of the three statements produced by them addressed the issues in the case, such as the investigation, the decision-making process and any follow up investigation.

23. It was not disputed that the claimant started early conciliation on 22 September 2020 and obtained an early conciliation certificate on 22 October 2020. Time points were not in dispute in this case.

24. The claimant entered into a contract with the respondent dated 17 March 2015 [43-48] that referred to a disciplinary procedure that could be found in the employee handbook. We were never shown a copy of that procedure. We took the ACAS Code of Practice 1 into account when making our decision.

25. The claimant was provided with a van to assist him in carrying out his duties.

26. It was not disputed that the claimant signed a Van and Time Keeping Policy on 8 November 2018 [51-52] and a Van and Company Credit Card Policy on 8 February 2019 [49-50]. The Policies both stated that the employee could not use the van outside of normal office hours without the prior consent on the respondent. We find that the term included the circumstances of the disciplinary offence alleged by the respondent because the claimant was not working when he visited his brother. The 2019 Policy stated that the penalty for such use may be summary dismissal. The Policies allowed the respondent to remove the van from the claimant when it saw fit to do so.

27. We find that the claimant was aware of the Policies and abided by them, as evidenced by a series of WhatsApp exchanges between him and Mr Pearson [53-54] in which he asked to use the company van for personal use. Specifically, we find that the claimant was aware that if he was to use the company van in his possession for non-work journeys, he could be liable to disciplinary action, including dismissal without notice.

28. We find that the claimant received a final formal warning on 1 October 2018 that remained on his record for six months. The warning was given for "failure to carry out requested work and insubordination and poor attitude towards management." The claimant did not dispute that he had received the warning or assert that he had appealed the decision. The warning had expired by the time of the disciplinary offence for which the claimant was eventually dismissed. The respondent pointed out that the claimant had asserted that he had a clean disciplinary record (§14 of his second witness statement). That statement was plainly incorrect, but did not fundamentally undermine the entire credibility of the claimant.

29. It is relevant to deal with the issue of work done for the respondent by the claimant's brother in December 2019, as it is the basis of the claimant's subsequent justification for his actions at his disciplinary hearing. We find that the respondent's brother, who is an electrician, did work for the respondent, at the request of Mr Pearson and at short notice. We make this finding because the claimant's evidence on the point (§5 of his first witness statement) was not challenged. We find that the claimant's brother was paid for the work, because Mr Pearson's oral evidence on the point was not challenged.

30. We find that there was no evidence that met the required standard of proof that Mr Pearson had agreed to allow the claimant and his brother to use the company van to collect some kitchen worktops that were to be delivered to the claimant's brother's house, as asserted by the claimant (§5 witness statement). We make that finding because:

    30.1. We found the claimant's evidence on the point to lack credibility;

    30.2. We found the claimant's account in his witness statement to be inconsistent with his appeal letter dated 17 July 2020 [79], in which he stated:

    > *"You had in the past given me permission to use the van to help my brother collect some wheel barrows. I assumed this*

limited use was allowed by custom and practice and I helped my brother pick something up in the van."

30.3. The claimant's account had no internal logic to it. It is internally illogical that an agreement to borrow a van to move kitchen units in December could be unilaterally converted into an agreement to use the van to pick up wheelbarrows the following April. It is unlikely that a favour would be owed to a tradesman who had been paid for his work;

30.4. Given that the claimant accepted that he had sent Mr Pearson a WhatsApp message every time he wanted to borrow the van, we see no reason why he would not have done the same in this instance;

30.5. We found Mr Pearson's denial of any such agreement to be more credible than the claimant's evidence;

30.6. The claimant accepted that his brother had picked up the wheelbarrows in his own vehicle;

30.7. In his first witness statement (§10), the claimant said he called into the respondent's premises a few days after 16 April 2020 and spoke to Mr Pearson. He said that he asked about borrowing wheelbarrows, but did not say that he asked Mr Pearson about borrowing the van to transport them.

31. We therefore find that the evidence does not show to the required standard of proof that the claimant had prior permission to use the company van that was allocated to him for private trips outside his working hours. Specifically, he did not have permission to use the van to return wheelbarrows to the respondent's premises at any time. We find that the claimant's trip to his brother's home on 22 April 2020 was not on company business. We find that that trip was nothing to do with the collection of wheelbarrows. We make that fining because of the claimant's unchallenged evidence that he went to his brother's house on that day to help him with building work.

Lockdown and Furlough

32. It was agreed that the claimant was furloughed in March 2020. It was also agreed that he was asked to return to work during his furlough to carry out maintenance at the respondent's premises. The claimant says that he was actually asked to do his normal job whilst on furlough. We find that the claimant's evidence on this point was more credible than the respondent's, because:

32.1. Under cross-examination, Mr Pearson accepted that the documents showed that the claimant did his usual job whilst on furlough; and

32.2. The documents themselves supported the claimant's assertions o the point (e.g. [63] message from Stuart Mitchell to Claimant 5 June 2020; [64] message from Stuart Mitchell to claimant 12 June 2020).

33. The purpose of this hearing is not to highlight any abuse of the CJRS. Neither is it to highlight any acts of the claimant that were inconsistent with the terms of the Covid lockdowns that sought to minimise travel. We make no finding as to whether the respondent committed any breach of the rules of the CJPS.

34. We find that it is clear from the written and oral evidence of the claimant; his WhatsApp exchange with Mr Pearson on 13 June 2020; the oral evidence of Mr Richards; and Mr Pearson's own written and oral evidence that he and the claimant had a tempestuous relationship.

35. We also find that the claimant's written evidence; his oral evidence and his WhatsApp messages to Mr Pearson disclose that he was very unhappy at being on furlough at 80% of his usual wage.

Protected Disclosures

36. It was not disputed that during an exchange of WhatsApp messages between the claimant and Mr Pearson on 13 June 2020, which had become heated on both sides, the claimant sent the following message to Mr Pearson at 12:38pm:

> "*But your breaking them [the CJRS rules] by having people work everyones unhappy and if u get caught well all have no jobs as*" (sic);

37. We find that message to be a protected disclosure because:

    37.1. We find it is a disclosure of information. It was clear from the evidence of the claimant and the oral evidence of Mr Pearson that the claimant was disclosing information that the respondent was breaching the rules of the CJRS by claiming furlough and requiring employees to work;

    37.2. We find that the disclosure of information was made in the public interest. We make that finding because:

        37.2.1. The decision of the Court of Appeal in **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ 979, as endorsed by the same Court in **Ibrahim v HCA International Ltd** [2019] EWCA Civ 2007, makes it clear that the test of whether a disclosure is in the public interest has two stages: whether the claimant genuinely believed, at the time of making the disclosure, that it was in the public interest; and, if so, whether that belief was reasonable;

        37.2.2. The submissions and evidence of the respondent concentrated on whether the disclosure was in bad faith. It was suggested that it was an attempt to extort more money from the respondent. We find that the test is met by considering the numbers in the affected group; the nature of the interest affected and the extent to which they are affected; the nature of the alleged malpractice and the identity of the alleged wrongdoer. In this case, the allegation

was one of defrauding the taxpayer. There were approximately 12 employees who were affected. The interest affected was the financial interest of the employees who may have been liable to repay monies paid under furlough. The nature of the alleged malpractice was serious, in our view;

37.2.3. Whilst we make no finding of fact as to whether the respondent breached any of the CJRS rules, we find that the claimant's belief was reasonable. A whistleblower does not have to have the public interest as their sole motivation. It is sufficient for the public interest to be one of the motivations. We find that the claimant's WhatsApp message reproduced above makes out that he has the public interest as at least part of the reason that he made the disclosure; and

37.2.4. We find that the disclosure tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation (the obligation to comply with the terms of the CJRS). We find that belief to have been reasonable.

Dismissal

38. It was not denied by the respondent that Mr Pearson was angered by the protected disclosure. It was apparent by his manner when he answered questions about the disclosure that he remained angry.

39. It is not necessary to quote the exchange of messages between the claimant and Mr Pearson verbatim, but it was not disputed by either party that Mr Pearson told the claimant to "Look at the world around you and then give your head a fucking shake!" [62]. Neither was it disputed that when the claimant threatened to report Mr Pearson for fraud [62], Mr Pearson responded by asking the claimant if he could take that as a resignation [62].

40. Mr Pearson then asked the claimant to return to work the following Monday, before almost immediately sending another message telling the claimant not to come in and to "accept this as notice of redundancy." He said he would do a letter on the Monday, but it was agreed that no such letter was ever written.

41. Mr Wilkin hinted at times that the claimant had been dismissed on 13 June by the WhatsApp message. The claimant expressly said as much in his first witness statement (§§23 and 24). We find that the claimant was not dismissed by WhatsApp message on 13 June because he remained in the respondent's employment and participated in the subsequent disciplinary proceedings that led to his dismissal. He never raised the issue of his dismissal in the disciplinary proceedings.

42. He did not allege that he was dismissed on 13 June in his ET1. He did not suggest that his effective date of termination was 13 June through Mr Wilkin at the preliminary hearing before me on 12 April 2021. In fact, Mr Wilkin confirmed that

the EDT was 10 July 2020, which is the date I noted in the Case Summary of my case management order [34]. The claimant never wrote to the Tribunal to dispute the Case Summary.

43. There was some confusion and dispute over a telephone conversation between the claimant and Andrew Richards on 15 June 2020 (which was the Monday following the exchange of messages on 13 June). At paragraph 25 of the claimant's first witness statement, he referred to a telephone conversation with Mr Richards "about a week after" 15 June 2020. At paragraph 14 of his witness statement, Mr Pearson refers to a telephone conversation between the claimant and Mr Harris "on or around 22 June 2020."

44. At paragraph 8 of his second witness statement, the claimant said "The conversation which Mr Pearson alleges I had with Mr Richards at paragraph 14 of his statement did not take place. It is a complete fabrication." We considered whether the claimant had meant that Mr Pearson's account of the conversation had been a complete fabrication, but found that because the claimant had been represented by solicitors, his statement would have been more precise if that had been his evidence. We therefore find that the claimant's evidence was inconsistent on the point, which reduced his credibility as a witness.

45. We find that the evidence pointed to the most likely explanation of the exchanges between the claimant an Mr Richards to be an attempt by the latter to act as peacemaker, including persuading the claimant that he had not been dismissed. The fact that the claimant did not assert that he had been dismissed in the subsequent disciplinary investigation and hearings is indicative of the fact that the claimant did not regard himself as dismissed on 13 June in our findings.

46. In the alternative, had he been dismissed on 13 June, he consented to the rescission of the dismissal by his subsequent engagement in the disciplinary process.

47. We find that there is no significance in the respondent, on 15 June 2020, requesting the return of the van that the claimant kept at his home. It was not disputed that the respondent had the authority to request the return of the vehicle, particularly as the claimant was not attending work at the time.

48. It was not disputed that the respondent's business was regarded as a priority business because of the signage it provided to the NHS and for Covid notices.

49. It was not disputed that Mr Richards had been working from home or that he returned to work on 22 June 2020. It was not disputed that on 26 June 2020, Mr Richards prepared the monthly payroll, or that this involved him checking timesheets and vehicle tracker reports. It was unusual that the evidence about what Mr Richards found when he looked at the tracker reports was given by Mr Pearson, rather than Mr Richards himself, but we are permitted to allow hearsay evidence.

50. We find that Mr Richards checked the tracker records for the van kept by the claimant for 22 April on 26 June and that it had not been possible to access the

tracker records remotely, because the respondent's evidence on the point was not challenged.

51. We find that the claimant's van was used to undertake a return journey of 11.2 miles on 22 April 2020. We find that the journey was from the claimant's home address to the home address of his brother. We find that the van was parked at the home of the claimant's brother for 3 hours and one minute. We make those findings, because the evidence of the respondent on the points was not challenged.

52. It was not disputed that Mr Richards reported the tracker record to Mr Pearson. Neither was it disputed that Mr Pearson authorised Mr Richards to write to the claimant and invite him to an investigatory meeting. That letter, dated 26 June 2020 [70], advised the claimant that Mr Richards was investigating:

    52.1. Using a company vehicle outside of normal office hours and/or at a time when the business was closed, without the prior consent of the company; and

    52.2. Falsification of time sheets.

    The claimant was invited to a meeting on 30 June 2020 at the respondent's offices.

53. We find that the ACAS Code of Practice requires the investigation and disciplinary hearing to be undertaken by different people "where practicable". On balance, we find that it was practicable for Mr Richards to have conducted the investigation, Mr Harvey the disciplinary and Mr Pearson the appeal.

54. We find that the investigation undertaken by Mr Richards was inadequate in a number of ways, even when taking into account the size and administrative resources of the respondent. In making this assessment, we used the test contained in the case of **Sainsbury's Supermarkets Ltd v Hitt** [2002] EWCA Civ 1588. That test requires a Tribunal to determine whether the individual parts of a disciplinary process were steps that fall within a reasonable range of responses. In effect, the test can be expressed as "whether no reasonable employer would have taken the step that this employer took." The defects in the investigation included:

    54.1. The notes of the investigation meting [71-72] were not complete. Mr Harris disclosed in cross-examination that he had taken a full note of the discussion, but had not produced them to the claimant or this hearing;

    54.2. It was therefore not possible to determine from a contemporaneous record what matters were raised by both parties;

    54.3. There appears to have been no investigation of the claimant's account of his brother being owed a favour by Mr Pearson;

    54.4. There appears to have been no investigation into the claimant's account of visiting the respondent's premises on 16 April and speaking to Martin Harvey and/or Stuart Mitchell;

    54.5. No witness statements were taken from anyone connected to the incident;

54.6. No investigation appears to have been undertaken into the arrangement to borrow the wheelbarrows;

54.7. Mr Pearson does not appear to have been interviewed about the conversation that the claimant said he had with him;

54.8. The investigation meeting starts with a question about whether the claimant had permission to use the van. He answered that he had. No follow-up questions were asked, which indicates to us that there was not a fair and impartial investigation – Mr Richards appears to have made his mind up;

54.9. Whilst the investigation invite letter states that the claimant was being investigated for falsification of time sheets, he was asked one question about this at the meeting. He said that journeys to home would have been to collect boots and passes, or to use the toilet at home. The record of interview shows that this answer was not challenged and Mr Richards gave no evidence of any further investigation on the point;

54.10. The invitation to a disciplinary hearing dated 7 July 2020 included a matter that appears not to have been resolved;

54.11. No post-hearing investigation was undertaken;

54.12. No post-appeal investigation was undertaken;

54.13. Mr Pearson made the decision to dismiss, rather than the purported decision maker, Mr Richards; and

54.14. Mr Richards was investigator and chaired the disciplinary hearing.

55. Mr Richards conducted the disciplinary hearing on 10 July 2020. The two allegations against the claimant were the same as in the invitation to the investigatory hearing. We were shown no record of the meeting. The respondent produced a document dated 10 July 2020 titled “Agenda of Disciplinary Hearing” [76-77]. Mr Richards said he kept a written note and that the outcome letter dated 10 July 2020 [78] contained a record of what had been said. It plainly did no such thing.

56. There was no indication in his written evidence or the dismissal letter of how or why Mr Richards had reached his decision and no explanation why he had decided to dismiss for the first of the two disciplinary allegations – using the van - while failing to make any mention of the second allegation of falsifying time records. The absence of written notes or records is exacerbated by the wholly inadequate witness statements filed by Mr Richards.

57. We note that the dismissal letter was signed by Mr Pearson. In answer to cross-examination questions, Mr Richards confirmed that he carried out no further investigations into the matter after the hearing on 10 July because “there was no evidence that the claimant had permission to use the vehicle”. He admitted

speaking to Mr Pearson on 10 July, but said he did not ask him if he had given permission for the claimant's brother to use the van.

58. We find that the decision to dismiss was Mr Pearson's. We make that finding because of his answers to questions asked by Mr Wykes about who had taken the decision to dismiss. Mr Pearson initially said it was Mr Richards' decision, but he then added that after the disciplinary hearing "He [Mr Richards] told me how things were. He asked me. I said if that's the situation, that's what we had to do." That indicates to us that the decision to dismiss was made by Mr Pearson.

59. Mr Richards also confirmed that he had not gone back to Stuart Mitchell to check if he had given the claimant permission, because Mr Mitchell could not give permission. We do not find that to be a decision that falls within the band of reasonable responses.

60. He said that he had taken into account the previous dismissal of Craig Brewis on 7 February 2018 [93-101], and would have dismissed the claimant even if Mr Brewis' case had never arisen.

Appeal

61. The claimant appealed by a letter dated 17 July 2020 to Mr Pearson [79]. His grounds of appeal were:

    61.1. He did not commit misconduct by using the company vehicle outside of normal office hours or when the business was closed;

    61.2. He used the van on the last day before the business closed [because of Covid] to make deliveries, but was unable to complete the deliveries because he had no PPE;

    61.3. Mr Pearson had, in the past given the claimant permission to use the van to help his brother collect some wheel barrows;

    61.4. He had assumed this limited use was allowed by custom and practice and he helped his brother pick something up in the van;

    61.5. The dismissal was after the claimant "had asked you about working when on furlough leave"; and

    61.6. The dismissal was unfair because he had not committed misconduct and had been because the claimant was a whistleblower.

62. On 31 July 2020, Mr Pearson wrote to the claimant, [81] inviting him to an appeal hearing on 6 August 2020 to be heard by Martin Harvey, the General Manager of the respondent. The meeting was rescheduled for 21 August 2020 [82].

63. Mr Harvey's entirely inadequate statement included one paragraph about the whole of the appeal process. He said he asked the claimant if he had permission to use the company van for personal use, and the claimant had replied "Technically, I didn't, no." Mr Harvey then stated that the claimant was unable to produce any evidence of permission being given and that it was on that basis

"along with the precedent of previous employee dismissal for the same charge of gross misconduct…" that he had dismissed the claimant.

64. The previous employee was Craig Brewis.

65. The respondent produced no contemporaneous notes of the appeal hearing, despite Mr Richards being in attendance as notekeeper. The respondent produced a document titled "Agenda of Appeal Hearing" dated 21 August 2020 [83], which appeared to us to be more likely to be a meeting template than a record of the meeting because it contained nothing that appeared to have been recorded at the meeting itself.

66. We find that after the appeal, Mr Pearson joined the meeting after its conclusion, but that this had no influence on the outcome. We make that finding because we find Mr Pearson's account to be more plausible than the claimant's evidence that Mr Pearson joined the end of the dismissal hearing.

67. The claimant was sent written confirmation of the appeal outcome on 25 August 2020 [85]. It does not indicate if the appeal was a review of the original decision to dismiss, or a rehearing.

68. We find that the steps taken by Mr Harvey in dealing with the appeal were not within a band of reasonable responses because there is no record of him taking any of the claimant's case into account and no evidence of him undertaking any further investigation to establish what had happened over the claimant's assertion that he had been given permission to use the van and the exchange that the claimant said he had had with Mr Mitchell and Mr Harvey.

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69. We have identified above a number of procedural failings in the way that the respondent conducted the disciplinary investigation, disciplinary hearing and appeal. We find that those failings are so egregious that we cannot find facts that demonstrate that there is any chance that a fair procedure could have led to a fair dismissal. The respondent's processes were so inadequate, unreasonable and unfair that we find that it was incapable of achieving a fair procedure in this case.

The claimant's conduct

70. The claimant's pre-dismissal conduct was a major evidential factor in this case. We find that his previous disciplinary warning in 2018 had no influence on the decision to dismiss, so could not be regarded as pre-dismissal conduct that led in any way to his dismissal.

71. We find that the claimant's conduct with regard to the use of the van, however, was pre-dismissal conduct that made a significant contribution to his dismissal. Put simply, we find on the balance of probabilities that the claimant committed the disciplinary offence that was made and upheld against him of unauthorised use of the company vehicle. We make that decision because:

71.1. As set out above, it was not disputed that the claimant signed a Van and Time Keeping Policy on 8 November 2018 [51-52] and a Van and Company Credit Card Policy on 8 February 2019 [49-50]. The Policies both stated that the employee could not use the van outside of normal office hours without the prior consent on the respondent. We find that the term included the circumstances of the disciplinary offence alleged by the respondent because the claimant was not working when he visited his brother on 22 April 2020;

71.2. The 2019 Policy stated that the penalty for such use may be summary dismissal. The Policies allowed the respondent to remove the van from the claimant when it saw fit to do so;

71.3. We found above that the claimant was aware of the Policies and abided by them, as evidenced by a series of WhatsApp exchanges between him and Mr Pearson [53-54] in which he asked to use the company van for personal use. Specifically, we find that the claimant was aware that if he was to use the company van in his possession for non-work journeys, he could be liable to disciplinary action, including dismissal without notice, because he admitted as much and usually asked to use the vehicle by WhatsApp;

71.4. We repeat of findings set out above that there was no evidence that met the required standard of proof that Mr Pearson had agreed to allow the claimant and his brother to use the company van to collect some kitchen worktops that were to be delivered to the claimant's brother's house, as asserted by the claimant (§5 witness statement). We made that finding because:

71.4.1. We found the claimant's evidence on the point to lack credibility;

71.4.2. We found the claimant's account in his witness statement to be inconsistent with his appeal letter dated 17 July 2020 [79], in which he stated:

"You had in the past given me permission to use the van to help my brother collect some wheel barrows. I assumed this limited use was allowed by custom and practice and I helped my brother pick something up in the van."

71.4.3. The claimant's account had no internal logic to it. It is internally illogical that an agreement to borrow a van to move kitchen units in December could be unilaterally converted into an agreement to use the van to pick up wheelbarrows the following April. It is unlikely that a favour would be owed to a tradesman who had been paid for his work;

71.4.4. Given that the claimant accepted that he had sent Mr Pearson a WhatsApp message every time he wanted to

borrow the van, we see no reason why he would not have done the same in this instance;

71.4.5. We found Mr Pearson's denial of any such agreement to be more credible than the claimant's evidence;

71.4.6. The claimant accepted that his brother had picked up the wheelbarrows in his own vehicle; and

71.4.7. In his first witness statement (§10), the claimant said he called into the respondent's premises a few days after 16 April 2020 and spoke to Mr Pearson. He said that he asked about borrowing wheelbarrows, but did not say that he asked Mr Pearson about borrowing the van to transport them.

71.5. The claimant's explanations of his actions were vague, internally inconsistent and illogical. He never explained with any degree of credibility when or how the wheelbarrows were returned; and

71.6. We also repeat our finding made above that the evidence does not show to the required standard of proof that the claimant had prior permission to use his company van for private trips outside his working hours. Specifically, he did not have permission to use the van to return wheelbarrows to the respondent's premises at any time.

Applying the Findings of Fact to the Law and Issues

72. Using the list of issues above, we make the following findings.

73. The claimant was dismissed. We make that finding as the respondent admitted that it had dismissed the claimant.

74. The claimant made a single qualifying disclosures as defined in section 43B of the Employment Rights Act 1996 by his WhatsApp message to Mr Pearson at 12:47pm on 13 June 2020. He disclosed information that be reasonably believed to be in the public interest that tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation to abide by the requirements of the CJRS. The belief was reasonable.

75. The disclosure was made to the claimant's employer, the respondent.

76. We find that the principal reason for dismissal was not that the claimant made the protected disclosure. We find that there were three reasons for the respondent's decision to dismiss the claimant:

76.1. The protected disclosure;

76.2. The unauthorised use of the vehicle; and

76.3. The breakdown of the working relationship of trust and confidence between the claimant and the respondent.

77. We find that whilst Mr Pearson was clearly annoyed by the claimant's disclosure, the principal reason for the dismissal was the unauthorised use of the vehicle. We find that the earlier dismissal of Mr Brewis was for exactly the same disciplinary offence as that for which the claimant was dismissed - unauthorised use of a company vehicle. That finding leads us to the conclusion that it was the principal reason for dismissal, with the protected disclosure and breakdown of the relationship as subsidiary matters. We found that the relationship had broken down because of the claimant's evidence that he would not have returned if the appeal had gone his way.

78. We therefore find that the principal reason for dismissal was conduct. We find that the respondent genuinely believed the claimant had committed misconduct.

79. We find that the respondent did not act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. In particular, we find:

    79.1.1. there were reasonable grounds for that belief;

    79.1.2. at the time the belief was formed the respondent had not carried out a reasonable investigation;

    79.1.3. the respondent did not otherwise act in a procedurally fair manner; and

    79.1.4. dismissal was not within the range of reasonable responses.

80. We repeat that we find there was no chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason, so no deduction to compensation should be made on those grounds.

81. We find that the claimant contributed to his dismissal by blameworthy conduct and that it would be just and equitable to reduce the claimant's compensatory award by proportion of 80%.

82. We find that it would be just and equitable to reduce the basic award because of the conduct of the claimant before the dismissal by a factor of 80%.

83. The claimant was not paid for a period of notice, but we find that the claimant did something so serious (using the company vehicle without notice) that the respondent was entitled to dismiss without notice.

84. The Tribunal will proceed to determine remedy at another hearing, the details of which will be advised, unless the parties are able to reach agreement between themselves on remedy.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
20 September 2021