EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Mr T Bijur		**Maritime and Coastguard Agency**

Held at: Exeter **On: 20 to 24 September 2021**

Before: Employment Judge Smail

Appearances

Claimant: Mr S. Purnell (Counsel)
Respondent: Mr P. Keith (Counsel)

RESERVED JUDGMENT

1. The Respondent shows that the sole reason for the Claimant's dismissal was misconduct. It was not that the Claimant made any protected disclosure.

2. The Claimant was unfairly dismissed by the Respondent because the Respondent did not expressly consider and reason the following material considerations: -

   (a) The difference between serious misconduct and gross misconduct;

   (b) Mitigating features such as length of service and performance at the Respondent;

   (c) Whether the expenses claim for the train fare of the police officer was dishonest as well as being a breach of the rules.

3. The compensatory award is reduced by 85%. There was an 85% chance that the Claimant would have been fairly dismissed at the time of dismissal anyway.

4. No additional contributory fault reduction is made from the compensatory award in addition to the Polkey reduction at paragraph 3 above.

5. The basic award is reduced by contributory fault of 85%.

REASONS

1. By a claim form presented on 23 April 2020 the Claimant brought claims for ordinary unfair dismissal (ss.94 & 98 Employment Rights Act 1996), wrongful dismissal, and automatic unfair dismissal, claiming that the principal reason for the dismissal was that the Claimant had made a protected disclosure (s.103A ERA).

2. The Claimant commenced employment with the Respondent on 3 May 2010, working latterly as the Respondent's Maritime Security Operations Manager, until his summary dismissal for alleged gross misconduct on 12 December 2019, which was the effective date of termination of his employment.

THE ISSUES

3. The parties agreed the following issues between them.

1. Unfair Dismissal

I. Was the Claimant dismissed for one of the prescribed statutory fair reasons? The Claimant contends he was dismissed for the principal reason of having made a protected disclosure. The Respondent will contend that the Claimant was dismissed for the reason of conduct, which is a prescribed statutory reason under S98(2)(b) ERA 1996.

II. If the Claimant was dismissed for a prescribed statutory reason (conduct) was his dismissal within the range of reasonable responses having regard to the overall circumstances of the case, including the size and administrative resources of the Respondent?

III. Did the Respondent apply a fair procedure before reaching the decision to dismiss the Claimant? The Respondent will contend that a fair procedure was followed, including that the Claimant was afforded a right of appeal.

IV. If the Claimant's dismissal was procedurally unfair, would the Claimant in any event have been dismissed if a fair and proper procedure had been followed and if so, is a Polkey deduction appropriate?

V. If the Claimant's dismissal was unfair, and he is awarded compensation, should a deduction to such compensation be made on the basis that the Claimant contributed by blameworthy conduct to the circumstances which led to his dismissal?

VI. If the Claimant's dismissal was unfair, and he is awarded compensation, should there be an uplift to reflect any unreasonable failure by the Respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

2. Dismissal for making a Protected Disclosure: S103A ERA 1996

I. Did the Claimant make a qualifying/protected disclosure? The disclosure upon which the Claimant relies was:

a) allegedly originally made in an email dated 23 February 2017 and repeated in an email dated 27 February 2017 to the HR S&I Transformation Programme, Nicky Yates, Katy Ware and Bill Dunham.

b) The Claimant contends that, via the 23 and 27 February emails, he - (i) communicated that a colleague, Tony Heslop, was privy to what should have been confidential information namely that the Claimant had been invited to an assessment for an Assistant Director position; and (ii) expressed concerns about the implications this could have for the fairness and impartiality of the selection process.

II. The Claimant contends that disclosure (a) qualifies for protection under S43B ERA 1996 on the basis that it was:

a) A disclosure of information which in the reasonable belief of the Claimant was in the public interest and showed that the Respondent and/or its employee (Tony Heslop), was failing/had failed to comply with a legal obligation to which it was subject (S43)(B)(1)(b) ERA 1996). Particularly, the Claimant contends he was disclosing that the Respondent/Tony Heslop was/was possibly breaching:

i. Sections 10 and 11 of the Constitutional Reform and Governance Act 2010 ("the Act") which set out legal obligations for fair recruitment in the civil service namely that appointments must be on merit on the basis of fair and open competition.

ii. Section 11 of the Act also requires the Civil Service Commission to publish a set of principles ("the Recruitment Principles") to be applied for the purposes of meeting the statutory requirements. Section 11(4) of the Act requires civil service management authorities to comply with the Recruitment Principles.

iii. The Respondent's obligations under data protection legislation (at the time, the Data Protection Act 1998).

iv. The implied term in the Claimant's employment contract not to damage mutual trust and confidence.

b) The Claimant asserts that his disclosure was in the public interest because the civil service pays salaries out of public funds and it is therefore in the public interest for a fair procedure to be adopted in recruiting individuals to positions in the civil service, and that such appointments should be solely on merit.

c) The disclosure was made to his employer in connection with the conduct of another employee (S43C(1)(a) ERA 1996).

III. The Respondent denies that the disclosure constitutes a protected disclosure which qualifies for protection under S43(B)/(C) ERA 1996. Particularly, the Respondent will deny that the Claimant disclosed information which was, in his reasonable belief, in the public interest and/or showed that a person was failing and/or had failed to comply with a legal obligation.

IV. If the Claimant did make a valid protected disclosure was the Claimant dismissed by the Respondent on grounds of making a protected disclosure, contrary to S103(A) ERA 1996? The Respondent will deny that the dismissing officer was aware of the sending/contents of the 27th February email and/or that the Claimant was dismissed on grounds/in connection with the fact the Claimant sent the 27th February email and/or grounds of the Claimant making a protected disclosure. Particularly, per above, the Respondent will contend that the Claimant was dismissed on grounds of, and in response to, his conduct.

3. Wrongful Dismissal

I. Was the Claimant dismissed on grounds of making a protected disclosure, as is alleged?

II. If the Tribunal accepts that the Claimant was not dismissed on grounds of making a protected disclosure, and that he was, as is contended by the Respondent, dismissed in response to misconduct, was the Respondent entitled to decide that the

Claimant's misconduct was serious enough to constitute gross misconduct and dismissal without notice was appropriate?

THE LAW

Automatic unfair dismissal where the reason or principal reason for the dismissal was that the Claimant made a protected disclosure

4. By s.43A of the Employment Rights Act 1996 a protected disclosure means a qualifying disclosure as defined by the Act. By s.43B(1) 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, or is likely to be deliberately concealed.

5. By section 103A of the Employment Rights Act 1996 if the reason or principal reason for the dismissal is that the Claimant made a protected disclosure the dismissal is automatically unfair.

6. Kuzel v Roche Products Ltd [2008] IRLR 530 (CA) dealt with the burden of proof in a public interest disclosure case. It is for the employer to prove a fair reason for dismissal. There is no burden on the employee either to disprove the reason put forward by the employer, or to positively prove a different reason, even where the employee is asserting that the dismissal was for an inadmissible reason. However, the employee who positively asserts that there was a different and inadmissible reason for dismissal, such as making protected disclosures, must produce some evidence supporting the case that there was an inadmissible reason and challenge the evidence produced by the employer. The employer can defeat a claim of an inadmissible reason for dismissal either by proving a different reason or by successfully contesting the reason put forward by the employee. If the Tribunal is not satisfied that the reason for dismissal is the reason asserted by the employer, it is open to it to find that it is the reason asserted by the employee, but it does not have to so find.

General Unfair dismissal

7. The Tribunal has had regard to section 98 of the Employment Rights Act 1996. By section 98(1) it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. A reason relating to the conduct of an

employee is a potentially fair reason. By section 98(4) where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

8. This has been interpreted by the seminal case of British Home Stores v Burchell [1978] IRLR 379 (EAT) as involving the following questions:

   (a) Was there a genuine belief in misconduct?
   (b) Were there reasonable grounds for that belief?
   (c) Was there a fair investigation and procedure?
   (d) Was dismissal a reasonable sanction open to a reasonable employer?

9. I have reminded myself of the guidance in Sainsbury's Supermarkets v Hitt [2003] IRLR 23 (CA) that at all stages of the enquiry the Tribunal is not to substitute its own view for what should have happened but judge the employer as against the standards of a reasonable employer, bearing in mind there may be a band of reasonable responses. This develops the guidance given in Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT) to the effect that the starting point should always be the words of s. 98(4) themselves; that in applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the employment Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment Tribunal must not substitute its decision as to what was the right course for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, whilst another quite reasonably take another. The function of the employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal is outside the band, it is unfair.

Wrongful Dismissal

10. An employee is entitled to notice of dismissal, and compensation in lieu, unless as a matter of fact as determined objectively by the Tribunal, on the balance of probability, the employee committed a repudiatory breach of contract entitling the employer to dismiss without notice by way of acceptance of the breach. The burden is on the employer to prove this.

FINDINGS OF FACT ON THE ISSUES

The decision to dismiss

11. The claimant was dismissed by Tony Heslop without notice on the 12th of December, 2019 for gross misconduct. Two allegations of gross misconduct arose from a training course the claimant had delivered on the 11th and 12th of February, 2019 in respect of ISPS verification audits. ISPS stands for the International Ship and Port Facility Security Code. One of the claimant's responsibilities as the Maritime Security Operations Manager was to train new surveyor recruits as to their obligations when examining security measures adopted by ships. The security measures included rules as to who could gain access to ships and various parts of ships. Mr. Heslop found, taking into account the evidence obtained by the investigation officer, Mick Groark, that on the balance of probability the claimant had made comments that not all deficiencies in security measures should necessarily be recorded as this would be detrimental to the UK flag and that shipowners may choose to flag their vessels on a register other than the UK. He further found, on the balance of probability, that the claimant made comments that the practice of not recording deficiencies was endorsed by MCA senior management. These actions fell below the standard of behaviour expected from a civil servant and were in breach of Chapter three of the staff handbook, of the civil service code of conduct and MCA values. Furthermore, these comments having been made in front of non-MCA personnel, in particular the representatives of the Department of Transport, they have brought the MCA into disrepute.

12. The second matter of gross misconduct found by Mr. Heslop was that he was satisfied that during this course, the claimant had shown a video of alleged bribery on board a UK registered vessel. Whilst the claimant appeared not able to remember when asked about the incident by his line manager, Mr. Panicker, and the branch assistant director, Simon Graves, whether the incident happened on a UK flagged vessel, in fact the incident in question was on the Stolt Lind a UK vessel. According to the respondent's records, the inspection took place on the 11th of September, 2017 in the Suez Canal in Egypt. The claimant was on board as an MCA surveyor undertaking surveys on behalf of the Liverpool office. The video showed a customs official from Suez demanding boxes of packets of cigarettes. It is apparently not unusual for customs officials in this part of the world to require what amount to bribes in the form of boxes of cigarettes. The claimant told the audience at the training that he had not done anything about the apparent bribery that had taken place in front of him. Mr. Heslop found that the claimant had provided no evidence to support his claim that on his return to the UK from the survey that he had communicated this incident with relevant personnel. No evidence had been presented to show that he had communicated with the technical manager or business manager in the Liverpool Office, the office for which he carried out the survey. There was no evidence that he had communicated with his own line manager, Mr. Panicker, about the matter. There was no evidence that he communicated about the matter with other relevant MCA personnel or with the owners of the vessel.

13. At the disciplinary meeting that took place on the 12th and 13th of November 2019, the claimant had stated that he had discussed the matter with Mr Panicker and the then Assistant Director Paul Coley. However, no evidence had been provided by the claimant to this effect.

14. The MCA policy statement on fraud, bribery theft or corruption set out the claimant's responsibilities. He had a responsibility to report immediately the relevant details through the appropriate channel if he suspected any fraud had been committed or seen any suspicious acts or events.

15. The claimant's union representative, Ulrich Jurgens, said to me in evidence that it is a matter of common knowledge that Suez customs officials have to be bribed with cigarettes. The Suez Canal is also known as the Marlboro' Canal for that reason. He suggested that the claimant showed the video to educate the new surveyors as to the ways of the real world.

16. Mr. Heslop was not in agreement with that position. If bribery is not challenged, the practice would never change. He told me that it was a common practice 40 years ago for stevedores to steal from British ports. Following years of challenge, that practice had been eradicated. As there was no evidence that the claimant had reported the suspicious acts seen, and bearing in mind he was the appropriate person within the MCA who had personally witnessed the bribery taking place, his lack of action was found to be gross misconduct.

17. The third allegation of gross misconduct related to the fact that the claimant had applied for travel expenses for a non-member of the MCA. The claimant had claimed expenses for a train ticket that was to be used by a police officer with whom the claimant worked closely on security matters. The value of the ticket was under £8.00. Further, the claimant had booked accommodation which he might have shared with the police officer by way of twin beds; but in the event the accommodation was not required. Mr. Heslop found that the claimant was aware and that MCA expenses should be booked for MCA personnel only, or people engaged on MCA business. The police officer was not engaged on MCA business at the time of the booking. This was a breach of the rules.

18. The claimant was cleared of engaging in activities with the CSO alliance and being engaged in activities with a named person inappropriate to his position, that named person was the police officer in question. He was also cleared of passing confidential documentation to non-MCA personnel and of being involved in a security incident at Felixstowe on the 15th of August, 2018. It was inconclusive that he had publicly disagreed with the actions of the MCA enforcement team. It was however found to be misconduct - not gross misconduct for which the claimant was dismissed - but it was found that the claimant did not deliver the course he was training effectively. Whilst this was a finding of misconduct only, Mr. Heslop noted that the Claimant had discussed various medical conditions which had affected him over the past few years. No evidence had been presented, however, to show that he was medically unfit to present the course in February 2019.

19. Mr. Heslop decided that the claimant's employment would be terminated without notice and without pay in lieu of notice. Because he had concluded that the claimant had committed misconduct involving fraud or dishonesty which was covered by the cabinet office definition of internal fraud, details of this would be sent to the cabinet office for inclusion on the internal fraud database of civil servants dismissed for internal fraud. This related to the expenses abuse.

20. Mr. Heslop did not expressly consider the issue of dishonesty in respect of the fraud, that is to say, whether claiming under £8.00 and travel expenses for the police officer was dishonest, as opposed to an honest mistake.

21. Further it is accepted on behalf of the respondent that Mr. Heslop not did not consider whether to attach weight to mitigating features, such as the length and record of service, as a basis to award for example a final written warning as opposed to dismissal.

<u>The Appeal</u>

21. The appeal was heard by Mrs Claire Stretch, a Change Director at the respondent. She met with the claimant and his trade union representative on the 5th of February 2020. Her outcome decision was sent on the 20th of February, 2020. In respect of comments regarding conduct of ISPS verification audits, Mrs. Stretch concluded that the majority of those who attended the course could recall the discussion and confirmed that comments were made by the claimant either stating or implying that deficiencies should not be recorded as this would be detrimental to the UK flag and that shipowners may flag their vessels elsewhere. The appeal was not upheld in this regard; the original decision of gross misconduct taken by the decision manager stood.

22. As to the allegation of showing of videos of alleged bribery. No evidence was presented by the claimant that he informed any of the relevant authorities of the issues captured in the video, specifically the shipping company, the MCA or the Department for Transport. The appeal was not upheld; the original decision of gross misconduct taken by the decision manager stood.

23. In respect of the misconduct finding that the Claimant had not delivered the ISPS verification course effectively: evidence from the responses to the requests by Mr. Simon Graves and the interviews with Mr. Groark supported the fact that the course was not effectively delivered. The appeal was not upheld; the original decision of misconduct taken by the decision manager stood.

24. As to arranging travel and accommodation for non-MCA personnel: the claimant had provided no evidence that the police officer was formally engaged on MCA activities for the travel arrangements he made. The appeal was not upheld; the original decision of gross misconduct taken by the decision manager stood.

25. Mrs. Stretch accepts that she did not consider whether there were any mitigating circumstances. She did not assess whether the claim of expenses in relation to the police officer could have been an honest mistake on the part of the claimant.

Failure to address issues of dishonesty and mitigation

26. Neither Mr. Heslop nor Mrs. Stretch expressly recorded decisions on the level of misconduct as defined by the respondent's disciplinary procedure. Serious misconduct is described as being either 'repeated minor offences or significant breaches of the standards expected'. Gross misconduct was either 'repeated serious offences or conduct serious enough to do irreparable damage to the working relationship between the employee and employer' and it's likely sanction is dismissal. The code goes on to say that there are a number of factors to consider when deciding the level of misconduct: the degree of misconduct; the impact on others and the departments; whether there has been damage to property; culpability; intent; and whether there has been a potential breach of the civil service code.

27. Bearing in mind the claimant's seniority and length of service, one would have expected matters of mitigation and the level of misconduct found to be expressly reasoned.

28. Similarly, one would expect the issues of dishonesty to be considered in respect of the expenses claim. Was claiming for the police officer's ticket valued at £8 dishonest as well as a breach of the rules? Or might it have been an honest mistake.

Reason or principal reason for misconduct

29. A belief in misconduct was plainly the reason for the dismissal. The claimant's attempt to argue that the principal reason was a protected disclosure made by him was contrived and made no sense. It is right that on the 27th of February, 2017 there were interviews for assistant director. The claimant applied but was unsuccessful. Mr Heslop applied and was successful. The claimant asserted that Mr. Heslop was aware that the claimant had applied for the job. The claimant found it disturbing that a person who had been very closely associated with the identification of the role and then represented the surveyor workforce as a union representative and someone who worked collaboratively with the senior leadership team appeared to be privy to information that the claimant was one of the candidates invited for this assessment. That was a reference to Mr. Heslop. The claimant continued that he was not aware of what other information this person may have which might give him an unfair advantage in the selection process. The behaviour demonstrated by the individual also appeared, from the claimant's perspective, to compromise MCA values of trust, failed to respect professionalism and the civil service core values of integrity, honesty and impartiality. The claimant trusted that HR and senior leaders would take his concerns seriously.

30. The claimant's basis for the belief that Mr. Heslop knew that he was a candidate relates to his assertion that in front of someone the claimant believed to be a further candidate, Mr. Heslop introduced the claimant as also being someone who was to be interviewed for the role.

31. Assuming for the sake of argument that the message contained in the email dated the 27th of February, 2017, and prefaced by an earlier email dated the 23rd of February, 2017, contained a protected disclosure because it raised concerns about the propriety of the MCA - a public body's - recruitment process, and assuming this was believed to be made in the public interest by the claimant; and as to that there may be some doubt because by raising the matter the claimant was seeking or to pursue his private interest; but assuming for the sake of argument this was a protected disclosure; in my judgment it is clear that this matter in no way motivated any of Mr. Heslop's actions and thinking around the allegations of misconduct brought against the claimant.

32. There were criticisms from the participants in the course that the claimant had suggested a lower standard of tolerance than was otherwise expected for fear of shipowners leaving the flag. When asked what he did about the bribery that he had videoed, the witnesses relayed that the Claimant said he did nothing. That greatly offended the representatives of the Department of Transport who walked out. All of this, coupled with the expenses error of judgment, generated the reason for dismissal. There is no factual basis to the claim that the protected disclosure had any effect whatsoever on Mr. Heslop and then Mrs. Stretch. The whistleblowing claim has appeared to be - and is - very weak.

Reasonable Grounds for the Belief in misconduct?

32. Mr Purnell, Counsel for the Claimant, provided the summary of what course delegates recalled in the investigation the Claimant had said on noting deficiencies. He has kindly allowed me to adopt his Appendix 1 (below). There is sufficient in those statements to support the view that the Claimant promoted the view that safety deficiencies (or some) should not be recorded so that ship owners did not leave the UK flag. The Respondent's management acted reasonably in regarding that as a serious matter. There was reliable evidence, including from the Department of Transport, that the Head of Security was recommending in a training context a discretionary approach to the recording of security deficiencies, giving the impression, that MCA seniors would not support surveyors finding deficiencies which might cause shipowners to consider other flags, where deficiencies may be more tolerated. Mr Groark, Mr Heslop and Ms Stretch were visibly offended by this suggestion. This was not, they made clear, what the UK flag is known for. The UK flag is known for high standards giving confidence in the British Flag to the shipping industry.

33. There was a basis for believing that the Claimant was promoting standards below the Respondent's position and was bringing it into disrepute. That's certainly what the Department of Transport representatives thought. They are a partner in Port security.

34. There was a basis for finding that the Claimant did not record and challenge the cigarette bribery in the Suez Canal he witnessed. I am grateful for Mr Purnell's Appendix 2, again reproduced below. There was an apparent resignation to/tolerance of corrupt practice. The thrust of the delegates' recollections supports that conclusion.

35. There was a basis for thinking that the Claimant had made an expenses' claim for a third party for whom he was entitled to make no such claim. The position of the Respondent's witnesses was that everyone knows you don't do that.

36. There is a common thread across these allegations, namely that the Claimant observed and promoted standards of behaviour and integrity lower than the level required by the Respondent. The Respondent is an enforcement body, akin to the Police.

37. There was a reasonable belief in misconduct, based on reasonable grounds.

Procedures

38. Mr Purnell has submitted that the Claimant was not clear with what he was charged by the terms of the Respondent's documentation. The record of the disciplinary hearing suggests otherwise, however. The Claimant knew he was being challenged about whether it was an acceptable practice for MCA staff not to record deficiencies on UK registered vessels for fear of operators leaving the registry and that this behaviour was encouraged by senior management. It shows he knew that he was being challenged about his response, in terms of *action taken in the particular case*, to the video of corruption. He knew that the expenses claim was challenged. There was no unfairness.

39. As to the Occupational Health reports: the Claimant was investigated for neurological issues. The greater part of the investigation was in respect of periods after the training course. There was no medical basis for explaining what the Claimant said on the course to the new surveyors by way of some sort of excuse or mitigation. That is how Mr Heslop saw it and that was a reasonable position.

Dismissal within range of reasonable responses?

40. In my judgment, dismissal was within the range of reasonable responses. The organisation cannot have its Security Operations Manager teaching new surveyors to ignore security breaches for fear of offending the shipowners. The process needs greater integrity than that. By the same token, telling the new recruits that he did nothing in connection with the cigarette bribery, was also below the standards of the organisation.

Leaving aside the issue of dishonesty, making an expenses' claim for a third party is a rule breach. Misconduct was reasonably regarded to have taken place in all 3 respects, the first matter being the most serious, in my Judgment.

CONCLUSIONS ON UNFAIR DISMISSAL

41. There were, however, three material omissions in reasoning apparent in the way the managers handled this. These were outside the range of reasonable responses. First, they did not consider mitigation and secondly, they did not expressly reason the difference between serious and gross misconduct. Express consideration of length of service, the Claimant's record in the MCA together with whether this sat within gross or serious misconduct might have led to final warnings or demotion rather than dismissal.

42. Thirdly, on expenses, there was no express reasoning as to whether this was dishonest conduct or innocent mistake. Yes, colleagues may not claim expenses for third parties and so there was rule breach; but was it dishonest. By the standards of a reasonable member of the MCA, having the same knowledge as the Claimant, was it dishonest to claim the police officer's train ticket, or was it an honest mistake?

43. In my judgment there was a chance, albeit modest, that the Claimant might not have been dismissed had these matters been expressly reasoned through. There was no chance of the Claimant escaping finding of at least serious misconduct, however. The organisation cannot have its security manager teaching tolerance of breaches. There was no more than a 15% chance that he would not have been dismissed. The Polkey reduction of the compensatory award is 85%.

44. So, the Claimant's loss is the loss of a chance of not being dismissed. The 85% reflects the misconduct. Is it appropriate to make further reductions for contributory fault? In my judgment it is not appropriate to make a further reduction for contributory fault from the compensatory award. The fault is in the Polkey reduction. There is a danger of double discounting. It is appropriate, however, to reduce the basic award. That reduction will be 85%, also.

WRONGFUL DISMISSAL

44. This is where the Judge makes his/her own findings. In my judgment, on the balance of probability, the Claimant taught new surveyors in the training course not to record all security breaches they saw in a survey because to do so might offend shipowners and they might deregister their ships from the British flag. The balance of the evidence as recorded in Mr Purnell's appendix 1 is consistent with that. That attitude of tolerance of breaches was compounded in the same training course by the Claimant telling the trainees that he did nothing in response to the cigarette

corruption he videoed. Not only did he tell them he did nothing; but he could not demonstrate he actually did anything in response to that particular case, the particular ship, the particular shipowners. This training position was seriously short of the principles the Claimant should have been teaching the new recruits.

45. The Claimant repudiated the implied term of his contract of employment that he would well and faithfully serve the Respondent. His conduct that day brought the MCA into disrepute. He undermined the principles he was meant to teach.

46. I do not rely upon the claim of a rail ticket of a police officer with whom he worked as sufficient to amount to a repudiatory breach of contract. I do not need to; the training matters were sufficiently serious on their own account.

47. The Respondent, therefore, is not obliged to pay the Claimant notice. They were entitled to accept the repudiatory breach of contract as terminating the contract of employment.

Employment Judge Smail
Date: 09 November 2021

Judgment & Reasons sent to the parties: 25 November 2021

For the Tribunal Office

Appendix 1: ISPS Verification Allegation

<table>
<tr><td colspan="3">Allegation 1(a): "You indicated that during the conduct of an ISPS Verification it is an acceptable practice for MCA Staff not to record identified deficiencies on K registered vessels for fear of encouraging the operators to leave the registry and that this behaviour was encouraged by senior management" [240]</td></tr>
<tr><td colspan="2">Column 1</td><td>Column 2</td></tr>
<tr><td>No recollection at all</td><td>No recollection of C specifically saying it, but witness interpreted/inferred…</td><td>Recollection of C specifically saying it</td></tr>
<tr><td>Neil Smith [159]

"NS' recollection of the discussion on this topic was vague…NS had no real recollection of it being discussed if MCA senior management would endorse it or not and did not specifically remember any specific instruction as what to write or not to write down as a deficiency. NS took from the instructor that professional judgment was still the primary aspect of whether to note any deficiency or not"</td><td>Charlie Probets [153]

"CP suggested that he sensed/picked up that [C] was referring to deficiency relation to ISPS and if the level of the deficiency is enough which could warrant stopping the vessel from sailing, then that deficiency could be moved to a ISM deficiency which, with other actions taken/required, would then allow the vessel to sail.

CP was given the impression that [C] was suggesting the MCA would not want to impound the UK flag vessels. CP was aware [C] was Head of MCA Maritime Security and therefore that anything that [C] delivered during the course should be the view of the Senior Management of the MCA and CP expected it to be the official line but it was difficult for him to believe that this was the case.

CP interpreted what [C] was saying is that we should protect the flag at all costs.</td><td>Steve Meakings [168]

"SM specifically recalled [C] stating that surveyors should not record deficiencies as "you will not make any friends" at MCA senior management level. He also recalled [C] stating that vessels will leave the flag if surveyors wrote down deficiencies, and "you" will find yourself in deep water"</td></tr>
<tr><td>Robert Hunter [164]

"RH did not recall any discussion surrounding being told not to write down deficiencies. RH stated that</td><td>Graham Dixon (DfT) [162]

"GD recalls…the inference being that 'we don't want to alienate our own ships…but recollection of the discussion on this topic was a bit</td><td>Diane Sinclair (DfT) [193]

"Di.S recalls that the aspect of [C] suggesting that MCA surveyors should not write deficiencies while on inspections on UK vessels being</td></tr>
</table>

nothing stood out throughout the course suggesting [C] did not want attendees to ignore deficiencies or that senior management endorsed ignoring deficiencies."	**vague**"	**quite clear in his instruction** to the attendees. Di.S remembers the instruction being that anything that could affect the operators attitude to the UK flag and potential to leave the flag should be avoided and **remembers the term "turning a blind eye" being used**. Di.S recalled other attendees being surprised and quite stunned by what [C] was stating. Di.S is of the opinion that [C] came across as stating that this was MCA senior management guidance and was endorsed by them"
***Matthew Mills* [175]** "MM **does not recall** any specific statement regarding that MCA senior management encourage surveyors not to raise deficiencies while on survey of UK vessels."	***Ross Watson* [166]** "RW recalls [C] talking about not upsetting owners and if any deficiencies are raised "you" could be subject to being brought to task by senior management… RW **took from the instructor's words** that the actions of the surveyor **might not be** supported by senior management if companies raised issues in relation to surveys of their ships."	
***Zia Ul Haq* [170]** "ZUH does **not recall** being told not to raise deficiencies…ZUH recalls [C] mentioning that ships can leave the flag if surveyors write down too many deficiencies. However, he **does not recall** it being suggested that this was encouraged or endorsed by senior management, but perhaps that writing down deficiencies may not be supported by senior management"	***Darren Halliday* [179]** "DH remembered [C] referring to being pragmatic when noting deficiencies and **the message he took from that** was the nature of the deficiency should affect if it is noted, not the consequence to the operator" "DH **does not remember an instruction** to not write down deficiencies on UK vessels but that **there was an inference during the discussions** that writing down deficiencies could cause difficulties for the register and that should be taken into account when doing so"	

	"DH **did not recall anything explicit** that [C] said in relation to not writing down deficiencies was encouraged by senior management **and could not recall hearing** [C] stating if you write down deficiencies you will not be supported by senior management but DH **took away the message that** this in fact would be the case"	
Iain Rowlands **[185]** "IR **did not recall** [C] stating explicitly that "Senior Management" supported or encouraged surveyors not to note deficiencies. IR does recall a lot of talking around this subject but often to the point where it was difficult to pick out anything specific."	***Mamun Rahman*** **[191]** "MR recalled this aspect of the conversation and that [C] stated it was outside the scope of the course. **MR could not recall a specific example or scenario** but did remember [C] stating that writing down too many deficiencies while on a survey/inspection will prompt the owners to leave the flag. MR **took from that** that surveyors should not write down too many deficiencies"	
Gareth Parsons **[183]** "GP did **not specifically recall** [C] stating that it was acceptable for MCA surveyors not to record deficiencies or not being supported by senior management if they did so"		
Tony Wilson **[187]** "TW **did not recall** this subject matter being discussed"		
DS **[172]** "DS **did not recall** any specific statement regarding that MCA senior management encouraging surveyors not to raise deficiencies while on survey of UK vessels or that they would not be supported but he does recall the subject		

matter straying massively from ISPS verification”		
Totals:		
8	**5**	**2**
13		**2**

Appendix 2: Video Allegation

Allegation 1(b): “You showed a video you hold on your personal laptop showing an alleged incidence of bribery of an overseas official taking place in your presence on a ship where you were conducting an inspection and that you reportedly stated that you took no action when asked on the ISPS Verification Training course” **[240]**		
Column 1		**Column 2**
No recollection of C stating “nothing”	*No recollection of C specifically saying “nothing”, but witness interpreted/inferred…*	*Recollection of C specifically saying “nothing”*
***Steve Meakings* [168]** “SM remembers the course taking a sour turn as a result of showing the video. He remembers the attendees from the DfT taking particular exception to the video. He further recalled the external attendee talking about security issues in ports and that ports are not as secure as we might think.”	***Charlie Probets* [154]** “CP **took it that** [C] was on board and the **inference** was that [C] and any other officers present turned a blind eye to the event in regard to any follow up action. CP suggested **the inference was** that we all know such corrupt practices go on around the world on ships and at ports and that is how it is. CP suggested that whilst this might be a personal view shared by many, he felt it was inappropriate hearing this on an official MCA training course.”	***Ross Watson* [167]** “RW accepted that bribery and corruption exists in the industry. However, he was surprised by the actions of [C] whom he assumed to be there in an official flag capacity, when on asking what he did about replied **“nothing”**.
***Mamun Rahman* [191]** “MR has **little recollection of a specific video** being shown which depicted bribery…”; “MR remembers during this period when the DfT participants left that there were several cross questions around the room which was		***Darren Halliday* [180]** “DH recalls the video and discussion during it being the issue that prompted attendees from DfT electing to leave the course. DH considers that [C] was highlighting that bribery and corruption does exist and seafarers just have to put up with it so surveyors should be

distracting" **[192]** "MR remembers so many things falling into the category of being outside of the course that much of it has fallen into a **grey area, the specifics of it being vague**"		mindful of that when on board during inspections." "DH does recall [C] being asked about that he did **while on board** and the reply being that **nothing was done about it**"
Neil Smith **[159]** "He recalls on at least six occasions [C] stating **'I do not condone this behaviour'** **[160]** "NS recalls several other attendees asked questions relating to what was done about the video in regard to follow up. NS stated that the answer he recalls was long the lines of "that was just a personal video". **There was no answer** in regard to anything that was done about the video in regards to follow up or notification to the MCA"		***Gareth Parsons*** **[183]** "GP stated that he would have expected that [C] would have brought the video to the attention to someone in the MCA even if he had no powers to take any action at the time of the incident. [C] recalls the question being asked about what was done in relation to the incident and [C] stated "**nothing**"
Graham Dixon **[162]** "GD recalls that when questioned about the follow up action in the video that **there seemed to be** no escalation of the process and felt that [C] was **trying to evade answering the question directly**"		***Iain Rowlands*** **[186]** "IR as an ex seafarer was not particularly surprised or alarmed by what the video depicted i.e. coercion and corruption, however he was surprised at the lack of follow up action." "IR recalled the video prompting lots of debate some of which got out of hand. IR recalled that questions were asked of what [C] did next **to which he replied "nothing"**
Robert Hunter **[164]** "RH recalled that the video prompted lots of discussion particularly with regard to		***Diane Sinclair*** **[193]** "Di.S recalls that when questioned as to what he did in regard to his position as a Flag official on the

follow up action such as "did you report it", "what did you do about it" **but there was no constructive answer to the question** or a way ahead identified in how to deal with the issue should be encountered by surveyors"		vessel **he replied "nothing"**. Di.S recalls [C] stating that the 'mate' is a very busy person and doesn't need to be bothered by him to deal with this." **[194]** "It was at this point that she and her DfT colleagues left the course. **Di.S did have a discussion with [C] prior to leaving but is conscious that this was a private discussion and would prefer for it to stay that way. There was an attempt at explaining his actions** but Di.S was still of the opinion that her continued presence on the course was untenable.
***Zia Ul Haq* [170]** "ZUH considered that the video was being shown as a training aid but remembers that when [C] was questioned with respect to follow up action and if the incident was reported to MCA management that a reply **something like** "that is something we cannot do" was given" **[171]** "ZUH thought that [C's] words **could have been subject to misinterpretation particularly in regard to the video** which he considered to be nothing more than a statement of fact that this is what happens, nothing more, nothing less"		
***Matthew Mills* [176]** "MM recalls [C] being asked about what was done about the events depicted in the video **but that no substantive or meaningful answer was given** nor was any guidance given to surveyors about what should be		

done about it should they encounter it in the future." "MM recalls DS and members of the DfT having a discussion about security in UK ports in relation to movement of goods through the ports being a minor flashpoint and **[C] losing control of the class**. MM recalls this being part of the events that prompted members from the DfT to leave the course when looking around the room seeing some attendees disengaged, some bemused and some quite agitated and animated."		
***DS* [173]** "DS recalls the class becoming vociferous in relation to the video and them asking [C] his opinion or guidance in relation to the incident and that **TB did not respond**. He felt that this alienated some attendees even further and again the class became chaotic and essentially the attendees took over the discussion."		
***Tony Wilson* [187]** "TW remembers the class asking [C] about his subsequent actions but due to lots of sideline discussions **does not remember any answer**. TW remembers lots of private discussion going on and him explaining to non-seafaring colleagues that although not acceptable practice it is something that happens"		
Totals:		
9	**1**	**5**

10	5