EMPLOYMENT TRIBUNALS

Claimant: **Mr Manji Vekaria**

Respondents: **CCF Ltd**

Heard at: Watford

On: 8, 9 and 10 June 2022

Before: Employment Judge Bartlett, Ms Turquoise and Ms Kendrick

Appearances

For the Claimant: in person
For the Respondents: Ms Randall

JUDGEMENT

The Claimant's claim for unfair dismissal fails.

The Claimant's claim for wrongful dismissal fails.

REASONS

Background

1. Prior to the final hearing which took place on 8, 9 and 10 June 2022, two Preliminary Hearings took place in respect of this case. All of the claimant's discrimination claims were struck out on 8 March 2021. The claimant appealed the Strike Out decision to the EAT however, permission to appeal was refused.

2. The summary of the August 2021 preliminary hearing sets out a list of issues which the final tribunal may potentially consider and these are listed as:

Unfair dismissal

i What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and 98(2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that the claimant was dismissed for a reason relating to his conduct.

ii If so, was the dismissal fair or unfair in accordance with s98(4) ERA, and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

iii If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed or he would have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to s122(2) ERA; and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to s123(6) ERA?

Breach of contract

iv. How much notice was the claimant entitled?

v. Did the claimant fundamentally breach the contract of employment by an act or acts of so-called gross misconduct? [N.B. This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct; if so, did the respondent affirm the contract of employment prior to dismissal?

Remedy

vi. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular,

a. Does the claimant apply for reinstatement or re-engagement, and if so, is such remedy appropriate?

b. How much compensation and/or damages is it just and equitable to award?

c. For any claim of loss of earnings, has the claimant sufficiently mitigated is losses.

3. The records of both preliminary hearings describing detailed discussions and decisions about the issues in the case there is not a single mention of whistleblowing or automatically unfair dismissal. For example the 19 August 2021 summary sets out:

> 8. From the details of complaint, I was not able to discern the basis of the unfair dismissal/wrongful dismissal claims, so we discussed this in detail. The claimant said that he wrote to his employer on 15 April 2019 setting out why he believed he was unfairly dismissed. This letter was sent after the investigatory meeting of 11 April 2019 but before the claimant was invited to a disciplinary hearing (on 24 April 2019). I note claimant's disciplinary hearing occurred on 1 May 2019 and was reconvened on 7 May 2019, at which point he was dismissed. As the letter of 15 April 2019 predated the disciplinary hearing, I cannot see how this can form the valid basis of the claimant's contention that he was unfairly dismissed. We went through the claimant's dismissal appeal letter and, by-passing the hyperbole, the claimant says that his unfair dismissal was based on bogus allegations, discrimination, corruption, vindictiveness, illegality and conspiracy. So far as any alleged procedural defects are concerned, the claimant contends that he was not given any investigation report. Ms Randall said that there was no investigation report but that the claimant was given copies of all notes of investigative meetings and interview records prior to his disciplinary hearing. The claimant disputes this.
>
> 9. I am concerned about the merits of the claimant's case. Despite the claimant's grandiose claims of conspiracy, corruption, illegality, etc there are evidential matters of dispute. The claimant contends that the respondent did not have a valid reason to

The hearing

4. A panel had been convened to hear the case. This is because the Tribunal's system had not been updated to remove reference to the struck out discrimination claims or the discontinued claims. Ms Randall asked why there was a full panel and this reason was given to the parties.

5. It was explained at the start of the hearing that the issues the Tribunal would consider would be those set out in the August 2021 list of issues namely unfair dismissal and wrongful dismissal. The parties were reminded that the respondent alleged that the claimant was dismissed for gross misconduct, the claimant confirmed that he considered that the situation was concocted. The claimant also claimed that the procedure was unfair and he had been wrongly dismissed in that he was summarily dismissed without payment of notice.

6. At the start of the hearing there was some discussion about the bundle. The claimant:

    a. stated that the bundle did not include documents that it should have. Judge Bartlett asked the claimant to set out explicitly what he considered was missing. The claimant's response was vague but he did identify that he had at no stage received an investigation report. Ms Randall stated that the respondent had never produced an investigation report and that it did not exist. The claimant confirmed that he had never seen an investigation report but it was his belief that the respondent should have prepared one. He could not explain why he held this belief;

    b. referred to an email from Sunita dated 3 April 2019 which apologised for her email being "clipped" (the Tribunal understands that this means that an attachment has erroneously not been attached to the email). The claimant had raised a concern about this in early April 2019 and he has persisted since that date with this complaint;

    c. The tribunal asked the claimant to look and the disciplinary invitation letter dated 24 April 2019 which states that a copy of relevant documentation was enclosed and lists six bullet points of documents. The tribunal went through the list with the parties and all the documents were identified as being in the bundle except for the claimant's request for a subject access data request. As this document was issued by the claimant he cannot claim that he was not aware of its contents.

7. The tribunal stated that they noted the claimant's concerns and that the respondent has control of the systems in which the documents are stored. However, having been through the disciplinary invitation letter and the documents to which it refers which resulted in the acceptance by the parties that claimant had received copies of all those documents (except the one that he drafted) the tribunal could not identify any failures in disclosure and it did not consider that any directions or orders were required.

8. The tribunal then referred to the witness statements with which it had been provided immediately prior to the start of the hearing. The respondent had provided two witness statements one from Mr Gareth Thomason and the second from Mr Colin Porterfield. The claimant had provided a document with the normal witness statement heading which ran to 60 paragraphs. It contained statements which were similar to some information provided in the ET1 and was written in the pleural "we" rather than "I", which is the style the claimant adopts. Initially the claimant denied knowledge of his witness statement and said he did not know that the respondent would have any witnesses. Ms Randall replied that the claimant had sent her his witness statement and she had sent him the respondent's witness statements. The claimant stated that he had prepared a witness statement last night. This was a short document running to just over one side of A4 whereas the other witness statement run to 60 paragraphs. Accompanying

the new witness statement was a short bundle of other documents which the claimant drew the tribunal's attention to for the first time. It was agreed that the 60 paragraph witness statement would be taken as the claimant's witness statement and the 2 page statement would be called his supplementary witness statement, both to be used as his evidence.

9. On perusing the claimant's new bundle Ms Randall stated that it made reference to whistleblowing but whistleblowing was not part of the claimant's claim. I stated that this was correct because having reviewed the summaries and orders from the two preliminary hearings there was no reference whatsoever to whistleblowing in any form or automatically unfair dismissal because of whistleblowing. If the claimant considered that whistleblowing formed part of his case he had had since August 2021 to write to the tribunal and the respondent to state this and make an attempt to amend the list of issues. The list of issues was quite clear in that it did not include whistleblowing. The tribunal considers that this is something that the claimant would have been aware he could do as he wrote to the tribunal and appealed to the EAT in relation to the strike out of his discrimination claims. He is an individual who is able to understand correspondence from the Tribunal and to take the action he considers necessary to pursue his case to the best of his advantage. The claimant stated he was surprised that whistleblowing was not part of his claim however the tribunal repeated that it was not.

10. Judge Bartlett asked the claimant if he had prepared cross-examination for the respondent's witnesses because in unfair dismissal cases the respondent's witnesses when first. The claimant stated that he had not prepared cross-examination and expressed surprise at the situation. Judge Bartlett gave a brief outline of witness evidence and cross-examination. She stated that the tribunal could help the claimant put his points as questions to the witnesses as lay people frequently struggled to put their points as questions due to the artificial nature of cross-examination. Judge Bartlett suggested various options such as the claimant giving evidence first or giving the claimant more time to prepare. It was decided that the claimant would be given (two hours which became two hours 15 minutes) to prepared cross-examination. At the end of this the claimant stated that he had made some preparation and we heard from the respondent's first witness, Mr Gareth Thomason. The claimant stated that he had not even read Mr Porterfield's witness statement. Mr Thomason's evidence took over two hours and concluded at approximately 14:30pm on 8 June 2022. It was decided to end the first day of the hearing at that time so that the claimant could prepared cross-examination and submissions during the remainder of the day so that Mr Porterfield's evidence could be heard on the second day.

11. The second day of the hearing was taken up with Mr Porterfield giving evidence and then the claimant giving evidence. The latter concluded just before 4 PM on the second day. Judge Bartlett had said on the first day that the witness evidence and the submissions should be concluded by the end of the second day. After the conclusion of the witness evidence Judge Bartlett asked the claimant if he had submissions to make and he said he had not. Judge Bartlett said that if his decision was influenced by the time, we could end the day there and hear submissions on the

morning of the third day so that the claimant had some time to think and prepare. The claimant said that he wanted to do this. The second day ended shortly after 4 PM.

12. On the morning of the third day the claimant stated that he did not have any submissions to make. The tribunal heard Ms Randall's oral submissions and reserved judgement.

13. The Claimant made it clear that he felt that it was improper to cut parts of emails off. This Judgement contains quotes from and extracts of documents and emails rather than copies of the entire documents. This is standard practice; judgements do not contain full page documents because they would become very long and unwieldly. We recognise that the claimant may be concerned or upset by us quoting extracts rather than full documents but this is the way judgements are drafted.

Witness Evidence

14. The tribunal heard witness evidence from Mr Thomason and Mr Porterfield for the respondent and from the claimant. The claimant cross examined Mr Thomason and Mr Porterfield and the claimant was cross examined by Ms Randall. The full record of the questions and answers are set out in the record of proceedings and will not be repeated here.

Facts

15. In this case there is little dispute about the facts. The conduct of the claimant which the respondent asserts amounted to misconduct is largely set out in emails which appeared in the bundle. The claimant did not dispute this. The claimant's dispute is that those matters could not fairly amount to gross misconduct or even misconduct.

16. The Tribunal's factual findings are set out below:

    a. The claimant was employed by CCF Ltd from 31 May 2011 to 7 May 2019 when he was dismissed for gross misconduct. He was employed as Branch Sales Co-ordinator at the Wembley Branch, Middlesex;

    b. On 18 April 2018 the claimant was instructed to complete GDPR training. At this point the claimant raised concerns relating to the use of his personal date in the context of the staff discount card because an address appeared on the till when used; the epos system. In June 2018 the claimant emailed the respondent's data protection team. They responded on 1 July 2018 and the claimant continued to email but they did not respond. On 28 January 2019 the claimant emailed the respondent's data protection office, copying in John Carter, CEO continuing to raise concerns about data protection. This email included the following:

Last year we were been BULLIED and FORCED to do this and that with a dead line date and as a MANDATORY not a request etc., accordingly, can you as a GROUP GENERAL COUNSEL please confirm IF and HOW are my PERSONAL DATAS' protected to similar standards from Tom, Dick & Harriet and COLLEAGUES?

Please do not refer me to any existing policy as this issue is not covered since day ONE!

A COMPLAINT to you was made on 25/09/2018 as below, however you have refused to deal with this issue, WHY?!

Your office to date have been useless in addressing above request (Email thread as below), will you help or maybe John Carter can, who is also copied?

If this is how Staff are treated by Head Office and your office' what example is your office setting for your Staff to treat Group Customers?

c. We find this email was inappropriately worded and in parts unprofessional. It went beyond raising a complaint and was aggressive and hostile.

d. On 29 January 2019, the following day, Robin Miller, General Counsel and Company Secretary, telephoned the claimant. Robin Miller apologised for the delay in dealing with the claimant's issues, stated that he would look into them and get back to the claimant. We find that the respondent did delay in dealing with the claimant's initial complaints in 2018 and his emails from September 2018 were not replied to. It is evident that this caused the claimant some frustration.

e. On 7 February 2019 Robin Miller sent a two page email to claimant about his data protection issues. We find that this is a comprehensive email. In oral evidence the claimant stated that he did not read it "in any detail" and neither did he look at the associated documents attached to the email. The claimant's said he switched off from the email when he realised that the email from Robin was drafted as a new email which did not contain the chain of previous emails involving the claimant and his issues. In oral evidence he said he could not remember reading the attachments.

f. On 12 February 2019 the claimant sent an email to John Carter which included the following:

Is Robin endeavouring to cover up something as current GENERAL COUNSEL, if so can we have PROCEDURE as already requested and refused to date?
Can we please have a hard copy of Employee Handbook?
We will address rest of Robin's email once above is in hand if need be.

g. An email from the claimant dated 15 February 2019 to Gary Turner set out:

We have been very patient but DATA PROTECTION Depart are a joke!!

On 28th January 2019 we again COMPLAINED to Deborah Grimson as GROUP GENERAL COUNSEL in the language COUNSEL would understand and copied the email to John Carter.

We had a call from New GENERAL COUNSEL, Robin Miller on the next day.

We do not here any further from Robin Miller so on 6th February 2019 we send an email to John and copy to DATA PROTECTION Depart, which to date has not been acknowledged and instead we are sent what we thought was joke of a reply from Robin Miller one and only the New GENERAL COUNSEL and SECRETARY on 7th February 2019.

In the email the claimant also appears to be refusing to the mandatory GDPR training.

h. On 15 February 2019 Gary Turner called the claimant twice. On the first occasion the claimant put the phone down on Gary. It is unclear what was said in the conversation. By 7 March the claimant alleged and continued to alleged that Gary bullied him. In an email of 7 March 2019 the claimant wrote:

In response to our email of Friday morning of 15th February 2019, we had a call from Gary who we felt he was very threatening, aggressive with raised voice and seemed very agitated, talking down to us, demanding, bullying and claiming that we have not followed the correct procedure again and again, and should speak with Tony and we saying otherwise as per your [John's] email of April 2018 going round and round having had enough of ear bashing and what we felt was rubbish coming from REGIONAL DIRECTOR, we felt abused and ripped to pieces, we asked if he wanted us to clear my desk? We thanked Gary and ended the call.

i. As the claimant repeatedly stated that Gary Turner had bullied him during the phone call, Judge Bartlett asked what was said and the claimant could only identify that he was told to "do it, just do it". The claimant has not identified elsewhere what the actions or words were which he claims were bulling, etc. When this is taken in the context of all the other evidence, we consider that this is an example of the claimant making vague claims but being unable to substantiate why he felt actions were bullying, discrimination, etc.

j. on 18 February 2019 Gary Turner started a meeting with the claimant. The claimant said he would not say anything so little more happened at the meeting. Later that day Gary Turner emailed the claimant a Letter of Concern. This is an informal disciplinary step. The letter states:

DISPARAGING REMARKS

I would also like to caution you about how you communicate in your emails. The email you sent to myself and John Carter contains a number of points that could be considered both disparaging and potentially defamatory about other colleagues in Travis Perkins. Please stick to the facts in your communications.

BEHAVIOURAL STANDARDS

Finally, and the thing I am very concerned about particularly after today, is your apparent lack of respect for your fellow colleagues. On Friday you 'hung up' the phone on me when I was talking to you. Today, you have refused to participate in a meeting with myself and Diana, which I told you about on Friday. I consider this to be a reasonable request in the circumstances. You have then stated to Tony that you will not supply me with the email history regarding your GDPR problem and that I should find it for myself.

This behaviour and refusal of a reasonable request is unhelpful, is bordering on obstructive and does not reflect our Company values.

This letter is therefore to be placed on your personal file and is to advise you that any future concerns about your behaviours (including but not exclusively those outlined above) will potentially result in disciplinary action which may include action up to dismissal.

k. From 22 February to 1 March 2019 the claimant sent emails to mypeopleservices expressing concern about being in the same room as a person who is bullying or harassing them. He also sent an email on 19 February 2019 asking to invoke the whistleblowing policy. Mypeopleservices told him on a number of occasions to contact employee relations and gave him the details of the phone number and the email address;

l. on 7 March 2019 the claimant responded to the Letter of Concern emailing the respondent's CEO, General Counsel and Carol Kavanagh which included the following:

We write further to our email of 12th February 2019, 15th February 2019 to Gary copied to you, with regrets, with extreme reluctance, under protest and pressure and without prejudice in response to Gary Turner's email/letter of concern of 18th February 2019 subsequent to a staged and conspired "meeting", which is far from the truth, we feel it is concocted, conjured and cover-up and needless to say we do not agree with and we are now more than likely to have to endure further unnecessary intimidation, victimisation, threaten, bullying and harassment and now even feel we are being blackmailed and ask that this LETTER OF CONCERN by Gary to be removed from our file immediately.

...

We feel that Gary's Letter of Concern is nothing short of concocted, conjured, cover-up, vindictive, retaliation harassment and a racist taunt and are at present refraining from commenting any further. If however you require us to answer we await your confirmation accordingly.

m. The respondent treated this as a grievance and arranged a grievance meeting with the claimant on 3 April 2019. On the morning of the meeting the claimant advised that he would be unable to attend and did not suggest a revised date stating that the CEO should "*sort it*". The claimant's witness statement suggested that he did not attend because the location was too far but when he was asked questions about the emails, he initial stated that his non attendance was because it was too far. The emails in the bundle set out that on the morning of the meeting the claimant indicated that he intended to attend but then a colleague declined to attend as his supporter on the morning of the 3rd April. The claimant went on to set out "*re-arrange for some other time?*". On 3 April 2019 Sunita Gherra asked the claimant to respond with availability by 3pm on 4 April. The claimant did not provide alternative dates.

n. The grievance proceeded without the claimant and the outcome dismissing the grievance was sent to the claimant on 10 April 2019;

o. Between 2 and 3 April 2019 there was an exchange of emails between the claimant and Sunita Gherra, an employee relations advisor at the respondent. The email of 2 April 2019 16:08 included:

Thank you very much for your evasive and abrasive reply, not very helpful and do not wholly agree as you are fully aware and you confirm and we feel is continued victimisation, intimidation, discrimination and harassment.

We were ready to attend with Lauren Jones, however your reply has confirmed otherwise, as you are confirming that the meeting of 18th February 2019 was a staged and conspired "meeting".

p. On 3 April 2019 at 12:12 Sunita sent the claimant an email which stated "*Please see the unclipped email, this was an admin error*."

q. The claimant alleges that this meant that Sunita was not attaching the whole email chain of their correspondence. The claimant maintained that there is at least one email in the chain that is missing from the bundle. The claimant's position was that the statement from Sunita demonstrated that there was a deliberate coverup and that he was being treated unfairly. He said clipping emails was offensive and untruthful.

r. A considerable amount of time was spent during the hearing trying to identify what was meant by "unclipped email" and what if anything was missing from the emails in the bundle and the email chain. The claimant's view was that some email was missing but he could not identify which email or give an indication of what was in the missing email. We find that email of 3 April 2019 at 12:12 referring to the unclipped email did in fact contain the full email trail

including the email from Sunita to the Claimant dated 2 April at 11:26 which responded to the claimant's email of 1 April 2019. We do not accept that any emails were missing either at the time of Sunita's email or from the bundle.

s. The claimant held similar views about Robin Miller's email of 7 February 2019. He said that it was a joke of a reply because it did not contain the chain of the claimant's emails and instead was written as a new email. We find that the claimant's views are extreme and unjustified.

t. The claimant's view was that the bundle did not contain all the documents it should have. He repeatedly stated that emails were cut off and only parts were in the bundle. The panel directed the claimant to p186 which contained an email from Sunita dated 5 April at 00:48. The start of the page set out who the email was from, who it was sent to and the date and time. In the middle of the email Sunita had cut and paste an email of the claimant and then she had continued her text underneath it. The claimant did not accept that this is what appeared on p186. He insisted that the text which appeared after his cut and paste email was part of different email, the rest of which had been purposively cut off. Having reviewed the document we find that it is evident on the face of it that it is just one email with the claimant's emailed cut and pasted into it. We did not find that there was doctoring of the email. The claimant himself said that he is not particularly computer savvy but he has adopted very fixed views about email histories and formats. Unfortunately, his views are not a reflection of general practice and the interpretation he has adopted is not supported by the evidence.

u. The claimant was suspended on full pay on 8 April 2019. The claimant disputes there was a meeting and that he was just handed the letter of suspension. He also denied seeing the meeting notes. We find that there was a very brief meeting to the extent that the claimant was given the letter and that the claimant might, quite reasonably, have interpreted this as not amounting to a meeting;

v. On 9 April 2019 he was issued with an invitation to an Investigative Meeting which identified three allegations which were to be discussed:

"*refusing to obey a reasonable instruction in following company policy and procedures;*

repeatedly using company email with intention to offend;

repeatedly using company email to mock, patronise and insult company colleagues";

w. an investigation meeting took place on 11 April 2019 which was heard by Tony Botton, Branch Manager. The claimant raised concerns about Tony Botton conducting the investigation as he was biased. We recognise that the claimant considered that Tony might

be biased against him though the claimant struggled to express why. We find that the claimant's view was part of his opinion that there was some sort of conspiracy; that there were nefarious reasons for the action being taken against him. However, for the reasons set out in this judgement we do not accept that there was any such conspiracy.

x. An issue the claimant raised at the time and during the hearing was that he was not provided with an "investigation report". As set out above we find that the disciplinary letter dated 24 April 2019 sets out the documents the respondent considered and that the claimant had copies of all of these. It is unclear on what basis the claimant believes there was an "investigation report". On the claimant's own evidence he did not and has not read the respondent's disciplinary or grievance policies and he is not aware of their contents. He was not told he would receive an investigation report and this appears to be some idea the claimant has created in his own mind.

y. A disciplinary procedure was commenced by letter of 24 April 2019 when the claimant was invited to a disciplinary meeting. The letter repeated the three allegations identified in the investigation procedure; a disciplinary hearing took place on 1 May 2019 which the claimant attended and signed the hand written notes of that meeting on the day. The meeting was adjourned and reconvened on 7 May 2019 when the outcome of summary dismissal for reason of gross misconduct was given to the claimant. His employment was terminated immediately;

z. on 17 May 2019 the claimant appealed and the appeal meeting took place on 25 June 2019 (rescheduled from 18 June 2019 following the claimant's non attendance). The claimant's appeal was dismissed in writing on 11 July 2019. Mr Porterfield's evidence, which we accept, was that he reviewed the claimant's appeal and distilled it into 5 points of appeal. We find that this is supported by the written documentation and at the appeal hearing the claimant largely agreed with the 5 points. At the appeal hearing the claimant was asked some questions to understand his concerns. The claimant provided very little further information, he was unco-operative and the tone of his responses was odd which could have been interpreted as sarcastic and obstructive. Some examples are:

"[from the 2nd page of the notes] CP Why do you feel you are being set up

MV I wish I could tell you

CP Can you explain why you are being manipulated

MV Look it up. All the managers have manipulated things…

…CP could you provide this

MV when it is necessary. It will end up in Tribunal as I have been sacked so that's where it will end up.

CP what would you like to achieve

BV my job back. Would I get a back hander as well per time lost and unnecessary prejudicial procedure brought against me. And I can see an elephant flying."

The law

Unfair Dismissal

17. In Hammersmith LBC v Keable UKEAT/2021/2019-00733 the EAT provided clear guidance on the law and principles which tribunal was must apply in cases of unfair dismissal:

"*68. The right not to be unfairly dismissed is set out in s.94 of the Employment Rights Act 1996 (ERA 1996). It is currently afforded to employees with two or more years of continuous service with an employer.*

69. The fairness of a dismissal is determined in accordance with the principles set out in s.98 of the ERA 1996. An employer bears the burden of establishing that the dismissal is for a potentially fair reason within the meaning of s.98(2) ERA 1996, and then, if that is established, the Tribunal will determine whether that dismissal was fair or unfair, (having regard to the reason shown by the employer). That determination will depend upon "whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and, shall be determined in accordance with equity and the substantial merits of the case". The critical question, therefore, is whether, having regard to those matters, the employer acted reasonably or not in treating the particular, potentially fair reason, as a sufficient reason for dismissing a particular employee.

70. It is implicit within those words that the question the Tribunal must address, is not whether the Tribunal members themselves would have made the decision to dismiss the employee; they must not simply substitute their view for that of the employer (Morgan v Electrolux Ltd [1991] IRLR 89 CA; London Ambulance Service NHS Trust v Small [2009] IRLR 563, CA). Over the years, Tribunals have been reminded that they must judge the standard of a fair dismissal, not by that which they would, or might have done, but by reference to the options open to a reasonable employer, in other words by an objective standard. A dismissal is only to be held to be unfair if it was outside the range of reasonable responses open to a reasonable employer. This assessment, of whether the decision to dismiss this particular employee in respect of a particular matter or issue, came within the range of reasonable responses open to a reasonable employer lies at the heart of the law relating to unfair dismissal; it is the litmus test by which each stage of the dismissal process and the decision to dismiss is to judged. Sainsbury's Supermarkets v Hitt [2003] IRLR 23, particularly para. 30.

71. In the context of a conduct dismissal it is clearly established that that test requires a Tribunal to address the following three matters:

a. *Whether the employer genuinely believed that the employee was guilty of the relevant misconduct; and, if so,*

b. *Whether that belief was based on reasonable grounds; and*

c. *Whether that genuine belief on those reasonable grounds had been formed after having carried out a reasonable investigation*."

Wrongful Dismissal

18. The question the tribunal must consider is "was the employee guilty of conduct so serious as to amount to repudiate any breach of the contract of employment entitling the employer to summarily terminate the contract?"

19. Guidance is set out by the Court of Appeal in Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22

21. "Under the contract, the employer is entitled to dismiss summarily for gross misconduct. So when can misconduct properly be described as "gross"? In my view a useful starting point in answering that question in the context of this case is the judgment of Lord Jauncey acting as the Visitor to Westminster Abbey in Neary v Dean of Westminster [1999] IRLR 288 para. 22:

> *"Whether misconduct justifies summary dismissal of a servant is a question of fact. In Clouston and Co. Ltd v Corry [1906] AC 122, which concerned summary dismissal for drunkenness, Lord James of Hereford delivering the judgment of the Board said at p. 129:-*
>
> > *'Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.'*
>
> *His Lordship went on to observe that*
>
> > *'the question of whether the misconduct proved establishes the right to dismiss the servant must depend upon facts - and is a question of fact.' "*

22. The judge then considered and rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing:

> *"I am fortified in this view by the decision of the Court of Appeal in Sinclair v Neighbour [1967] 2 QB 279. Sellers LJ at p.287C said*
>
> > *'But whether it is to be described as dishonest misconduct or not, I do not think matters. Views might differ. It was sufficient for the employer if he could, in all the circumstances, regard what the manager did as being something which was seriously inconsistent - incompatible -*

with his duty as the manager in the business in which he was engaged.'

Davies LJ expressed views to similar effect at p.289 B

'The judge ought to have gone on to consider whether even if falling short of dishonesty the manager's conduct was nevertheless conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant such as would render the servant unfit for continuance in the master's employment and give the master the right to discharge him immediately.' "

23. *The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence*."

Decision

Unfair Dismissal

20. The respondent identifies the three reasons for dismissal set out in the outcome letter which were:

> "*refusing to obey a reasonable instruction in following company policy and procedures;*
>
> *repeatedly using company email with intention to offend;*
>
> *repeatedly using company email to mock, patronise and insult company colleagues*

21. The respondent also relied on failure to obey a reasonable instruction in following Company Policies and Procedures. This was related to the claimant not pursuing his complaints through a grievance process and continuing to email his complaints to the CEO and others he chose. By itself this is insufficiently serious. However this is inextricably linked to the issues with the emails we discuss elsewhere in this Decision.

22. As set out above the content of the claimant's emails is uncontested. In isolation the claimant's emails are not sufficiently serious to amount to gross misconduct however we have considered them as a whole and find that:

    a. They were over a period from September 2018 to May 2019;

    b. They were not one offs or isolated incidents;

    c. The emails were addressed to a range of employees from employee relations to senior employees including the CEO and General Counsel;

d. The emails to the CEO and most of the emails to the General Counsel were unsolicited by them. There communications with the CEO were entirely one sided on the part of the Claimant;

e. The words, tone and contents of the emails all combine to make them serious;

f. The emails made serious allegations against employee including the CEO and General Council about victimisation, discrimination, cover-ups, bullying and blackmail. All without detail or reasoning;

g. He persisted sending emails to whoever he chose rather than pursuing his complaints through the grievance process even when he had been told to follow the procedure;

h. He had been issued with a letter of concern which clearly set out what was expected of him and the potential implications if he continued. He continued with his conduct after this letter;

i. He continued with the same sort of emails until at least the end of May 2019

23. The other point relied on is "repeatedly using company email to mock, patronise and insult company colleagues". Again this is inextricably linked to the emails as a whole.

Did the respondent genuinely believe that the claimant had committed the misconduct?

24. The claimant asserts that the whole situation was concocted. The Claimant mentioned whistleblowing and discrimination but these allegations were unsubstantiated. The claimant said in evidence that Gareth Thomason was biased against him as he committed discriminated in 2014 however no other evidence has been provided about the 2014 situation or what it is Gareth is alleged to have done. The claimant was asked why, if he thought Gareth was biased or had acted in a discriminatory way had the claimant had asked for him to attend the investigation meeting with him and the claimant was unable to say. The Tribunal finds that the Claimant asking Gareth to be his companion undermine his (already vague) claim that Gareth acted in a discriminatory way. The Tribunal finds that the respondent did genuinely believe that he had committed the misconduct, the claimant's claims otherwise and extremely vague.

Was that belief based on reasonable grounds?

25. We conclude that the respondent's belief was based on reasonable grounds given our findings relating to the emails above. We found the respondent's evidence across the written documentation and witness evidence was consistent. Its position was supported by written documentation. At times the claimant was not credible, he professed to have a very clear memory about certain things and no recollection at all

about a whole range of other matters. He made vague assertions which when asked he could not explain or substantiate in anyway. He identified views (that are not reasonable and not commonly accepted) that he held particularly around emails being cut off or missing and how he was treated but he could not express any reason for these views that without stood scrutiny. We find that the documents available to the respondent support its belief and they are reasonable grounds.

Did the employer form that view having carried out a reasonable investigation?

26. We conclude that the investigation was reasonable. The issues were identified in writing to the claimant, he was provided with the documentation, he was invited to a meeting and after the investigation the matter proceeded to the disciplinary process. In the disciplinary process the claimant was told of the accusations against him, invited to a meeting to give his views, provided with the documentation and he had a right to appeal which he exercised. He was also notified of and given the option to be accompanied to the meetings.

27. As set out above we recognise that the claimant asserts that the process was unfair in various ways including about who was involved and the genuine nature of the process but we have rejected those assertions for the reasons set out above.

Was the decision to dismiss within the range of reasonable response?

28. We conclude that it was. We consider that a small number of the emails taken by themselves would not be within the reasonable range of responses however the emails must be considered in the wider context which we have identified above. In short, the number of emails, the senior individuals they were sent to, the content of the emails including their tone and language and their persistent nature all combine to establish that the claimant committed the 3 allegations of misconduct as alleged and that dismissal in these circumstances was within the range of reasonable responses. We note that Gareth Thomason also stated that he did not think that the claimant would stop his conduct. The letter of concern did not dissuade the claimant in anyway. This was a clear warning to the Claimant. The claimant recognised his behaviour could be interpreted as upsetting but he did not at any point say he would stop or demonstrate insight into why his conduct was unacceptable.

Was the Dismissal Procedurally fair?

29. We conclude that the dismissal was procedurally fair. The claimant was issued with the Letter of Concern which was like an informal warning. The claimant did not alter his behaviour. He was suspended and given a letter which informed him of the allegations against him. There was an investigation meeting to which he was invited, he was given the right to be accompanied. The process then moved on to the disciplinary process, against the Claimant was informed of the allegations against him, provided with the documentation, invited to a meeting at which he was allowed a companion and given a written outcome. He was given an appeal, he was

given notice of the meeting and allowed to attend with a companion and given a written outcome.

30. The claimant was not given an investigation report because one did not exist. He was given copies of the documents referred to in the disciplinary letter. There was no procedural unfairness in these actions.

Wrongful Dismissal

31. When considering wrongful dismissal the Tribunal must consider whether or not the claimant committed the conduct as alleged and was it gross misconduct.

32. We conclude that the claimant did commit the conduct, this is not disputed and is clear on the face of the documents.

33. The Tribunal finds that the conduct did amount to gross misconduct because it poisoned the relationship between the employer and employee. The claimant emailed a range of employees within the respondent including the CEO over a number of months which made serious allegations of cover-ups, blackmail, discrimination, whistleblowing which were unsubstantiated in any way. The tone and content of the repeated emails was unpleasant, insulting, unprofessional and mocking. The claimant ignored instructions to pursue his complaints through proper channels and instead chose to send his emails to whoever he thought appropriate. Despite being warned about his behaviour he continued with it which demonstrated that he had no regard whatsoever for the employer's standards of behaviour and had no intention to be bound by them. We find that all of the circumstances of the conduct combined demonstrate that the Claimant's behaviour was so grave and weighty that he had destroyed the relationship between him and his employer.

34. The claimant's claims are dismissed in their entirety.

Employment Judge Bartlett

Date: 13 June 2022

JUDGMENT SENT TO THE PARTIES ON

14 June 2022

FOR THE TRIBUNAL OFFICE