EMPLOYMENT TRIBUNALS

Claimant:	**Lewis Louttit**
Respondent:	**Severfield (UK) Ltd**
Heard at:	**Remotely by Cloud Video Platform ('CVP')**
On:	**10th and 11th November 2021**
Before:	**Employment Judge Sweeney**
Appearances:	**For the Claimant, Courtenay Barklem, counsel** **For the Respondent: David Sillitoe, solicitor**

JUDGMENT having been given to the parties on **11th November 2021** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

The Claimant's claim

1. By a Claim Form presented on **30 April 2021**, the Claimant, Mr Louttit, brought claims of unfair and wrongful dismissal arising out of the summary termination of his employment on **05 February 2021**. The Respondent contended that the Claimant had been fairly dismissed for a reason related to conduct. It contended that by his conduct he had repudiated the contract of employment entitling it to terminate his contract summarily.

The Hearing

2. Mr Louttit was represented by counsel, Mr Barklem. The Respondent was represented by Mr Sillitoe, solicitor. The parties had prepared an agreed bundle of documents consisting of 247 pages.

3. The Respondent called three witnesses:

   (1) Michael Reilly, Senior Site Manager,
   (2) David Kidd, Senior Construction Manager at the time of the Claimant's dismissal,
   (3) Simon Atherton, Safety, Health and Environment Manager

4. The Claimant evidence on his own behalf and called one additional witness, Mark Martin, a regional officer of Unite the Union.

The issues

5. The issues to be determined were agreed at the outset and were as follows:

   5.1. What was the reason or principal reason for dismissal? (this was not in dispute)

   5.2. Was the reason a reason which related to conduct? (this was not in dispute)

   5.3. If the Respondent has satisfied the Tribunal that the reason for dismissal related to conduct, did it act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant? This involves considering the following:

      5.3.1. Whether the Respondent genuinely believed that the Claimant had done the thing for which he was dismissed;

      5.3.2. Whether, in forming that belief, the Respondent carried out a reasonable investigation;

      5.3.3. Whether the Respondent had reasonable grounds for its belief;

      5.3.4. Whether the sanction of dismissal was reasonable;

      5.3.5. Whether the Respondent followed a fair procedure;

   5.4. If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

   5.5. If so, would it be just and equitable to reduce the Claimant's compensatory award? If so, by what proportion?

   5.6. 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?

   5.7. What was the claimant's notice period?

   5.8. Was the claimant paid for that notice period?

   5.9. If not, did the Claimant repudiate the contract of employment thereby entitling the Respondent to terminate the contract without notice?

6. It was accepted that the Respondent dismissed the Claimant due to its genuine belief that he had fraudulently claimed to have had an accident at work and that he had thereby fraudulently sought to be paid company sick pay.

7. In light of the Claimant having secured alternative employment immediately following his dismissal, Mr Sillitoe confirmed that he was not advancing any 'Polkey' argument.

Findings of fact

8. The Claimant was employed as a steel erector from **19 October 2015** to **05 February 2021**, on which date he was summarily dismissed by Mr Kidd. His appeal against dismissal, which was heard on **19 February 2021**, by Mr Atherton was not upheld.

The events which led to the Claimant's dismissal

9. On **11 January 2021**, the Claimant had been working on a construction site near Kings Cross, referred to as the 'Google site'. The precise nature of the work being undertaken is irrelevant.

10. He worked as part of a team of steel erectors. On **11 January 2021**, the team had been working on a floor of the building (referred to as level 2), access to which was gained via a temporary staircase known as a 'Haki' staircase. There was more than one Haki staircase on site and each has its own identification. This staircase was referred to as the 'Core 4' staircase.

11. It is a H&S approved metal staircase, set within scaffolding. Both scaffolding and staircase was, in turn, located inside a concrete lift shaft (or what was to become a lift shaft). The staircase consisted of several connected sections. Those sections zig zag down the inside of the concrete lift shaft. There are about 6 sections (or 'zigs') from Level 2 to level 1. At level 1, there is a cabin. The cabin is located outside the lift shaft. The stairs continue down the shaft from level 1 down another two flights to the basement, where there is a drying room. The drying room is where the Claimant and other workers changed into and out of their work clothes at the start and end of the working day.

12. On **11 January**, as on any other day, the cranes on site shut down at 5pm and the team finished off their work in order to clock out at 5.15pm. Those who were working on level 2 at that time, including the Claimant, descended the Haki staircase to the cabin to return tools and then from the cabin down to the drying rooms in order to get changed before leaving site.

13. Mr Reilly is a senior site manager. Mr Reilly's responsibilities require him to remain on site for longer than the other member of the team. He invariably leaves work at about 6pm. Sometimes he leaves a little earlier, sometimes much later. On **11 January 2021** he left site sometime between 5.45pm and 6pm.

14. On **12 January** at 06.05am, Mr Reilly received a text from the Claimant (see page **81**). In that text the Claimant said '*Morning mate I'll not be in this morning. Had no sleep all night. I slipped coming down the stairs in core 4 dun something to my back and side thanks kerr*'. The Claimant goes by the name of 'Kerr'.

15. On *receipt* of this text Mr Reilly went to inspect the Haki staircase, in order to investigate the surroundings. He had to consider whether the area presented a hazard to health and safety and whether he might have to make the area safe. He spoke to a supervisor, foreman and 3 colleagues who worked with the Claimant to assess whether he needed to report to the safety department and whether he needed to complete an incident report. However, on seeing nothing hazardous he did not send anything to the safety department. He spoke to someone from safety and said he was not aware of any hazard on site. He did not complete an official incident report. He then phoned HR to say that he could not back up anything to say there had been an incident

16. That same morning, The Claimant visited his local hospital. After a wait of about 3 hours he was seen by Dr Bannerjee of PELC. This is evident from the print-out of the Claimant's medical notes on page **137**. The medical note records:

> *"50 year old male, slipped on steps and fell on his left side, hitting left anterior chest wall. No head injury….this injury occurred yesterday around 6pm'.*

17. It goes on to record:

> *"pain over the left sided anero-lateral chest wall; bruising noted over 8-10th rib, mid axillary line*
> *Oral co-codamol 2 tabs QDS for 5 days"*

18. On **15 January 2021**, the Claimant texted Mr Reilly again, (page **81**) to say he was going to take that day off as well, as he was still in a lot of pain with his ribs. He said he had a letter from the hospital to give to Mr Reilly; that he had booked off as leave Monday **18 January**, so he would give it to him on Tuesday morning. However, the Claimant did not return to work on **19 January**. He texted Mr Reilly at 06.37 that morning to say '*sorry mate still in a lot of pain. Hopefully be back tomorrow. At 07.11 he asked Mr Reilly 'have you put this in the axident [sic] book?'*. He then sent another text saying: *'I can't be sitting in my digs on no money when this happened at work?' Mr Reilly replied that he had not, as the Claimant had not reported it. The Claimant responded 'it was last thing at night when we had to fit 8 slabs in an hour before finning. I definitely want this in the axident [sic]*.' (page **82**).

19. The Claimant - and other steel erectors - was entitled to SSP in respect of sick leave. However, in certain circumstances, he understood that the company would exercise its discretion to pay full pay. Those circumstances are where the employee has had an accident at work which, through no fault of his own, means that he must take time off work on sick leave. Such a payment is not automatic, however. It requires approval. Nevertheless, that was the Respondent's practice and the Claimant, in **June 2019**, had a period of absence of about 3 weeks (following an accident at work), the first week of which had been paid in full.

20. The Claimant obtained a further fit note saying he was not fit to work on 19 and 20 January. That fit note (page **241**) states the condition as being '*broken ribs, secondary to a fall from stairs*'.

21. Therefore, the Claimant remained on sick leave and returned to work on **21 January 2021** – he had been absent for 6 days (the 18th being pre-booked leave).

22. On **21 January 2021**, R sent C a letter signed by Jo Wheeler (page **121**) inviting him to attend a disciplinary hearing on Monday **25 January 2021**. The hearing was to consider an allegation of gross misconduct in relation to :'*your actions on 11 January 2021, whereby it is alleged that you slipped coming down the stairs in core 4 whilst working on Google site and failed to report the incident*.'

23. That invitation followed an investigation carried out by Mr Reilly. He interviewed:

    - Lee Atkinson,
    - David Briggs,
    - Michael Keilly,
    - Alan shepherd,
    - Kurt Davies,
    - Danny Preston

24. Stephanie Holyoake, an HR officer, interviewed others.

25. Mr Reilly prepared a report into what was considered by him at the time to be an allegation of non-reporting of an accident at work. His conclusion is found at the end of the report on page **113**. Mr Reilly's conclusion went further than merely considering whether the Claimant had failed to report an accident at work – it also went to whether there had been an accident. Mr Reilly concluded: *"I do not doubt Lewis has injured himself, but the evidence points towards him not doing it during the working day."*

26. Mr Reilly did not interview the Claimant at any stage. He did not ask him to explain anything about the accident. Mr Reilly carried out his interviews with those identified above on **20 January 2021**. His report was dated **21 January 2021**. One of those interviewed, Mr Atkinson, said that at 5 – 5.10pm he was watching Danny Preston and his men 'on the wagon' and that the Claimant and two others were 2 floors up the building, landing concrete slabs. Thus, on the face of things, he put the Claimant and Mr Preston at different parts of the site at around the time the Claimant said the incident took place (page **90**). In Mr Preston's statement he was asked whether the Claimant looked in any discomfort, to which he replied: '*no, I followed him down the stairs at the end of the shift and didn't see or notice anything*.'

27. This gives rise to a potential discrepancy. It is one that is capable of an explanation. For example, it is possible that Mr Atkinson saw Mr Preston at ground level (on the wagon), only for him then to make his way back up to level 2 and to then follow the Claimant down to cabin level. However, nobody asked Mr Atkinson or Mr Preston about this. Mr Kidd did not notice the potential discrepancy, nor did Mr Atherton. The Claimant did not notice it either.

28. That same day, **21 January 2021** (page **115**), the Claimant emailed HR a "self-cert", a hospital statement and a doctor's note to cover his absence from work. The hospital statement was at page **133** of the bundle. It is on Barking Havering and Redbridge University Hospitals note paper and is addressed '*to whom it may concern*'. It is signed by Dr Banerjee. It said: '*this patient, C, attended the emergency department at Queens hospital on 12 January 2021 at 10.33 and was discharged'*.

29. That letter clearly aroused suspicion in the mind of someone because it caused Stephanie Holyoake to call the Trust. This can be seen from her statement at page **128**. She contacted the hospital on **25 January 2021**. She was told that no paperwork was given to patients on discharge. She was told that there was no one at the Trust working under the name of Dr Banerjee or with that doctor's job title. She then checked on an NHS website, 'our consultants' but could not find anyone under the name Dr Banerjee.

30. This resulted in an amendment to the allegation against the Claimant, which was sent to him on **26 January 2021** (page **130**). The allegation was now:

    'following further investigation, further allegations of gross misconduct have been made as follows:

    - Fraudulently claiming to have had an accident at work.
    - Fraudulently seeking to be paid company sick pay when it is not owed."

31. The natural inference from this sequence of events is that it was the belief formed by Ms. Holyoake, following her discussion with the Trust and internet research, that resulted in the elevation or, as Mr Barklem put it, the upgrading of the charge to one of fraud – a much more serious allegation. Clearly, the suspicion that the Doctor Banerjee discharge note was fraudulent triggered this reformulation. Attached to the letter was the statement from Ms. Holyoake at page **128**.

32. Once again, the Claimant was not interviewed by anyone prior to that charge being formulated, nor was he interviewed after it had been formulated and prior to the disciplinary hearing which had now been rescheduled to **04 February 2021**.

33. Having read Ms. Holyoake's statement, on **27 January 2021,** the Claimant emailed Ms. Dodson of HR, attaching the discharge summary of his attendance at hospital and making clear that he was seen by a doctor from Partnership of East London Co-operatives (known as 'PELC'). This is an organisation which provides GPs and other health professionals to work at various hospitals in East London, of which Barking Hospital is one.

34. On **04 February 2021,** the Claimant attended the disciplinary hearing before Mr Kidd. He was represented by his trade union representative, Mr Martin.

35. Mr Kidd read Mr Reilly's investigation report and the statements before the hearing started. From this and the statements of the other employees, he formed the firm view before commencing the hearing that the Claimant did not have an accident at work, that he had thereby been lying about having sustained an injury at work and that his motivation was fraudulent. He approached the disciplinary hearing on the basis that he intended to hear from the Claimant to see if the Claimant might say something that would change his view.

36. The statements of those interviewed all said that they did not see the Claimant fall on the staircase. The Claimant himself said that, as far as he knew, no one had seen the fall because he was behind the others. He said to Mr Kidd that he did not think to report the incident because at the time he did not feel any injury.

37. At the end of the hearing, Mr Kidd concluded that nothing the Claimant said changed his view and that the Claimant did not have an accident at work and was fraudulently attempting to claim full pay from the Respondent for his absence, which was why he did not report that an incident had taken place and that this caused a breach in trust and confidence.

38. Mr Kidd summarily dismissed the Claimant. He was clearly and significantly influenced by his suspicions regarding the letter from Dr Banerjee. This is clear from paragraph 23 of his witness statement where he says: '*the fact that the hospital had confirmed that they wouldn't prove that information and the doctor not being on record cast further doubt on the Claimant's credibility as to whether he had injured himself on site*' – in other words further doubt that the Claimant was telling the truth.

39. However, a simple reading of the medical records provided by the Claimant on **27 January 2021** would have authenticated what he had said about Dr Bannerjee. He would also have seen the Claimant's explanation for the injury, which he gave to his doctor on **20 January 2021** (page **223**), namely that he slipped on the stairs, when rushing. However, Mr Kidd did not read those notes. Nor, I infer, did Ms. Holyoake or anyone else from HR.

40. C appealed (page **159**). In his letter of appeal, dated **11 February 2021**, among other things, he said that Danny Preston had followed himself downstairs to the Drying Room – and not that part of the staircase where he said the fall had occurred. Mr Preston had been on the same team on the day and was one of those interviewed by Mr Reilly. In his statement Mr Preston had mentioned that he had followed the Claimant downstairs but saw nothing. The Claimant did not say at the disciplinary hearing that Mr Preston had followed him to the drying room, as at that time, he was not sure and said that he did not see anyone- referring to the place on the stairs where he had slipped (page **153**). No one had asked Mr Preston during the investigation which part of the stairs he had seen the Claimant on and specifically, whether it had been on the section leading to the drying room (below the cabin level). No-one had put to the Claimant that he had been seen by Mr Preston at the end of the shift going down that section where the Claimant said he had fallen (above the cabin level).

41. Mr Atherton, who heard the appeal, had never personally visited the site. He did not uphold the appeal. In his outcome letter at page **167** – he went through all the points raised by the Claimant. His conclusions are set out under paragraph 9, on page **170**. Mr Atherton accepted that the Claimant had been seen by PELC at the A&E department (page **170**). However, he still concluded that the Claimant was lying about where the incident took place and that he had been motivated by financial gain. He did not make any inquiries about the point made by the Claimant regarding Mr Preston.

42. Therefore, at this juncture, the position was that: at the disciplinary hearing Mr Kidd had concluded that the Claimant had lied about there being an accident at work based on:

    a. The fact that the Claimant did not report the incident prior to leaving work at the earliest opportunity;
    b. The fact that the Claimant had been made aware of the need to report incidents at the earliest opportunity which would have been before he left work;
    c. The fact that no one witnessed the incident;
    d. The fact that the Claimant did not mention it to any of the other workers
    e. The dubious hospital discharge note provided by Dr Banerjee.

43. Mr Atherton came to the same conclusion based on the same things save that he accepted the hospital discharge note was genuine and that he had been seen by Dr Bannerjee. Both Mr Kidd and Mr Atherton inferred that the Claimant lied about the accident in order to dishonestly obtain full company sick pay.

Findings of fact relevant to the wrongful dismissal claim and to the issue of contributory conduct

44. On **11 January 2020**, the Claimant lost his footing when coming down the Haki stairs from level 2 at the end of his shift. None of his colleagues saw this happen because they had gone ahead of him. On the balance of probabilities, Mr Preston, who had been at ground level, went back to the cabin from where he could not have seen and did not see the Claimant fall higher up. It is more likely than not, and I so conclude, that Mr Preston went down the stairs behind the Claimant after he left the cabin to go to the drying room. The accident was entirely the Claimant's fault, as he was behind his colleagues and was rushing to get down to the cabin. There was no defect or obstacle on the stairs. He simply lost his footing and fell on his left side. He knew that he was required to report any accident at work, whether he was at fault or not. He understood that accidents, whether they resulted in injury or not, should be reported at the earliest opportunity.

45. The earliest opportunity to report what had happened to the Claimant was when he got to the cabin or shortly thereafter, before leaving for the day. He could have gone to see Mr Reilly (who always remained behind after the steel erectors), but he did not. He did not do so because he did not consider himself

to have been injured and he was embarrassed by his own negligence, and because he wanted to get home.

46. It was only in the small hours of the morning when he felt the pain of what had happened and was unable to come to work that he decided to report what had happened. He did so because he was reporting in sick for work. He then went to A&E where it was confirmed that he had bruised ribs.

Relevant law

Unfair dismissal

47. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

48. A reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

49. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions.

50. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. In assessing the reasonableness of the response, it must do so by reference to the objective standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). The Tribunal must not substitute its own view as to what was the right course of action.

51. In misconduct cases, the approach which a Tribunal takes is guided by the well-known decision of **British Home Stores v Burchell** [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:

    (i) Did the employer carry out a reasonable investigation?

(ii) Did the employer believe that the employee was guilty of the conduct complained of?

(iii) Did the employer have reasonable grounds for that belief?

Sanction

52. When determining whether dismissal is a fair sanction, it is not for the tribunal to substitute its own view of the appropriate penalty for that of the employer.

53. Consequently, and as set out by the editors on Harvey on Industrial Relations and Employment Law [Division D1, C.(6)(a), para 1534], there is an area of discretion with which management may decide on a range of penalties, all of which might be considered reasonable. It is not for the tribunal to ask whether a lesser sanction would have been reasonable, but whether dismissal was reasonable. But this discretion is not untrammeled, and dismissal may still be too harsh a sanction for an act of misconduct.

Fair procedures

54. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

Contributory conduct

55. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow Security Services Ltd v Millicent** [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have caused or contributed to the dismissal: **Nelson v BBC (No2)** [1980] I.C.R. 110, CA. For the purposes of the compensatory award there must be a causal connection between the conduct and the dismissal. Langstaff J offered tribunals some guidance in the case of **Steen v ASP Packaging** [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

56. There is an equivalent provision for reduction of the basic award, section 122(2) which states that '*where the tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

57. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

Wrongful dismissal – breach of contract

58. If an employee is dismissed with no notice or in adequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim damages in respect of the contractual notice.

59. An employer is entitled to terminate a contract without notice in circumstances where the employee has committed an act of gross misconduct. It is for the employer to prove on the balance of probabilities whether the employee has committed gross misconduct. Whether an employee has committed gross misconduct entitling the employer to terminate summarily is a question of fact in each case. However, the courts have considered when 'misconduct' might properly be described as 'gross': **Neary v Dean of Westminster** IRLR [1999] 288 (para 22).

60. The damages payable following a breach of contract have one basic purpose — to put the claimant (i.e. the innocent party) into the position he or she would have been in had both parties to the contract performed their obligations according to that contract. In the context of employment, this obviously entails compensating a wrongfully dismissed employee by an amount of money equivalent to that which he or she would have earned had the contract not been wrongfully terminated.

61. Where a contract expressly provides that if the employer terminates the contract with insufficient notice the employee will receive a payment in lieu, any subsequent dismissal without adequate notice will not be wrongful even if the employer does not actually make the payment in lieu – **Abrahams v Performing Rights Society Ltd** [1995] I.C.R. 1028, CA. In these circumstances the contract has been lawfully terminated and the employee must claim for a liquidated sum due under the contract (i.e. a debt), not damages for breach of contract. This means that the employee is not under a duty to mitigate or give credit for any earnings received from other employment during the notice period.

62. In **Cerberus Software Ltd v Rowley** [2001] I.C.R. 376, the Court of Appeal made it clear that the **Abrahams** doctrine only applies to PILON clauses under which the employee is *entitled* to pay in lieu, and does not apply where the employer has a discretion whether to give pay in lieu. A dismissed employee is under a general duty to try to reduce his or her losses by taking reasonable

steps to find another job. Where he or she is successful, the salary and any other benefits earned during the damages period must be deducted from the award of damages. Similarly, if the employee becomes self-employed, any profits made during that period are deductible. The duty to mitigate applies equally during the statutory notice period: **Westwood v Secretary of State for Employment** [1985] I.C.R. 209, HL.

Conclusions

Reason for dismissal

63. It is not in dispute that the Respondent's reason for dismissal was genuine or that it related to conduct and is thus a potentially fair reason. Therefore, the complaint of unfair dismissal turns on section 98(4). I must apply the law as per the guidelines in Burchell and not substitute my opinion for that of the Respondent.

64. The essential question is whether the Respondent (acting through Mr Kidd and Mr Atherton) acted reasonably in treating the reason for dismissal as a sufficient reason for dismissal in all the circumstances. Both representatives agreed that, as part of this assessment, it involved asking whether Mr Kidd and Mr Atherton had reasonable grounds for drawing the inference that the Claimant did not have an accident at work and if so, whether they had reasonable grounds for drawing the further inference that he was attempting to gain financially by fraudulently claiming full company sick pay. In other words, did they have reasonable grounds for forming their beliefs?

65. In my judgement they did not. What they had was:

a. A number of statements which were neutral in their effect: in the sense that no one saw the incident which was alleged to have happened on the stairs inside a lift shaft;

b. A text sent by the Claimant at 06.05am on **12 January 2020**, reporting that he had sustained an injury at work;

c. Medical confirmation that on the morning of **12 January 2021** the Claimant had attended A&E and was seen to have bruising to his ribs, which – alongside the early morning text - lends some credence to his explanation that he fell at work;

d. The potential – but no more than this - for the Claimant to be paid full pay.

e. The absence of any suggestion from C that there had been any fault with the stairs, there simply being his claim that he lost his footing going down the stairs;

f. The absence of any specific request from the Claimant to be paid full pay;

66. Before the claimant could have been eligible for sick pay, his injury must have been through no fault of his. If a manager concluded that he had been at fault – for example, through rushing downstairs - no discretion would be exercised to pay him full pay. To draw the inference from the potential availability of full pay, alongside the other factors is not reasonable. There were no reasonable grounds for forming the beliefs held by Mr Kidd and Mr Atherton and the Respondent did not carry out a reasonable investigation before they were formed.

67. Nobody interviewed the Claimant about the incident or about his expectations regarding sick pay. Mr Reilly carried out an investigation but he interviewed everyone except the Claimant. The unfairness of this on the Claimant is readily apparent when one comes to understand that Mr Kidd formed the firm view that the Claimant had been lying from the investigation report and statements provided by Mr Reilly and Ms. Holyoake. His firm view was formed by what he had read. Had C been interviewed and asked about the detail of what happened prior to a disciplinary hearing, and had he given the detailed explanation of the incident which he gave today, Mr Kidd may well not have approached the disciplinary hearing from the same starting point, i.e. from the point of view that the Claimant was guilty unless he could persuade him otherwise.

68. Nobody interviewed the Claimant about the 'discharge letter' which clearly had a significant impact on the thinking of those who framed the charge. This must have included Mr Kidd to an extent as he signed the second disciplinary invite letter. Without doubt, Mr Kidd assessed the truthfulness of the explanation given by the claimant at the disciplinary hearing partly by reference to the Dr Banerjee document – he says so himself in his witness statement. Thus, his views were formed by what he had read in Ms. Holyoake's statement. Had the Claimant been interviewed or asked about those documents in a reasonably conducted investigatory interview, he would have had an opportunity to address the concerns. Indeed, it may well have had a bearing on whether the reformulated allegation should have been put at all, given that the trigger for the reformulation was the suspicions generated by the hospital documentation. The unfairness to the Claimant lay not just in that failure to interview him, but in the fact that Mr Kidd had not read through the hospital documentation which clearly authenticated what the Claimant said.

69. No one ever asked the Claimant about pay, whether at the investigation stage or during the disciplinary hearing or appeal, about what his expectations were in relation to pay. No one put the text regarding 'no money' – page **82** - to the Claimant or suggested to him that this played a key part in the thinking that he was acting fraudulently.

70. The above failings are inherently unfair to the Claimant. In my judgement they are such that I conclude the investigation to be outside the band of a reasonable investigation (applying **Sainsbury v Hitt**). They deprived the Claimant of an essential safeguard of being able to put his side to the investigator prior to a disciplinary hearing. He was deprived of any input prior even to the decision to advance the matter to a disciplinary hearing. There was no discussion at an investigatory stage which might have concentrated minds on an 'apparent'

(although not an obvious) discrepancy between the statement of lee Atkinson and Danny Preston. An investigation which involved interviewing the Claimant would have facilitated an understanding of where exactly the Claimant said he was when the accident took place relative to others; it would have facilitated an understanding as to whether Danny Preston followed the Claimant downstairs after he had been to the cabin (i.e. down to the drying room) or before (i.e. from level 2 to the cabin level). It would have facilitated an understanding as to whether Danny Preston had gone back up to level 2, after he had been seen by Lee Atkinson by the wagon – if he had, presumably he would have passed the Claimant on the way. A reasonable investigation would have involved asking Mr Preston which section of the stairs was he referring to when he referred to following the Claimant at the end of the shift.

71. In closing submissions, Mr Sillitoe submitted that there was no unfairness to the Claimant by not interviewing him because he was able to say his piece at the disciplinary hearing. However, as is clear from Mr Kidd's evidence, the damage had largely been done by then – as Mr Kidd was firmly of the view from what he had read at the investigatory stage, that C was guilty as charged. Mr Kidd then put the onus firmly on the Claimant to dissuade him of his firmly held view at the disciplinary hearing. That is not what a reasonable employer would have done. It is one thing to say '*now is your chance to put your case*' but another to reasonably investigate matters prior to that stage. By the time the Claimant enters the disciplinary hearing, the decision-maker – influenced entirely by the investigation - was expecting the Claimant to shift him from a firm view and to prove his innocence.

72. I bear in mind the seriousness of the allegation against the Claimant. In a case where there is a suggestion of attempted fraud on the employer, any employer, acting reasonably, would look for cogent evidence before acting on genuinely held suspicions. Several times in Mr Kidd's statement (and Mr Reilly used the same language) he that '*the evidence pointed towards…..*'. That evidence included the fact that no-one saw the Claimant fall. All the more reason to ensure that the Claimant was interviewed as part of the fact-finding investigation to establish where he was relative to others at the crucial time. That evidence also included (from Mr Kidd's perspective) the evidence relating to Dr Bannerjee. All the more reason to investigate the authenticity of the discharge document by speaking to the Claimant and reading the additional medical documentation which he provided. That evidence included a text on page **82** where the Claimant said he was sitting in digs without money. All the more reason to ask him about it and to ask about his expectations regarding full pay.

73. Finally, nobody asked Mr Preston to say where he was on the stairs when he followed behind the Claimant. I fully recognise that Mr Barklem identified the potential discrepancy and that neither the Respondent or the Claimant did at the dismissal or appeal stage. I recognise that I must judge the standards of the Respondent's investigation and decision-making process by that of the reasonable employer – and not that of the skillful advocate. However, the potential for the discrepancy is clear from a reasonably careful reading of the two statements. More importantly, it arises from a failure to ascertain where, at

the relevant time, the relevant people were relative to each other. That is a failure which would have been identified by a reasonable investigation. Bearing in mind that all that Mr Reilly believed he was investigating at the time he set about taking statements was a 'non-reporting' of an accident at work, that may well explain why the statements were not reasonably carefully read. Once the charge had been elevated to fraud, however, the relative positioning and timing assumes a greater relevance and importance, which should have been the subject of further investigation and interview of the Claimant. I bear in mind that the Respondent is a substantial organisation with HR advisers there to advise managers.

74. Therefore, having regard to the issues, I conclude that, albeit the Respondent genuinely believed in the Claimant's guilt, it did not carry out a reasonable investigation prior to forming that belief and did not have reasonable grounds for so holding it.

75. As to sanction, had I concluded that the Respondent had carried out a reasonable investigation and had reasonable grounds on which to conclude that the Claimant had lied, I would have concluded that the inference that he had done so for financial gain was reasonable and would have concluded that the sanction was within a band of reasonable responses.

76. However, as I have not so concluded, I find that the decision to dismiss the Claimant was outside the band of reasonable responses. The complaint of unfair dismissal is, therefore, upheld.

77. That left two other issues: wrongful dismissal and contribution.

Wrongful dismissal

78. The Claimant gave a plausible explanation as to what happened as he was leaving site. I reject the argument advanced by the Respondent that he has given various inconsistent explanations to the Respondent. He has, on the whole, been consistent in his explanation, which was that he fell late in the day, on his way down to the cabin from level 2; he did not think of reporting it at the time as he did not immediately feel any pain; it was only the next morning that he felt pain which resulted in him going to A&E. What he told A&E is consistent with what he told the Tribunal and the Respondent. I do not draw any adverse inference from inconsistent versions against the Claimant, as I was invited to do by Mr Sillitoe.

79. In light of my findings of fact on the wrongful dismissal complaint, the Respondent has not established that the Claimant repudiated the contract of employment. It has not proved that he lied about having an accident at work. At most it has established to my satisfaction that the Claimant failed to report an incident at the earliest opportunity. The earliest opportunity was when he got to the cabin or shortly thereafter, before leaving for the day. He could have gone to see Mr Reilly but did not. He did not do so out of embarrassment, because he had not felt any pain and because he wanted to get home. Those are inadequate reasons, which he himself accepted. However, at most they

demonstrate that he knowingly failed to report an accident at the earliest opportunity. In my judgment, while there is a degree of fault there, it does not demonstrate that he no longer intended to be bound by the essential terms of the contract.

80. I accept Mr Barklem's submissions that this falls short of a repudiatory breach. Therefore, the complaint of wrongful dismissal succeeds.

Remedy

Findings of fact

81. The Clamant commenced employment on **19 October 2015** and was dismissed on **05 February 2021**. He had 5 complete continuous years' employment at the date of dismissal and was aged 50 at the effective date of termination ('EDT').

82. His gross weekly earnings were **£924.55**. His net weekly pay was **£739.64**.

83. He obtained employment as a steel erector at ATM UK Construction Limited on a sub-contractor basis on **08 February 2021** earning more than he earned with the Respondent.

Conclusions on Remedy

Unfair Dismissal

Contributory conduct

84. The Claimant's failure to report the accident at the earliest opportunity should be reflected in the remedy for unfair dismissal. That failure, after all, was one of the key factors in the reasoning of Mr Kidd for concluding that C had not had an accident at work. It contributed significantly towards the decision to terminate his employment.

85. The failure was culpable in the sense described by the CA in **Nelson v BBC**. The Claimant understood that the accident was reportable, and he understood that the Respondent expected accidents to be reported at the earliest opportunity, whether they resulted in injury or not. His failure to report affected his credibility in the mind of Mr Kidd and Mr Atherton and thereby significantly contributed to his dismissal.

86. Mr Sillitoe submitted that the compensatory award and basic award should be reduced by 50%. Stepping back and having regard to the overall size of the award, in my view 50% is a touch on the high side. However, I agree that the reduction should be significant. Given the importance which the Respondent rightly attaches to the reporting of accidents, the announcements it makes in that respect and the Claimant's understanding of this, I consider a reduction of 40% in respect of both basic and compensatory award to be just and equitable.

In my judgment that does justice to the Claimant and the Respondent on the evidence I have heard and seen.

Basic Award

87. The Claimant's basic award (before reduction) was agreed at **£4,035**. Therefore, applying a 40% reduction, this results in a basic award of **£2,421**.

Compensatory Award

88. Mr Barklem confirmed, as per the Schedule of Loss on page 30 of the bundle that the Claimant sought no compensatory award, save for an award of **£500** in respect of loss of statutory rights. Mr Sillitoe did not argue against that amount, save that it should be reduced to reflect the finding of contributory conduct.

89. Therefore, the Claimant's compensatory award is an award of **£300** to compensate him for the loss of his statutory rights.

Wrongful dismissal - damages

90. Mr Barklem submitted that the Claimant should be awarded 5 weeks' net losses of **£3,698.20** because that is what he was entitled to under contract. He submitted that his earnings from fresh employment should not be set off against those damages. Mr Sillitoe, referring to **Cerberus Software Ltd v Rowley,** submitted that all of the Claimant's earnings should be offset against his losses and as he had earned more in the period immediately following his dismissal, no award of damages was payable to the Claimant.

91. I agree with Mr Sillitoe. I must apply the principles on common law damages, referred to in paragraphs 60 – 62 above. The Claimant's losses during the contractual notice period are entirely offset by his earnings in that period and must be deducted from any award of damages. As it is agreed that he earned more than the damages claimed of **£3,698.20**, this means that there is no award payable to the Claimant.

92. Therefore, the total award due to the Claimant is **£2,721**, consisting of a basic award of **£2,421** plus a compensatory award of **£300**.

Employment Judge **Sweeney**

23 November 2021