EMPLOYMENT TRIBUNALS

Claimant: Mr D Cox

Respondent: TC Facilities Management Limited

Heard at: London South (Croydon) Tribunals
On: 10th and 11th January 2022
and 28th January 2022 in Chambers

by: Hybrid: CVP and face to face

Before: **Employment Judge Clarke**
Mr N Shanks
Mrs A Rodney

Representation
Claimant: Mr D Cox (in person)
Respondent: Mr Graham Underwood (Personnel Management Services Ltd)

RESERVED JUDGMENT ON LIABILITY

It is the unanimous decision of the Tribunal that:

(1) The complaint of unfair dismissal is well-founded. This means that the Claimant was unfairly dismissed by the Respondent.

(2) The complaint that the Claimant was subject to a detriment is not well-founded. This means that the Claimant has not been subjected to a detriment in contravention of section 47B ERA 1996.

(3) The Respondent is ordered to pay compensation to the Claimant in the **total sum of £5,439.40**.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Cluster Facilities Manager. He was dismissed on 12th October 2018 with immediate effect and notified ACAS under the early conciliation procedure on 24th December 2018. The ACAS certificate was issued on 10th January 2019.

2. By a claim presented to the employment tribunals on 14th January 2019 the Claimant complained that his dismissal was unfair and that he had suffered a detriment as a result of making a protected disclosure.

3. The Respondent resists the claim denying the Claimant's complaints and asserting that the Claimant's dismissal was fair on the substantive issue and a fair procedure was followed.

The Evidence

4. At the Hearing, the Claimant represented himself and gave sworn evidence.

5. The Respondent was represented by Mr Graham Underwood, who called sworn evidence from Mr Haris Niksic (Regional Facilities Manager (North) and dismissing officer), Mr Cosmin Tecuta (Divisional Director for Core Contracts and appeal officer), and Ms Lisa Raynor (HR Business Partner).

6. The Tribunal were referred to, and considered, documents contained in a bundle comprising 215 pages and witness statements from each witness who gave oral evidence. References to page numbers hereafter are to pages of this bundle.

7. At the conclusion of the evidence both the Claimant and Mr Underwood (on behalf of the Respondent) made oral submissions on both liability and remedy.

8. As there was insufficient time remaining for deliberations and an oral judgment, the Tribunal reserved judgment.

The Issues for the Tribunal

9. At the start of the hearing the list of issues relating to liability was agreed between the parties to be those listed on the Case Management Summary of 11th December 2019, namely:

Unfair Dismissal

1. What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for Section 98 of the Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for the dismissal.

2. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds? The burden of proof is neutral here.

3. Was decision to dismiss a fair sanction, that is was it within the reasonable range of responses for a reasonable employer?

4. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

5. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

Public interest disclosure claim(s)

6. What did the Claimant say or write?
   (i) The Claimant said that he alleged that the Respondent was breaching the Working Time Regulations by requiring staff to work excessive hours
   (ii) The disclosures were contained in e-mails, in his grievance and in other documents

7. In any or all of these, was information disclosed which, in the Claimant's reasonable belief tended to show one of the following?
   (i) A criminal offence had been committed
   (ii) The Respondent had failed to comply with a legal obligation to which he was subject
   (iii) the health and safety of the individual had been put at risk
   (iv) or that any of those things were happening or likely to happen, or that information relating to them had been or was likely to be concealed?

8. If so, did the Claimant reasonably believe that the disclosure was made in the public interest?

9. If so, was that disclosure made to:
   (i) the employer
   (ii) to another person whose conduct the claimant reasonably believed related to the failure;
   (iii) another person who had legal responsibility for the failure

Detriment Complaints

10. If protected disclosures are proved, was the Claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that:
    (i) he was subject to performance management
    (ii) He was suspended from work

11. If the act of detriment was done by another worker,
    (i) Can the employer show that it took all reasonable steps to prevent that other worker from doing that thing or acts of that description; or
    (ii) can that worker show that s/he had relied on a statement by the employer that the doing of the act did not contravene the Act, and that it was reasonable to rely on that statement

Unfair Dismissal Complaints

12. Was the making of any proven protected disclosure the principal reason for the dismissal?

13. As the Claimant does have two years service:
    (i) Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?
    (ii) Has the Respondent proved its reason for the dismissal, namely misconduct?
    (iii) If not, does the Tribunal accept the reason put forward by the Claimant or does it decide that there was a different reason for the dismissal?

Remedies

14. If the Claimant succeeds, in whole or in part, The Tribunal will be concerned with issues of remedy.

15. There may fall to be considered re-instatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earning, injury to feelings, breach of contract and/or the award of interest.

Other Matters

16. If the Tribunal determines that the Respondent has breached any of the Claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

10. In relation to remedy, the Claimant secured alternative employment 3 weeks after his dismissal but claims an ongoing loss as his earnings in the alternative employment are less than he received in respect of his job with the Respondent, and he does not have the benefit of a car or fuel card. The parties are agreed, subject to liability, and the duration of any compensatory award, on the following figures for compensation:
    (i) Basic award: £2,448.00
    (ii) 1st 3 weeks loss of earnings (wages only): £1,464.00
    (iii) Ongoing loss of earnings thereafter (wages only): £125.00 per week

(iv) Loss of benefit (Car): £4,300.00 pa
(v) Loss of benefit (fuel card): £1,979.00 pa

Relevant Findings of Fact

11. The Respondent is a facilities management contractor specialising in the cleaning of supermarkets. It employs approximately 6,000 persons, on multiple sites throughout the UK. One of the major clients of the Respondent was Tesco and for this client the Respondents management structure was organised into North and South Regions which was in turn split into clusters. Each cluster had a mobile manager responsible for the cluster who manages the individual stores. Larger stores also have an in-store cleaning manager but the smaller express stores do not.

12. The Claimant started his full-time continuous employment on 6th October 2015 and was transferred under a TUPE transfer to the Respondent on 19th June 2017. At that time, he was employed as Facilities Manager of a Tesco Fulfilment Centre (Distribution Centre) at Enfield under a minimum 40 hour contract [**199-208**].

13. On 29th January 2018 he changed roles to become a Cluster Facilities Manager [**192- 198**] under a new contract which the Claimant did not sign.

14. As a Cluster Facilities Manager , and following the splitting of the East Anglian region, the Claimant was managing about 480 sites being a mix of both larger stores and express stores in a geographical region in East Anglia. He was expected to carry out structured site visits, ensure that cleaning specifications were met and client expectations were positively managed and to take any necessary actions to turn around under-performing areas. This essentially required him to travel to the various stores he managed, conducting cleaning audits, managing or overseeing the budgets for the individual stores, dealing with or overseeing recruitment, the development and mentoring of managers and cleaning of the stores. The Respondent required him to submit various standard paperwork in respect of each store regularly.

15. The Claimant was initially managed by Ian Stevens, Regional Facilities Manager (South).

16. By March 2018 the Claimant was working long, and his opinion excessive, hours and was unhappy about the hours he was working. He was also failing to meet the Respondent's expectations.

17. On 30th March 2018 he sent an e-mail to Ian Stevens and others stating "… with driving time alone I would be working too many hours, let alone the work requires in each store. I have not opted to work above the Working Time Regulations." [**147**].

18. He was incorrect in stating that he had not opted out of the working time Regulations. As part of the TUPE transfer, he signed a number of documents including an "opt out" of the 48 hour maximum working week under the Working

Time Regulations 1998 [**191**]. Nevertheless, the Tribunal finds that by March 2018 the Claimant had forgotten that he had signed the opt out and he believed that he had not opted out. At no time subsequent to this e—mail did the Respondent seek to disabuse him of this belief.

19. Mr Stevens responded later the same day stating ""I am not instructing you or anyone to break employment law, if you could explain what you mean re breaking employment law …" [**147**]. A subsequent e-mail, also on 30th March 2018, from Mr Stevens to the Claimant stated that he would "... arrange a con call with Lisa (HR) so we can discuss the issues you keep raising as I wasn't aware Of the contract you had to work Monday to Friday which is not possible in the role your in. As the contract should read 48 hours over 6 days so far as I am aware and needs of the Business. But don't quote me on this I could be wrong." [**145**].

20. The intended meeting did not take place due to other events described below and no evidence was placed before the Tribunal that the Claimant provided an explanation at that time.

21. On 2nd April 2018 the Claimant sent a further to numerous people including Ian Stevens stating " I will be going to Bury again clean express stores and working an average 70 hours plus a week can you advise when I will get these hours back as I have not signed the opt out for working more than 48 hours per week, this alone breaks employment law, and out of six weeks had only 3, or maybe 4 days off" [**143**].

22. In a further e-mail to Ian Stevens dated 8th April 2018 the Claimant attached a summary of his working hours [**179**]. That summary [**180**] records that from 2nd April 2018 to 7th April 2018 inclusive the Claimant was working between 9 hrs 45 mins and 12 hours per day, and had worked a total of 64 hours 5 mins over those 6 days.

23. As a result of the Claimant's failure to meet the Respondent's expectations, the Respondent's commenced a performance management process. On 20th June 2018 Ian Stevens made the Claimant subject to a Performance Improvement plan that was due to last until 20th July 2018 [**81**]. All the objectives set out on the plan were directly relevant to the role the Claimant was employed in and required action to be taken by the Claimant.

24. On 21st June 2018 the Claimant e-mailed Ian Stevens again stating that his contract was Monday to Friday 40 hours per week and that he had not agreed to work over 48 hours per week "…so being enforced to work above this and seven days a week should have been discussed as well, as employment law is being broken by current enforced working practices" [**123**].

25. A further Performance Improvement Plan between Ian Stevens and the Claimant for the period 28th June 2018 to 27th July 2018 contained the same objectives but with revised deadlines for meeting some of those objectives [**80**].

26. A review of the Performance Improvement Plan took place at a meeting between the Claimant and Ian Stevens on 20th July 2018 at which time the Claimant had not met the majority of the objectives [**81**].

27. Ian Stevens conducted a further meeting with the Claimant on 17th August 2018 which was described as a disciplinary hearing whose purpose was to discuss his performance in the role of Cluster facilities Manager, and in particular concerns that he had failed to ensure compliance in returning required documentation, had failed to manage the wages for his area and his inability to lead and manage the In-Store managers who were not meeting booking percentage targets [**73-79**].

28. During this meeting the Claimant told Mr Stevens that he had "not opted out of the 48 hour weeks… it is not achievable to for the work to get done in the time Frames and current structure…" [**73**], referred to the tracker on the car and the hours that he was driving (backed by a report covering a 12 week period) [**73, 78**] and stated "I am not prepared to continue to work this kind of hours, its breaking the law and I want to stress I have not opted out and will not be opting out." [**78**] and "" I am not going to continue to be working these hours and not going to opt out of working hours, its breaking the law re my working hours" **[79**]

29. During the period 3rd April 2018 to August 2018 in addition to those e-mails set out above, the Claimant has sent a number of other e-mails to Ian Stevens in which he had listed the work he had done, the hours he had spent driving and/or said that he had insufficient time to complete all the work required.

30. A further meeting between the Claimant and Ian Stevens took place at 7am at a Lowestoft Store on 23rd August 2018. The Claimant was told during the meeting that he would be subject to a first written warning for poor performance. No notes of this meeting were provided to the Tribunal and the warning was never issued in writing, which the Respondent states was due to it having been superceded by the events at paragraphs 31-34 below.

31. Shortly after the that meeting, at 10am, the Claimant attended a training session at the store on a new audit procedure for use when assessing the cleaning standards of stores. Following that training he had a conversation outside the store with Ian Stevens and Haris Niksic before getting into his car and driving several hours from Lowestoft to Aldeburgh where he visited a store in his cluster in order to clean it.

32. As he was leaving that store, he received a phonecall from Ian Stevens who told him that he was required to leave the car keys with the store manager and that he was being suspended from duty as he believed that he had consumed alcohol whilst on duty.

33. This allegation arose from Ian Stevens' observations of the Claimant at the Lowestoft Store earlier that day and were supported by Mr Niksic who said he thought the Claimant looked rough and smelt of alcohol when he saw him outside the Lowestoft store.

34. The Claimant subsequently received a letter dated 24th August 2018 confirming his suspension and the reason for it [**85**]. However, after an investigation meeting that was held by Danielle Taylor Gibbs (the Respondent's HR Development Manager) during which he notified her that he suffered from sleep apnoea, the Claimant was told first by telephone then by e-mail on 5th September 2018 that no further action would be taken, and he could return to full duties on 10th September 2018 [**83**].

35. The Tribunal does not accept that Mr Stevens had a genuine belief that the Claimant had consumed alcohol whilst on duty and finds that this allegation was not genuine. Neither Mr Stevens nor Mr Niksic raised any issue with the Claimant about his appearance, behaviour or consumption of alcohol earlier that day when they spoke to him and neither stopped him from leaving, getting into his company car and driving away, something which Mr Stevens at least knew that he would be doing. Mr Stevens only contacted him several hours later and the Tribunal found the delay to be implausible and inexplicable in light of the seriousness of the allegation.

36. Although the Claimant had repeatedly raised his working hours and asserted that they were excessive and in breach of the working time regulations, the Tribunal does not find that this was the reason for the allegation and suspension. Although the Tribunal did not hear evidence from Mr Stevens, on the basis of the written notes of meetings and the e-mails referred to above, the Tribunal finds that this was not a matter which Ian Stevens understood or was concerned about. No evidence was presented to suggest that he took any steps to make further enquiries the Claimant's contracted or working hours or to address this issue at all. He was merely concerned with the Claimant's performance, not the hours he was working and had deferred this issue to a meeting with HR which never in fact occurred.

37. The Tribunal finds that the most likely reason for the allegation and the suspension was that the Claimant was underperforming and was therefore a nuisance and this might afford an easier route to getting rid of him.

38. The Claimant did not return to work on 10th September 2018 as anticipated as he did not feel ready to do so and took a period of annual leave.

39. On 18th September 2018, during his period of leave, the Claimant e-mailed Stephanie Woodley (the Respondent's HR business Partner) raising a grievance [**126**]. His grievance raised a number of matters including his suspension from work under a false allegation, that Ian Stevens expected him to work excessive hours and "I have continuously exceeded the working time directive, I have made Ian Stevens aware of this on numerous occasions however he has not addressed this at any point."

40. Although an investigatory meeting regarding that grievance was conducted by Saita Rai on 1st October 2018 when she discussed the grievance with Ian Stevens in the presence of Melanie Acott (a notetaker from HR), the Claimant was not informed of the outcome of his grievance until 29th October 2018 after his dismissal [**86-87**]. The Tribunal find that the subject matter of the grievance

and the matters leading to the Claimant's dismissal were distinct from the issues leading to the Claimant's dismissal and had no bearing on the dismissal.

41. The notes of the meeting on 1st October 2018 show that in response to the Claimant's complaint regarding excessive hours Ian Stevens took the view that it was up to the Claimant to manage his time, that he had given the Claimant support and that the Claimant had raised these issues before with his previous employer. Nothing in either the notes or the grievance outcome letter suggests that either Mr Stevens or the Respondent took this issue seriously.

42. The Claimant returned to work a few days before 25th September 2018. During his absence, the Respondent had taken the decision to re-allocate the management of the Claimant's cluster to Haris Niksic, the Regional Facilities Manager for the North, who not uncommonly was asked to come and help out a struggling cluster.

43. A few days after his return, on 25th September 2018 the Claimant had an introductory meeting with Mr Niksic. Mr Niksic intended this to be a fresh start for the Claimant and consequently did not undertake a performance review but did set out his expectations as to what the Claimant would do going forward [**69-70**]. There is a dispute between the Claimant and Mr Niksic about what was discussed at this meeting and in particular whether the Claimant's complaints about his working hours were raised. The Tribunal finds it likely that the Claimant said something about working long hours and finds that Mr Niksic was aware that the Claimant was complaining that he was working hours in excess of permissible working hours but had no subsequent regard to this. As the Claimant did not place any emphasis on the contents of this meeting in the context of his claim the Tribunal did not consider it necessary to determine exactly what was said.

44. On 5th October 2018 the Claimant went to the Beccles Tesco store and met with the Tesco Store Manager, Craig Elmer, to undertake the weekly cleaning audit for the store.

45. The weekly audit involves the assessment of different areas of the store on a specified list ("the sectors") which are rated and marked as either green or red depending upon whether the cleaning standards in these areas meet expectations. The ratings for each sector should be agreed between the Claimant and the Tesco Store Manager during the course of a walk through the Store although in practice the walk-through frequently did not happen. The ratings for each sector are inputted on a hand-held appliance (eg a tablet or mobile phone) which by default shows the ratings given on the previous audit, which must then be manually accepted or amended. At the end of the audit the Tesco Manager provides a unique Code which when inputted submits the finalised audit but has no opportunity to review the whole audit before doing so.

46. The audit is graded overall as either red (fail) or green (pass) depending upon the number of red and green areas and the locations of any red areas (different areas carry different weights eg customer facing areas and food handling areas are weighted higher).

47. This process is the means by which Tesco monitors the contract with the Respondent. If audits are failed, the Respondent is subject to escalating financial penalties (depending on the number of consecutive failed audits). Other contractual penalties apply if multiple stores within a cluster have red audits for the same consecutive weeks and multiple failing stores in a cluster may ultimately lead to the removal of a cluster from the contract, which would result in substantial financial loss for the Respondent.

48. The audits, and in particular the integrity of them is a matter of real importance to the Respondent. Falsification of an audit would potentially significantly undermine the Respondent's relations with its major client and was therefore a very serious matter so far as the Respondent was concerned.

49. The Beccles store had continuously failed its last 5 cleaning audits (ie they had been marked as red overall) when the Claimant attended to undertake the audit on 5th October 2018 (week 32). The Claimant had not undertaken the previous audits as he had been absent from 23rd August 2018 until mid-late September 2018 for the reasons set out above. On 5th October 2018 he was using the new system in respect of which he had received training on 23rd August 2018 but which he had limited opportunity to use subsequently and was not fully familiar with.

50. It is common ground that the Claimant and Mr Elmer did not walk the store together as they were expected to, but merely discussed some of the sectors that had been marked as red on the previous audit from the office in the presence of Gary Bulley, the Respondent's in-store manager.

51. Mr Elmer was still unhappy about the standard of cleaning in several areas of the store and expected the store to remain red overall at the end of the audit. He was due to be visited later that afternoon by his own manager and he would be judged by him on the cleanliness of the store. He wanted the audit to be red so that he could say that he was dealing with the issue with the cleaning manager. He showed the Claimant some photographs of the store and agreed that the toilets had improved and could be marked as green.

52. At the end of the discussion the Claimant submitted the audit which can be found at [**37**]. The submitted audit shows that within a period of significantly less than a minute (between 10:18:59 and 10:19:01) immediately before the audit was submitted, the Claimant had entered responses to all the sectors and changed information on 10 of those, including changing 9 of those 10 that had been marked red on the previous week to green.

53. The result of the changes inputted by the Claimant was to change the overall colour of the audit from red (fail) to green (pass).

54. The audit is usually automatically sent to the relevant Tesco Store Manager by e-mail. However, in this case, the e-mail to which the audit was directed was not the current e-mail for Craig Elmer and consequently he did not receive a copy of the audit immediately. There was no evidence put before the Tribunal to suggest that the Claimant was aware of this communication flaw.

55. On about 9th October 2018 Craig Elmer telephoned Haris Niksic to complain about the poor cleaning standards at the Beccles Store and to advise that he was escalating the matter to head office. During the course of that conversation, it became apparent that Mr Elmer did not know that the submitted audit conducted on 5th October had been green overall and had not expected it to be so. He told Mr Niksic that he had not agreed any improvements in the cleaning standards marked as red previously and that the Claimant had recorded this. As it became clear that he was questioning the validity of the audit, Mr Niksic asked him to explain why he was questioning the audit in an e-mail. His subsequent e-mail of 9th October 2018 [**35**] stated that at least 7 attributes have not been marked as NOT MET (ie red) and that the audit was not a reflection of the store or what he had agreed with the Claimant. He further stated that what he had agreed with the Claimant was that nothing marked red the previous week would be changed apart from the toilets and listed a number of areas that had been discussed but which were not reflected in the audit.

56. Mr Niksic then telephoned the Claimant to investigate what had happened and discussed the audit with him. The Claimant informed Mr Niksic that everything he had put as MET (green) had been agreed with Craig Elmer and that the audit had been agreed and uploaded from Mr Elmer's office. The Claimant also informed Mr Niksic that Gary Bulley had been present during the conversation and confirmed that he would be happy for Mr Niksic to contact Mr Bulley to obtain a statement from him.

57. Mr Niksic called Mr Bulley and asked him what had been said at the meeting. Mr Bulley confirmed that a discussion had taken place in the office and that Mr Elmer had agreed that a couple of the areas were to be changed from red to green, namely the bakery and the toilets, but that Mr Elmer had said that the other areas were to remain red. Mr Niksic asked Mr Bulley to confirm this in an e-mail, which he did in a brief e-mail the same day [**36**].

58. Following these investigations, Mr Niksic decided to instigate disciplinary proceedings against the Claimant and wrote to him on 20th October to invite him to a disciplinary hearing on 12th October 2018 [**34**]. That letter advised the Claimant that it concerned allegations of falsifying the Beccles store audit and that the allegations, if found to be true, may be considered gross misconduct and could result in his summary dismissal. It also informed the Claimant of his right to be accompanied and enclosed a copy of the Respondent's disciplinary procedures.

59. Despite having undertaken the limited investigation set out above, the disciplinary meeting on 12th October 2018 was chaired by Mr Niksic. Stephanie Woodley, the Respondent's regional HR Business Partner, was present to take notes. The Claimant was not accompanied. At the meeting, the audit and what took place on 5th October was discussed at some length. The Claimant maintained that Mr Elmer had agreed all the changes that he had made and gave further details as to what had been discussed. He said that it had not been a quick audit and had taken 30-45 minutes in total. He gave no explanation as to why all the changes were made within less than 1 minute and said that he could

not see how it could have been as it was more than 1 minute. The Claimant complained that there had been no investigation and that had there been Mr Bulley would have been asked more questions about what he had heard and there would have been more discussion with Mr Elmer. After taking some time to review the documents and what had been said Mr Niksic took the decision to dismiss the Claimant with immediate effect and advised him of this and of his right to appeal. The Claimant then stated that the process was flawed, that Mr Niksic did not have all the information and had not asked details from Mr Elmer and Mr Bulley and that he had checked the time for the audit and it was 16 minutes. He stated he would appeal [**39 - 43**].

60. The Claimant was due to attend an audit at the Saxmundum Store on the afternoon of 12th October 2018. This audit had been rearranged by the Claimant from a previously agreed day because the Tesco manager had not been available at the time it was originally scheduled.

61. Prior to the disciplinary hearing Mr Niksic voided the audit planned for the Saxmundum store and cancelled the Claimant's rearranged visit. Although the Claimant asserts that this was evidence that Mr Niksic had made the decision to dismiss him prior to the disciplinary hearing the Tribunal does not find that this was the case. The Respondent's contract with Tesco entitles them to "void" any audit in circumstances such as this where the Tesco Manager does not attend. This automatically renders the audit green. There is therefore a significant advantage to the Respondent of voiding the audit rather than rearranging it in circumstances where the Tesco Manager does not attend. This is because it removes any risk that the audit will be red (failed) and expose the Respondent to potential penalty.

62. The Claimant's dismissal was confirmed in a dismissal letter dated 22nd October 2018. It stated that he had been dismissed for gross misconduct because Mr Niksic believed that he had falsified the audit in order to obtain a green score and that this was a serious breach of the audit procedures and a significant breach of the implied trust and confidence [**44-45**]. The Tribunal finds that the letter accurately reflected the basis on which Mr Niksic took the decision to dismiss and the seriousness with which he viewed the Claimant's actions.

63. The same day the Claimant e-mailed Lisa Rayner to appeal against his dismissal [**46**]. The reasons for his appeal were largely to do with the procedure adopted by the Respondent: the lack of investigation and that he was not given the opportunity to question either Gary Bulley or Craig Elmer, that the decision was pre-determined and that he was not suspended.

64. An appeal was initially scheduled for 7th November 2018 and the Claimant was advised of this by e-mail dated 31st October 2018 [**47**]. He was not available on this date and e-mailed asking for the meeting to be moved to 12th November 2018 and for Craig Elmer and Gary Bulley to be available [**48**].

65. The appeal hearing was ultimately rearranged for 19th November 2018 and took place on that date with Mr Cosmin Tecuta as the chair and Paula Baxter as notetaker. Mr Tecuta had had no previous involvement with this matter. Prior to

the hearing he received the e-mails from Craig Elmer and Gary Bulley, the disciplinary hearing notes, the Claimant's e-mail of appeal, various e-mails and the audit document [**37**] and spoke to Mr Niksic by telephone to obtain further background. He did not have the Claimant's personnel file and was unaware of the grievance the Claimant had raised. The Claimant was not accompanied at the meeting although he had been advised of his right to be. Neither Gary Bulley nor Craig Elmer was present. The Claimant's grounds of appeal were discussed but no decision was made at the hearing as Mr Tecuta intended to make further investigations before reaching a decision [**51-58**].

66. Following the hearing Mr Tecuta spoke again to Mr Niksic about the voided Saxmundum audit, spoke to Jeff-Lloyd Jones (the Respondent's contract director for Tesco who had power to void audits) and received a number of e-mails in relation to this matter [**63-65**]. He also made enquiries of HR in relation to the notes of the disciplinary meeting and the existence of an issue between Mr Stevens and the Claimant. He did not speak to Craig Elmer or put the points raised by the Claimant at the disciplinary hearing and appeal to him as he considered it to be a sensitive issue and he did not wish to be seen to questioning what Mr Elmer had said in his e-mail. He did speak directly to Mr Bulley who confirmed that what he had written in the e-mail was correct and that Mr Elmer had agreed to change only the bakery and toilets from red to green with the other red areas to remain red. Mr Tecuta did not however put the points made by the claimant to Mr Bulley for his comment.

67. Mr Tecuta concluded that the audit had been falsified and on 26th November 2018 he wrote to the Claimant confirming the original decision to dismiss and rejecting the appeal [**59-60**].

Relevant Law and Conclusions

68. Section 47B of the Employment Rights Act 1996 ("the 1996 Act") confers on workers (which includes employees, see section 43K) the right not to be subjected to a detriment on the ground that they have made a protected disclosure. Enforcement of that right is by way of complaint to the Tribunal under section 48(1A).

69. The Claimant must show that he made a qualifying disclosure under s43B. The disclosure must be of information and contain facts and he must show that he had a reasonable belief the information disclosed tends to show one of matters specified in s.43B. This is both an objective and subjective test and the belief must be based on some evidence.

70. The Claimant must also show that he had a reasonable belief that the disclosure was made in the public interest. This requires that the worker considered the disclosure to be in the public interest, believed the disclosure served that interest and reasonably held that belief.

71. Disclosures which relate to breaches of the employees own employment contract may nevertheless be in the public interest having regard to the numbers in the

group whose interest is affected, the nature of the interests affected and the extent to which they are affected, the nature of the wrongdoing and the identity of the wrongdoer – see ***Chesterton Global Limited (t/a Chestertons) and anor -v- Nuromohammed (Public Concern at Work Intervening) 2018 ICR 731 CA and Dobbie -v- Felton t/a Felton Solicitors EAT 0130/20***.

72. If the Claimant reasonably believes that the information tends to show one of the matters, the disclosure will be qualified even if the information turns out to be true or inaccurate.

73. Who the disclosure is made to is also relevant. In this case the Claimant made the disclosures to his employer – a category covered by section 43C.

74. If a protected disclosure has been made, the Tribunal must consider whether the Claimant has been subject to a detriment by the Respondent, as viewed from the perspective of the Claimant. The matters which may be considered to be detriments are wide ranging and can include deliberate failures to act, suspension, disciplinary action, moving the worker and subjecting the worker to performance management – see ***Shamoon -v- Chief Constable of the RUC 2003 ICR 337 HL***, ***Merrigan -v- University of Gloucester ET 1401412/10***, ***Keresztes -v- Interserve FS (UK) Ltd ET 2200281/16*** and **Chief Constable of West Yorkshire Police -v- B and anor EAT 0306/15.**

75. Having established that the Claimant made a protected disclosure and has been subjected to a detriment by the Respondent, the Tribunal must also consider whether the Claimant was subject to the detriment because they made a protected disclosure. It is for the employer to show the ground on which any act, or deliberate failure to act was done (section 48(2)). The Tribunal may draw inferences from the facts found.

76. Section 94 of the 1996 Act confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of complaint to the Tribunal under section 111.

77. The Claimant must show that he was dismissed by the Respondent under section 95 but in this case, the Respondent has admitted that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 12th October 2018.

78. Section 98 of the 1996 Act deals with the fairness of dismissals. There are 2 stages that the Tribunal must consider. Firstly, the Respondent employer must show that it had a potentially fair reason for the dismissal within section 98(2). The burden of proving the reason for the dismissal is placed on the Respondent.

79. Section 103A provides that it is an unfair dismissal if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

80. Secondly, having established the reason for the dismissal, if it was a potentially fair reason, as then Tribunal has found that it was, the Tribunal has to consider,

without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

81. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question of whether or not the dismissal was fair or unfair, having regard to the reason shown by the employer:
    (a) depends upon whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and
    (b) shall be determined in accordance with equity and the substantial merits of the case.

82. There is also well-established guidance for Tribunals on the fairness within s.98(4) of misconduct dismissals in the decisions in ***British Home Stores -v- Burchell [1980] ICR 303*** and ***Post Office –v- Foley [2000] IRLR 827***. In summary, the Tribunal must consider whether:
    (i) the employer had a genuine belief in the employee's guilt (this goes to the employer's reason for dismissal, where the burden of proof is on the Respondent);
    (ii) such genuine belief was held on reasonable grounds;
    (iii) the employer had carried out a reasonable investigation into the matter;
    (iv) the employer followed a reasonably fair procedure; and
    (i) dismissal was an appropriate punishment as opposed to some other disciplinary sanction, such as a warning.

    In relation to (ii), (iii), (iv) and (v) above, there is a neutral burden of proof.

83. In considering all aspects of the case, including those set out above, and in deciding whether or not the employer acted reasonably or unreasonably within section 98(4) of the 1996 Act, the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances.

84. It is also immaterial how I would have handled events or what decisions I would have made. I must not substitute my view for that of the reasonable employer – ***Iceland Frozen Foods Limited –v- Jones [1982] IRLR 439***, ***Sainsbury's Supermarkets Limited –v- Hitt [200]3 IRLR 23***, and ***London Ambulance Service NHS Trust –v- Small [2009] IRLR 563***.

Public Interest Disclosure

85. The Tribunal finds that the Claimant's e-mails dated 30th March 2018, 2nd April 2018, 8th April 2018, 21st June 2018 and his grievance e-mail of 18th September 2018 (referred to in paragraphs 17, 21, 22, 24 and 39 above) and his oral statements at the performance management meeting on 20th July 2018 (referred to at paragraph 28 above) all contained factual information and amounted to a disclosure of information that he was excessive working hours in breach of the Working Time Regulations to the Respondent as the Claimant's employer.

86. The Claimant had in fact signed an opt-out of the Working Time Regulations and no breach of the Regulations was therefore in fact occurring or had occurred. However, for the reasons set out above the Tribunal finds that the Claimant was unaware of this at the point when he made the disclosures and that this did not detract from the Claimant's genuine and reasonably held belief that these disclosures tended to show that a criminal offence had been committed and that the Respondent was failing to comply with a legal obligation to which it was subject (namely a breach of the Working Time Regulations 1998, which pursuant to Regulation 29 of the Regulations is an offence). These disclosures were therefore qualifying disclosures within the meaning of section 43B of the 1996 Act.

87. The qualifying disclosures related solely to the Claimant himself and not to others in the Respondent's employ. There was no inherent public interest resulting from nature of the Claimant or the Respondent or the work being undertaken and no wider safety issue of general concern. The contents of the Claimant's disclosures concerned the Claimant alone. Indeed, at one point he noted that was working more hours than most because the East Anglian Cluster that he was responsible for covered a large geographical area and the stores were spread out such that there was a greater amount of travelling than in other areas. He specifically referred to the other Manager in the East Anglian area and stated that she had an easier time. At no time did he suggest that his working hours were indicative of a wider problem affecting anyone other than himself or general operational misuse.

88. In his evidence to the Tribunal, he had difficulty in articulating what the public interest would be and ultimately was only able to say that it was the Respondent making employees work excessive hours. The Tribunal found no indication that he either considered whether the disclosures were in the public interest or believed that the disclosures served the public interest. He was entirely focused on himself and what he perceived to be a breach of his own employment contract and in his own interest.

89. Taking into account all the above, the Tribunal finds that the disclosure related solely to the Claimant's employment rights and that the Claimant did not, either at the time of making the disclosures or subsequently, genuinely or reasonably believe that the disclosure was in the public interest.

90. Accordingly, the Tribunal finds that although the disclosures were qualifying disclosures, they did not amount to public interest disclosures.

Detriment

91. The Tribunal finds that the Claimant was subjected to performance management and was suspended from work and that both these actions amount to detriments from the Claimant's perspective.

92. However, in view of the Tribunal's conclusion that the disclosures made were not public interest disclosures, the detriment claim must fail.

93. If the Tribunal is wrong about whether the disclosures amounted to public interest disclosures, the Tribunal would in any event have found that the Claimant was not subjected to either of the detriments because of the disclosures.

94. This is because the Tribunal finds that, for the reasons set out in paragraphs 36-37 above, the Claimant was suspended on the basis of a non-genuine allegation because he was underperforming.

95. Further, there was ample evidence to demonstrate that the Claimant was underperforming on the Respondent's expectations for someone in his role and this was not denied by the Claimant. The objectives on the Claimant's performance plan were clearly key to the Claimant's role the Claimant accepted that they were relevant.

Potentially Fair Reason for Dismissal

96. In this case, it is not in dispute that the reason that the Respondent gave for the Claimant's dismissal was that it believed that the Claimant was guilty of gross misconduct by reason of falsifying the Beccles audit on 5th October 2018 and that this was a potentially fair reason under section 98(2) of the 1996 Act.

97. The alternative reason for the dismissal advanced by the Claimant is that he was dismissed because he made a protected disclosure, which would automatically render the dismissal unfair under s 103A of the 1996 Act.

98. Having heard the evidence, and for the reasons set out above, the Tribunal is not satisfied that the Claimant has produced sufficient evidence to raise the question of whether the reason for the dismissal was the making of a protected disclosure. The Tribunal is satisfied that the Respondent has proved its reason for dismissal.

99. None of the Respondent's employees who were aware of the Claimant's complaints about his working times appeared to take this matter seriously. The Tribunal is satisfied that the Respondent and its employees neither understood nor were concerned about the disclosures (which were in any event not public interest disclosures) and had no regard to the disclosures in reaching or upholding the decision to dismiss.

100. There is ample evidence that the sole focus of the disciplinary proceedings was the audit, that there was evidence before the dismissing and appeal officers to raise the suspicion of falsification of records (some of which came from the Respondent's client not from within the Respondent itself) and that falsification of an audit was a serious issue for the Respondent. The disciplinary and appeal outcome letters both refer to the reason for dismissal as being the falsification of the audit and provide coherent reasons for the dismissal. The Tribunal finds that the dismissal was based solely on the Respondent's conclusions as to what had occurred in relation to the Beccles audit.

Genuineness of the Belief

101. Having heard from the Respondent's witnesses orally, as well as receiving their written evidence, the Tribunal finds that both Mr Niksic and Mr Tecuta, held a genuine belief that the Claimant was guilty of misconduct, namely falsifying the audit.

102. There was significant evidence to support their belief, namely the accounts of Craig Elmer and Gary Bulley and the audit print out showing that all sectors were accepted or changed within less than a minute immediately before the audit was submitted.

Investigation and Procedure

103. However, the Tribunal must also consider therefore whether, at the time the belief was formed, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

104. The allegation of falsifying an audit was very serious. Not only does such conduct amount to gross misconduct justifying summary dismissal under the Respondent's disciplinary policy (see paragraph 124 below), but a dismissal for misconduct of this nature may have more far-reaching consequences and impact the Claimant's prospects of obtaining similar managerial roles elsewhere.

105. The Respondent in this case is a fairly large organisation, employing around 6,000 people and operating a number of different sites. It has an extensive management structure and a dedicated and substantial HR department as indicated by the status and job descriptions of the 3 witnesses who gave evidence on behalf of the Respondent, and others who at various times wrote e-mails or attended meetings as note takers.

106. The Tribunal had the band of reasonable responses and these factors clearly in mind in reaching a decision as to whether the investigation was reasonable in the circumstances.

107. Taking all the circumstances into account, the Tribunal finds that there were deficiencies in the extent and quality of the investigation conducted by the Respondent.

108. At no stage prior to the decision to dismiss was any aspect of the Claimant's account of what occurred at Beccles on 5th October 2018 checked for veracity or put to either Craig Elmer or Gary Bulley for comment. No reasonable employer in the Respondent's position would have failed to make such enquiries.

109. The Respondent's failure to ask Craig Elmer and Gary Bulley for a detailed account of what exactly was discussed during the audit was compounded by its failure to ask either of them to attend either the disciplinary or appeal hearings, which would have permitted those matters to be addressed.

110. On hearing the Claimant's account, and in view of the seriousness of the allegation, the Respondent could and should have checked the movements of the Claimant's car using the tracker device to ascertain how long he was at the Beccles store. This would have allowed to the Respondent to take a view as to the veracity of at least part of the Claimant's account and might have raised questions as to what occurred during that period of time.

111. There was a clear inconsistency between the accounts given by the Claimant, Mr Elmer and Mr Bulley of the meeting on 5th October 2018. The Tribunal did not hear evidence from either Mr Bulley or Mr Elmer and the Claimant's evidence on this issue was limited.

112. The Claimant explained in the course of the Tribunal proceedings why the sectors were all accepted/amended and submitted within a minute, namely that the system kept logging him off and so he inputted everything that had been discussed at the end rather than as it was being discussed. He had not given that explanation during the course of his disciplinary proceedings and gave no explanation as to why he had not done so. The Respondent could not have been expected to investigate this matter prior to the conclusion of the disciplinary process as it was not raised by the Claimant. In any event, on the evidence before the Tribunal, no investigation would have been possible as the system did not log aborted attempts.

113. The Claimant also suggested that Ian Stevens had put Mr Elmer up to making the claim that audit had been falsified by the Claimant and that this information had come from Gary Bulley. No evidence was submitted to substantiate this suggestion and the Tribunal did not find it credible, particularly having regard to the very late stage at which it was raised (only in his own cross-examination) and that Gary Bulley's recollection of the meeting on 5th October 2018 was far closer to that of Mr Elmer than it was to that of the Claimant. This is also a matter the Respondent could not have been expected to investigate prior to dismissal.

114. However, there were minor inconsistencies in the information provided by Mr Elmer and Mr Bulley: Mr Niksic stated that on the telephone Mr Elmer had said that nothing in the audit had changed from the previous week [**W/S para 29**] whereas in his e-mail Mr Elmer stated that he had agreed that the toilets be changed [**35**] and Mr Bulley said that Mr Elmer had agreed to change both the toilets and the Bakery [**36**].

115. The Respondent should have gone back to both Craig Elmer and Gary Bulley and put the Claimant's account and asked for their response, either by adjourning the disciplinary hearing to do so, or by enquiring after the hearing but before a decision was made. The allegation of falsification of the audit was strongly denied by the Claimant who had given an alternative explanation as to what had occurred which, if found to be correct, would have substantially undermined the belief of the Respondent's managers that the audit had been falsified. Such enquiries might have led to further information being available or concessions as to some or all of the points the Claimant raised.

116. The appeal process did not remedy the deficiencies of the earlier stages. The Claimant's account was still not put to either Craig Elmer or Gary Bulley for comment although Mr Tecuta spoke to Gary Bulley. Although the various grounds of appeal were discussed, the Tribunal finds that the appeal process amounted to little more than a rubber stamping which did not put right what had gone wrong before.

117. The deficiencies in the Respondent's investigation made this dismissal unfair.

118. The Claimant complains of other defects in procedure related to the delay in providing notes of the disciplinary hearing and that Mr Niksic both undertook the investigation and conducted the disciplinary hearing.

119. The Tribunal did not consider these points to have been of sufficient significance as to potentially render the dismissal procedurally unfair. This is because the delay in providing the notes had no bearing on the decision made and the investigation conducted by Mr Niksic was extremely basic and largely limited to the collection of documents (the audit report and the e-mails from Mr Elmer and Mr Bulley). Nevertheless, in an organisation the size of the Respondent they could and should have found someone else to conduct the disciplinary hearing.

Reasonableness of the Belief

120. For the reasons set out more fully in the findings of fact above, the Tribunal finds that Mr Niksic and Mr Tecuta's beliefs were reasonable based upon the facts available to them, namely the accounts of Craig Elmer and Gary Bulley and the audit print out showing that all sectors were accepted or changed within less than a minute immediately before the audit was submitted.

121. However, the flawed process adopted, and the lack of sufficient investigations, meant that the Respondent did not gather evidence which was potentially highly relevant to whether or not the Claimant had in fact been guilty of falsifying the audit and may not therefore have been in possession of all relevant facts.

122. The Tribunal is unable to speculate as to what further information might have been available had those defects not occurred.

123. Consequently, in all the circumstances, the Tribunal finds that the deficiencies were such that the Respondent's could not have had a reasonable belief in the Claimant's guilt because of the unreasonable process which led to that belief. Therefore the belief, though genuine, was not reasonably held.

Proportionality of Sanction

124. The dismissal related to an isolated incident and no adverse disciplinary history of the Claimant was considered. Nevertheless, for the reasons set out in paragraphs 47 and 48 above, the integrity of the audits was of the utmost significance to the Respondents. The Respondent's disciplinary procedure cites

"any conduct which could lead to probable or actual damage to customer relations or goodwill" "A significant breach of the implied trust and confidence …" and "action or behaviour which is directly against the best interests of the Company" as examples of what might be considered to be gross misconduct [**184-185**].

125. The Tribunal therefore had no hesitation in finding that on the basis of the genuinely held belief of the Respondent's managers that the Claimant had been guilty of behaviour that amounted to falsifying an audit that it was within the range of reasonable responses for the Respondent to characterise the Claimant's actions as gross misconduct and to decide that summary dismissal was the appropriate punishment for such an act.

Conclusion on Fairness

126. For the reasons set out above, The Tribunal finds that the Claimant was unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

Polkey

127. In accordance with the principles in ***Polkey -v- AE Dayton Services Ltd [1987] UKHL 8***, the Tribunal considered whether any adjustments should be made to the compensation element of the Claimant's award on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed. That is, if the procedural and investigative flaws that the Tribunal found had not occurred what would be the chance of a fair dismissal?

128. ***Polkey*** reductions tend to arise in cases where there has been procedural unfairness. The Tribunal found procedural defects which rendered the dismissal unfair, namely the failure to investigate the Claimant's explanation for changing the markers from red to green by putting the Claimant's explanation to Gary Bulley and Craig Elmer for their comment and by failing to check the tracker on the Claimant's car to determine how long he had been at the store so as to either corroborate or disprove the Claimant's assertion in support of that explanation that the discussions took place over a period of about 30 mins.

129. Further evidence may or may not have emerged which either verified, supported or undermined the Claimant's explanation for his actions if a reasonable investigation been undertaken. In particular, had the details of the discussion between the Claimant, Craig Elmer and Gary Bulley that were given by the Claimant been put to Craig Elmer and Gary Bulley it may have jogged their memories and led to them agreeing that other markers had been agreed to be changed from red to green.

130. In his evidence the Claimant remained adamant that all the changes he made were agreed by Mr Elmer and he stated that he had expected the audit to remain red overall and could not explain why it did not.

131. The Tribunal did not hear evidence from either Mr Bulley or Mr Elmer and the Claimant's evidence to the Tribunal as to what occurred on 5th October 2018 was limited.

132. However, the Tribunal found it unlikely that even if the Respondent had put the Claimant's account to Craig Elmer and Gary Bulley this would have led to either conceding that ***all*** the markers changed by the Claimant had been changed by agreement. This is because although there was a minor discrepancy between the account given by Craig Elmer (1 marker agreed to be changed) and Gary Bulley (2 markers agreed to be changed) there was a far greater discrepancy between these 2 accounts and the number in fact changed (10).

133. Taking into account all the circumstances including: the way in which the issue arose and the surprise expressed by Craig Elmer on finding that the overall audit had changed to green; the short period of time that had passed since the audit when they first gave their initial accounts; the obvious expectation by both that the audit would remain red overall; and the lack of any apparent reason for Gary Bulley to give inaccurate information, the Tribunal considered it to be unlikely that they would have agreed that their initial account was so far wrong (ie that they had forgotten that Craig Elmer had agreed at least another 8 markers be changed).

134. The Tribunal further found that unless Craig Elmer and/or Gary Bulley had conceded that they were wrong and that all the markers changed from red to green by the Claimant had been agreed to be changed, the Respondent's conclusions and the decision to dismiss were not likely to have been different.

135. The Tribunal therefore finds that even if the procedural defects had been remedied by the Respondent there would nevertheless have been a high likelihood that the Claimant would have been fairly dismissed in any event. Taking into account the uncertainties as to what would have been uncovered if a proper investigate had taken place the Tribunal assessed this likelihood at 60%.

Contributory Fault

136. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

137. Section 122(2) provides:

> "Where the Tribunal considers that the conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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."

138. Section 123(6) provides:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

139. In determining whether any deduction should be applied to either part of the Claimant's award as a result of contributory fault, I must first identify what conduct on the part of the Claimant could give rise to contributory fault. I must then also consider whether any such conduct was culpable, blameworthy or unreasonable and whether the blameworthy conduct caused or contributed to the dismissal to any extent.

140. Although the Claimant had been performing poorly, this did not cause or contribute to his dismissal.

141. The Claimant's action in submitting a response to all parts of the audit in a period of less than 1 minute and changing several of the markers from green to red did cause or contribute to his dismissal. If the Claimant's explanations for those actions is accurate, such actions were entirely innocent and cannot be said to be culpable, blameworthy or unreasonable.

142. The evidence before the Tribunal did not include anything which illuminates the accuracy or otherwise of the Claimant's explanation as this was a matter the Respondents either failed to investigate or had no opportunity to do so, and the Claimant did not himself have the ability to obtain such evidence.

143. Falsifying an audit would be dishonest and carried substantial risks to the Claimant. The Claimant did not know that Craig Elmer would not receive a copy of the audit report and the majority, if not all, of the previous failed audits at the store had taken place during a period when the Claimant was not managing the cluster due to his suspension followed by a period of leave. In the circumstances, the Tribunal could find no plausible gain to the Claimant himself from falsifying the audit.

144. Taking into account all of the above, the Tribunal did not find on the balance of probabilities that the Claimant had in fact falsified the audit.

145. The Tribunal considered whether the Claimant could reasonably be criticised for not having provided the explanation for the submission timeframe that he subsequently gave to the Tribunal but concluded that it would have made no difference even had he done so. The Respondent's witnesses gave evidence that the system did not record aborted attempts to complete the audit and there would therefore have been no way of verifying his account and the primary reason for the Respondent concluding that the Claimant had submitted a false audit was the submitted audit did not match that agreed with the Tesco manager.

146. For the reasons given above, the Tribunal was not therefore able to identify any culpable, blameworthy or unreasonable conduct that had caused or contributed to the dismissal and did not consider that it would be just and equitable to make

any deductions from either the either the Claimant's basic or compensatory awards on the basis of contributory fault.

Remedy

147. The parties were agreed as to the monetary value of the unfair dismissal claim subject to the liability decisions above, and the Tribunal's findings as to the appropriate duration of the compensatory element of the award.

148. Reinstatement or re-engagement was not requested by the Claimant, and he has been in alternative employment, albeit at a lower salary, since 3 weeks after his dismissal. No evidence was led as to the availability or practicality of reinstatement or re-engagement and the Tribunal did not consider either to be an appropriate remedy in all the circumstances.

149. The Tribunal received no evidence as to the availability of alternative employment at the same or similar level of remuneration, any efforts the Claimant continued to make to obtain alternative employment at a higher level of remuneration after commencing his new employment, or the timescale within which the Claimant might reasonably have acquired employment at a similar level of remuneration. The parties were however agreed that a period of 3-6 months post-dismissal was an appropriate timeframe.

150. Taking all of the above into account, the Tribunal finds that the appropriate duration of the compensatory award is 6 months from the date of dismissal. This is because Claimant was likely to be disadvantaged in seeking an equivalent position as a result of the reason for his dismissal, which was in effect a reason associated with dishonesty. Nevertheless, the Claimant has a good work record and succeeded in obtaining alternative employment quickly which would have assisted him to move to a further job.

151. The Claimant's award is therefore calculated as follows:

152. The loss of benefits (car and fuel card) are agreed at total of £6,279.00 per annum. There being 52 weeks in a year, this equates to a weekly value of £120.75 to be added to the weekly loss of wages.

153. The award is therefore:

Basic Award:	**£2,448.00**
Compensatory Award: Loss of earnings 12/10/18 to 02/01/18 (comprising agreed loss of earning plus 3x £120.75 loss of benefits):	£1,826.25
Ongoing loss of earnings 03/11/18 to 11/04/19 (comprising £125.00 loss of wages plus £120.75	

loss of benefits for 23 weeks):	£5,652.25
Total compensatory award prior to deduction:	£7,478.50
Less 60% Polkey deduction	(£4,483.10)
Total Compensatory award:	**£2,991.40.**

154. The Tribunal did not hear submissions in respect of whether or not it should make a financial penalty under s12A of the Employment Tribunals Act 1996 and did not find any aggravating features to the breach. The Tribunal will not therefore impose any financial penalty.

Employment Judge Clarke
Date: 2nd February 2022