# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Brunsden

**Respondent:** Delice de France (UK) Ltd

**Heard at:** Watford (by CVP) **On:** 25 & 26 April 2022
21 July 2022

**Before:** Employment Judge Maxwell

**Appearances**
For the claimant: in person
For the respondent: Ms Stroud, Counsel

# REASONS

1. These reasons are provided pursuant to the Claimant's request.

**Preliminary**

Timetable

2. This matter had been listed for a 2-day hearing before a judge sitting alone. The judge originally listed to hear this case became unwell and the case was transferred, with the end result being a late start at 11.45am. I explained that in order for the claim to be determined within the time that remained it would be necessary to timetable the matter and, so as to ensure a level playing field, once agreed it would be necessary to stick to these timings. The following was agreed:

   2.1 Respondent's evidence 2 hour 15 minutes (2 hours cross-examination, the remainder for Tribunal questions and re-examination);

   2.2 Claimant's evidence 2 hour 15 minutes (2 hours cross-examination, the remainder for Tribunal questions and re-examination);

   2.3 Closing submissions 1 hour (half each);

   2.4 Deliberation 2 hours;

2.5 Remedy if appropriate (likely to be agreed).

Further Documents

3. The Claimant complained the Respondent was seeking to introduce further documents. Ms Stroud confirmed the Respondent had found two new documents, a job description and an email exchange. I noted that EJ Kurrein had adopted the Claimant's description of the Respondent's approach to the provision of documents when the matter appeared before him for final hearing two months ago and was then postponed, as a "shambles". I expressed surprise that the Respondent should, against that backdrop, find itself applying to admit further documents only on the morning of the postponed hearing.

4. I asked Ms Stroud why these documents were only disclosed today and she proceeded by seeking to explain their potential relevance. I pressed for an explanation of the timing and Ms Stroud was unable to give one.

5. The documents had not found there way to me and I asked whether they had been emailed to Tribunal or sent to the document upload centre ("DUC"). Ms Stroud did not know. I indicated that I would endeavour to locate the documents and consider whether they should be admitted into evidence during my pre-reading. Having heard the Claimant's objections (essentially that it was too late) I asked him to read these documents (circa 11 pages) so he would be prepared in case I decided to admit them.

6. After having adjourned the hearing, I caused a check to be made of the email inbox and did my own search on the DUC. Having found nothing on the DUC I waited for my clerk to revert with respect to email and when she did, nothing had been received there either. When the hearing resumed, I ruled against the admission of these documents because:

    6.1 despite the Respondent saying it had sent these to the Tribunal, nothing could be found;

    6.2 there was limited time, the matter having been referred to me part-way through the first morning of a two day hearing;

    6.3 we needed to commence the evidence in order to be able avoid another postponement or risk going part-heard;

    6.4 the Respondent had left it too late to seek to introduce new documents and had failed to ensure they were with the Tribunal in time for their admission to be considered before the evidence began to be heard;

    6.5 it was not in the interests of justice to admit the documents as this would necessitate additional delay whilst they were sent to the Tribunal and the Respondent's application to admit them then further considered.

Participation

7. When the hearing began Mr Jenvey joined this from his car, whilst he was driving. This was not an acceptable way to participate in a tribunal hearing and I

declined to allow it. I required Mr Jenvey and all participants, to join the hearing by CVP from a (static) private place. I reiterated the need to treat this process with the same seriousness and solemnity as would apply if we were assembled in a physical court of tribunal hearing room.

Claim

8. The Claimant presented his claim form on 26 April 2021. He brought claims of unfair and wrongful dismissal, although by reason of his length of employment only the latter claim was accepted. He claims notice pay. The Respondent denies that anything is due in this regard, contending he was summarily and lawfully dismissed for gross misconduct.

Evidence

9. I received an agreed bundle of relevant documents running to page 260.

10. I received witness evidence by way of written statements and oral evidence from:

    10.1 The Claimant;

    10.2 Ana Pleasants, a former employee of the Respondent;

    10.3 Adam Hodgetts, former Head of Finance;

    10.4 Jenny Bayliss, Sales Operation Director;

    10.5 Max Jenvey, Director for Insights and Strategy.

11. I also received a witness statement from Yana Velichkova, although she did not attend to give oral evidence.

12. I was satisfied that all witnesses sought to give honest and accurate evidence to the best of their recollections. There was, however, a tendency, in particular on the part of Mr Hodgetts and the Claimant, to say what they wanted to rather than answer the specific question asked. I had to intervene several times to point out:

    12.1 witnesses should focus on the specific question just asked and it was unhelpful to do otherwise;

    12.2 I was aware of the positions they adopted more generally and they did not need to keep trying to remind me of this.

**Facts**

Background

13. It was common ground that the Claimant was not accused of any fraudulent activity and no financial loss was suffered by the Respondent as a result of the matters alleged to comprise his gross misconduct.

14. The Respondent operates a chilled and frozen baked goods sales and distribution business. The Claimant, a qualified accountant, was employed from

10 June 2019, as Head of Reporting. He was provided with a company handbook, which included:

> **Gross Misconduct The following are examples of the most common types of gross misconduct that would normally result in summary dismissal (i.e. dismissal without notice and without pay in lieu of notice):**
>
> **• Serious breaches of, or failure to comply with, Delice De France policies and procedures relating to:**
>
> **• The handling of stock, cash, cheques and vouchers**
>
> **• The recording and/or administration of transactions, discounts, refunds, manual sales and similar matters**

15. From 1 July 2020, the Claimant became Head of Cash Flow Management. The Respondent had previously outsourced Accounts Payable and Accounts Received to a third party, Arytza, but had decided to bring this work back in-house. The Claimant was involved in setting up a new team for this purpose. He was involved in recruitment and training. The Claimant reported to Mr Hodgetts, the Head of Finance. Above Mr Hodgetts were Anthea Chia, Chief Finance Officer and Thierry Cacaly, Chief Executive Officer.

16. The Claimant's role was an important one within the business. Whilst he was not a strategic decision-maker, Head of Cash Flow Management was a senior position and especially important set against the pandemic and difficult trading period encountered by the Respondent. Whilst the Claimant denied the proposition when put, given his job title and various responsibilities it is clear that it was central to his role that he would focus on money coming in and going out, providing cashflow forecasts and providing accurate financial information to the key decision-makers.

17. In cross-examination, Ms Stroud put to the Claimant that where he approved the work of his line reports it was necessary for him to check this and ensure it was entirely accurate. This proposition appeared to involve an element of overstatement. The Claimant would not be able to satisfy himself the work undertaken by his juniors was correct in every detail, save unless he himself repeated the same exercise they had just carried out. That would involve an obvious duplication and require a considerable amount of the Claimant's time, when he had many other duties to attend to. There was no job description, written procedure, or other document to support such an absolutist position. I was not satisfied this was what the Respondent had expected of him at the time or could, objectively, have been understood as required. Instead I accept the Claimant's characterisation that he was required to undertake a "sense check" looking at amounts, totals and dates to ascertain whether, broadly, this was in keeping with what was expected. Of course, if there were known issues with particular accounts or amounts, these might call for more detailed scrutiny.

18. As set out above and acknowledged by the Claimant, this was a difficult trading period for the Respondent. Whilst it still had substantial funds in the bank, sales and income had diminished very considerably, along with the balance of its trading account.

Italia Coffee

19. Some of the Respondent's customers were given payment terms, which meant they could run up a debt with the respect to their purchases. The Respondent used a credit ratings service to assist with any decision in this regard. The Claimant did not dispute the account of Mr Hodgetts, which I accept, to the effect that the Claimant himself could authorise credit up to £2,000, Mr Hodgetts up to £5,000 and Ms Chia or Mr Cacaly above £5,000.

20. The mechanism by which decisions in this regard were implemented is that the Claimant completed a spreadsheet with the limits for various different customers and then sent this to Aryzta, who would then upload it to the Respondent's SAP accounting systems.

21. With respect to Italia Coffee, for a period of time this customer benefited from a £10,000 credit facility, whereas only £3,000 had been approved. The limit was set against a background in which the ratings service advised zero credit. It meant that any loss would be uninsured. Whilst the Claimant was not certain how this happened, he accepted it was most likely his "typo", in that he entered or failed to correct the figure of £10,000 on the schedule, when this should have been £3,000. I agree and accept this was most likely what happened. The credit limit was then, subsequently, further increased to £13,000. The Claimant said this was a further "typo", although it may have been made by the AR Manager. I am satisfied the most likely scenario is that the second error with respect to this credit limit came about because the original error was identified, along with the need to reduce the figure to £3,000, but this was then mistakenly implemented by adding £3,000, either by the Claimant executing this, or delegating it to someone below him and then not checking they had done this as intended.

Direct Debits

22. The Respondent receives many payments by way of direct debit mandates. Once again a spreadsheet in this regard is prepared by staff reporting to the Claimant and he is required to approve this.

23. On 25 December 2020, various payments totalling circa £100,000 were due to be received by the Respondent from its customers. Because this was Christmas day, the staff undertaking this work sought advice from the Claimant about how to proceed. He advised they should make the payment date 29 December 2020, as the 4 days from 25 to 28 December were either bank holidays, Saturday or Sunday, when the banks would be closed and no monies could be transferred.

24. One of the points taken by the Respondent about this step is that the Claimant failed to update the cashflow forecast. The Claimant's response to that was he did not need to as:

    24.1 bank balances would be frozen between 25 and 28 December 2020 and there was no cashflow;

    24.2 25 and 29 December fell in the same week and given the cashflow reporting process at the Respondent was undertaken on a weekly basis it made no difference.

25. These two factual propositions went unchallenged and I accept they are correct. Whilst it is right the Claimant did not make a specific report in this regard, for the reasons he gave there was nothing to report.

26. In evidence at the Tribunal, Mr Hodgetts suggested the correct response to this situation would have been to amend the direct debits to the day before and take payment early. The Claimant said this would contravene the customers terms of business. Whilst I do not have evidence before me to resolve this difference of opinion, it is clear the Respondent had no settled rule or procedure to the effect contended for by Mr Hodgetts and his suggestion is, therefore, an afterthought.

27. The direct debits also went through on 29 rather than 25 January 2021. This happened because when the spreadsheet was prepared, it did not occur to those undertaking the task to revise the direct debit payment dates back to those previously in place. Furthermore, when the Claimant came to review the spreadsheet, he did not think about the date change either

28. Whilst there was no written procedure in this regard, the Claimant did not suggest he had any general discretion to vary direct debit dates. Rather when to recover payment for outstanding invoices was a matter for decision-makers above him. Given the January direct debits were collected on the 29th by way of an oversight, it follows the Claimant had neither sought nor obtained approval for this step from his seniors.

29. The Respondent was engaged in a careful business exercise at this time, with the key decision-makers negotiating with creditors and debtors about money in and money out. Whilst it did not in fact do any damage to the trading position, a 4-day delay with respect to the receipt of circa £100,000 in January 2021, is a matter with which the Respondent could be legitimately concerned. The Claimant's role was to implement the decisions made by his seniors rather than make judgments or juggle the Company's finances himself.

Payments Out

30. The Respondent's process involved regular payment runs, twice a month. Whilst these were notionally due to take place on the 10th or 20th of the month, in practice the date was often varied, as a result of decisions made by Ms Chia or Mr Cacaly. Separately from the regular payment runs, individual manual payments could be made.

31. It was common ground between the parties that in order to make payments, the Claimant required authorisation from above. There was a small difference on who could give that authority. The Respondent said only Ms Chia or Mr Cacaly could do so. The Claimant agreed that was the position "99%" of the time, although he said Mr Hodgetts occasionally authorised small amounts. Given the Claimant does not rely on Mr Hodgetts as having approved any of the disputed payments, it is unnecessary for me to resolve that dispute, although it struck me as a realistic proposition that the Head of Finance might himself authorise a modest sum.

32. The bigger difference between the parties was over whether any authority for payments had to be in writing, as the Respondent contended, or might be given

verbally, which the Claimant said had been the position. I was struck by the absence of any written procedures in this regard. When I asked Mr Hodgetts about this, he said there was an email which referred to the Respondent adopting the same procedures as had been in place when Arytza carried out the functions. The difficulty with that evidence was the Respondent did not have copies of any Arytza policy documents or suggest these had been provided to the Claimant. The Claimant described his activities in building up an internal team to complete the work in his new role. I noted the lengthy email exchange with Mr Hodgetts in January 2021, in which the Claimant referred to his extensive workload and sought guidance about his role and the prioritisation of tasks. The Claimant said that the procedures were developing and Ms Chia or Mr Cacaly were changing these. The Claimant described attending meetings where payments were discussed between himself Ms Chia and Mr Cacaly with the latter making changes to the dates or amounts, which were then actioned by the Claimant based on that verbal instruction. The Claimant said that over time there was a move toward the greater use of written confirmations, which had been increased when people were not in the office because of covid and he would also try to get this to cover himself. Ms Stroud put to the Claimant that written authorisation was always necessary for auditing purposes. Whilst this might well have been good practice, there was little to show the Respondent had a clear policy in this regard which had been communicated to the Claimant. I accepted what the Claimant said about this, namely that whilst there was a preference for and trend toward the greater use of written authorisation, some approvals were given only orally at a meeting. Support for the Claimant's account can also be found in the interview conducted with Mr Cacaly (neither he nor Ms Chia gave evidence before me) which included:

> **JB In terms of the process, you started to outline, we make 2 payments a month, 10th and 20th, you get sent a file 2 days before the payment run, you go through the detail and identify what you want and don't want to pay, then AP do some work on the amount on what you've agreed?**
>
> **TC Correct, we have to carefully manage the cash flow through covid, we need to make sure we can pay salaries, in my mind the most important thing is to be able to pay salary, we have to follow this pattern of 10th and 20th regularly, otherwise we risk not having the cash, the cashflow is a sensitive matter through covid. We're 30 percent of where we were which affected cash, its been a thorough approach, we agreed looking at AP who we need to pay and how much money we have, there's a payment in euros and sterling, we come up to the total sum, see how much we have available and then make the payment accordingly. If it's a valid invoice, it goes to payment.**
>
> **JB Okay, so the conversation on these 2 pay runs take place between who?**
>
> **TC Adam, Anthea and myself, sometimes we're not all available but lately Adam is completely involved and Anthea will be there too**
>
> **JB And what part does Keith play in that? Is he involved?**
>
> **TC Yes completely, he is the manager or AR and AP so he knows how much money we need to pay and how much we've been collecting. He's completely involved**

**JB Okay so the approvals for what's to be paid, is that done by email or verbal?**

**TC What we do is we meet and then we go through the ledger and then we agree verbally what needs to be paid, we will come to a total of sterling or euros and then it goes through the process of being paid, Keith will send us a total and then we will approve**

**JB On email?**

**TC Yes, has it happened every time? I do not think so. But mostly yes**

33. Separately, the Claimant argued that if there was any fault in not obtaining written approval for money going out, this should apply to Mr Hodgetts as much as him, since for the payment to be made both the Claimant and Mr Hodgetts had to sign-off on this. Whilst this point has some superficial attraction, a core function of the Claimant's role was to ensure that cash only went out at times and in amounts which had been approved and the weight of this responsibility would, as a result, fall upon him.

Southall

34. A payment of £264,000 was made on 30 December 2020, for rent on the Respondent's Southall premises. During his disciplinary hearing, the Claimant referred to an email he had sent to Mr Cacaly on 22 December 2020, which identified this payment as being due. The text of an email of that date between the two of them provides:

**Subject: FW: Payment - Reminder**

**Hi Thierry,**

**No payment plan.**

**Invoices held up due to being sent in by post (not received) and not having the correct PO number.**

**All posted now and ready to pay, £160,223.75 now due**

**Other payments to pay:**

**Southall Rent £264,678**

**Inter County £310.51 ((Nick Bignall Utilities)**

**Rest to go in payrun in early Jan-21.**

35. At the disciplinary, the Claimant said that his email conveyed that the payments referred to, including for Southall rent, were proposed to go out in the next couple of days. The Claimant also said:

**KB Yes we'd spoken about it in a meeting also**

> **JB So to confirm, in regards The southall rent payment of 264 thousand pounds, there was an email exchange between you and Thierry on the 22nd December where he confirmed that payment?**
>
> **KB He was aware of it, I wouldn't say he confirmed it, but he was aware as we discussed it**

36. In his appeal submission the Claimant said more about a discussion with Mr Cacaly:

> **Email 22-Dec-20 14.52 KB to TC, stating other payments due including Southall rent £264,678, this was then verbally approved between Keith/Thierry on the payrun meeting 23rd December.**
>
> **Anthea email ll-Jan-2117.00 (to KB/AH and cc TC/Hannan) aware of the Southall rent payment, didn't raise an issue with it being paid implying that she was very aware of the payment and at the time saw no problem with it.**
>
> **The quarter Southall rent payment is a business critical payment to be made on time as the case with all rent payments, therefore the company would always expect to make these payments on time which is what was done.**

37. Ms Stroud put to the Claimant that Mr Cacaly would not have approved this payment because he had agreed with the landlord to defer payment from December until January. She referred to the note of Mr Cacaly's interview:

> **JB Did you authorise for that to be made?**
>
> **TC I don't think so, the rental to give detail - our landlord has been quite generous as covid hit, we tried to negotiate with them and we were able to pay them at the right time for us, it's a large amount 200+ thousand pounds, so they've been nice to accept payment later, in a nutshell if a payment was due in December we'd pay in January and they would be very understanding**

38. Doing my best with the evidence, it seems to me likely that the Claimant believed Mr Cacaly was content for him to make the rent payment and not that the latter had provided an express approval, either verbally or in writing. This is consistent with the Claimant's account at the disciplinary when he said:

> **JB So to confirm, in regards The southall rent payment of 264 thousand pounds, there was an email exchange between you and Thierry on the 22nd December where he confirmed that payment?**
>
> **KB He was aware of it, I wouldn't say he confirmed it, but he was aware as we discussed it KB He was aware of it, I wouldn't say he confirmed it, but he was aware as we discussed it JB So when you say he was aware but not confirmed, so he knew but not the date?**

If the Claimant had recalled a positive approval, he would have spoken of this at the disciplinary hearing, as Ms Stroud put to him. I do not accept the Claimant would have omitted this vital details because, as he suggested before me, he was "waiting" to be asked the correct question; this was not consistent with the

Claimant's approach to answering questions; several times, I had to remind the Claimant to answer the question he was being asked rather than simply saying what he wanted to irrespective of whether it addressed the question.

Aryzta

39. On 23 December 2020, a payment of £500,000 was made to Aryzta. In cross-examination, Ms Stroud took the Claimant to an email chain of 18 December 2020 passing between him, Ms Chia, Mr Cacaly and Mr Hodgetts, titled "Aryzta Payment run approved". This included a table of sums due be paid to Aryzta. This appears to record permission being given for payments to be made to Aryzta. Ms Stroud then suggested the Claimant was given an instruction not to make any payment before 31 December 2020. It was not immediately apparent to me how the email was to be read in this way and I asked her to explain. It then became apparent that Ms Stroud was not relying upon the email as speaking for itself, rather she was putting what Ms Chia said when interviewed:

> **JB So you're clear, payment was to be made on the 31st, could there have been confusion that that's the date they should have received the payment?**
>
> **AC I would say that's its clear on the email that it says its to be paid on the 31st, that was also clear in the meeting**

40. The Claimant's recollection was that Ms Chia confirmed the payment, which was by then 3 months overdue, should be made. He denied recalling he was told the payment should be delayed until the 31st and observed that, given the email was not as clear as Ms Chia seemed to think, then perhaps the same is true about her recollection of their discussion. This latter point appeared to have some force. I did not hear any evidence from Ms Chia. Ms Stroud did not suggest any basis upon which this meaning could be taken from the email. In these circumstances, I am satisfied the Claimant was given written permission to go ahead and make the payment by this email exchange and the date was not qualified by Ms Chia orally. If there was any misunderstanding, then it was on the part of Ms Chia, who did not convey an instruction to delay.

Lineage

41. On 22 December 2020, £111,000 was paid to Lineage. There was no evidence of any written approval of this payment. The Claimant said there may have been such an email and complained it was unfair he was not allowed to explore his own email inbox to find evidence in this regard. He doubted the thoroughness or fairness of the Respondent's search. The Claimant was not, therefore, making a positive assertion there was an email in this regard, he was merely advancing that as a possibility. There was no evidence before me to justify a conclusion that the Respondent had investigated the email traffic and / or made disclosure in bad faith. Whilst I did have some concern about the thoroughness of this exercise, noting the very late disclosure and application to admit further evidence on the first day of this final hearing, I was not satisfied on balance that it was likely that Ms Chia or Mr Cacaly had sent email approval for the Lineage payment.

42. The Claimant said there was email traffic with another director, Martin Sturges, in which he referred to making this payment and although I was not referred to this, Ms Stroud did not say the Claimant was wrong about this. She did, however, put to the Claimant that he required permission from Ms Chia or Mr Cacaly, which he agreed and said he had received, verbally if not in writing.

43. I found this point a difficult one. There was nothing in writing and the Claimant's position was somewhat vague. Nonetheless, on balance, it is likely the Claimant did have at least verbal approval from Ms Chia or Mr Cacaly. Whilst Ms Stroud in cross-examination put to the Claimant that he was taking it upon himself to decide whether and when to make payments, this struck me as most unlikely. The Claimant was very clear in his evidence that he was a processor and not a decision-maker. I doubt the Claimant would have signed-off on a payment of more than £100,000 save unless he had been given at least oral approval to do so.

44. Whilst I can understand the Respondent's preference for written approval and an audit trail, it is apparent from the evidence of the Claimant and Mr Cacaly's note of interview that such an approach was not universally applied at this time. The benefits of a written procedure and consistent approach are obvious but were not then in place.

DeliFrance

45. On a date which is not clear but prior to late January or early February 2021, a payment was made to DeliFrance of £8,056.94. The usual practice was followed here of a spreadsheet of proposed payments being prepared. The unchallenged evidence of Mr Hodgetts, which I accept, is that Mr Cacaly "de-selected" this payment, which is to say he expressly did not approve it.

46. The reason why this payment went out is that notwithstanding Mr Cacaly's decision, when the final instruction to the bank was prepared by one of the Claimant's line reports, in error the payment to DeliFrance was still included. Both the Claimant and Mr Hodgetts signed-off on this without spotting the error.

47. As set out above, the role of the Claimant at this latter stage was not to repeat entirely the work undertaken by his subordinate. The Claimant's job at this stage in the process was in the nature of a sense check, to consider whether the payments out, the recipients, amounts and dates, appeared broadly correct. He was not expected to revisit each individual payment. That said, given Mr Cacaly had expressly declined this payment, the Claimant should have checked to ensure this was reflected in the final instruction, which he clearly did not do and was at fault. Whilst the Claimant said Mr Hodgetts would be equally to blame in this regard, for the reasons set out earlier in this decision the weight of responsibility would fall more heavily on the Claimant.

FLT Meeting

48. On 2 February 2021, there was a meeting of the Finance Leadership Team. The discussion on this occasion touched on some of the matters set out above. Mr Hodgetts took exception to some of the Claimant's remarks, which he felt were unduly critical of the Board and members of the Accounts Payable team. Whilst

Mr Hogdetts criticised the Claimants' conduct on this occasion, it was not something Ms Stroud put in cross-examination or relied upon to justify his summary dismissal.

Suspension

49. As at 4 February 2021, Mr Hodgetts believed he had identified serious issues with the way in which the Claimant was carrying out his role. He suspended Claimant from work whilst he investigated these matters. The suspension was confirmed by a letter of the same date:

> **I write to confirm that you have been suspended on contractual pay to allow an investigation to take place following the allegations send to you on email 02/02/2021 as shown below.**
>
> > **1. It is alleged that you changed December DD collections from 25th Dec to 29th Dec without updating cashflow or informing myself or Anthea**
> >
> > **2. It is alleged that there are a number of payments with no evidence of approval**
> >
> > **3. It is alleged that your behaviour was unacceptable and caused concern during our the ?? meeting on Date/time**
>
> **Following further investigation, I also will investigate further allegations, as summarised below:**
>
> > **4. It is alleged that you changed the credit limited for Italia Coffee without authorisation**
> >
> > **5. It is alleged that you did not get authorisation for payments — DeliFrance**
> >
> > **6. It is alleged that your behaviour was unacceptable and your failure to follow reasonable management requests**

Investigation

50. The Claimant met with Mr Hodgetts for an investigatory meeting. This was conducted over three days on 10, 11 and 15 January 2021. The various disputed transactions were explored at length. The Claimant felt he was on the back foot, as he did not have access to his email inbox where he there would be evidence to support his position. In addition to answering questions, the Claimant sought to ask question of Mr Hodgetts, which the latter declined to respond to. Both thought they were in the right and their exchange was a robust one. This was also reflected to some extent when the Claimant cross-examined Mr Hodgetts at the Tribunal, each having a tendency to repeat their own narrative and ignore what the other was saying.

Disciplinary

51. The Claimant was required to attend a disciplinary hearing. The invitation letter of 26 February 2021 included various attachments comprising the evidence against him and provided:

> **The matters of concern are as follows: Taking part in activities which cause the company to lose faith in your integrity namely, a blatant breach of company rules and procedures, further particulars being that:-**
>
> **• It is alleged that you changed December Direct Debits collections from 25th December 2020 to 29th December 2020, and failed to correct this in January without authorisation from Head Of Finance, CFO or CEO. Impacting the businesses cashflow.**
>
> **• It is alleged that there are several significant payments with no evidence of approval, for example but not limited to Southall Rental Payment, E264K, Deferred Purchase Payment for Delice de France for Arytza of £500K, Lineage/Coleshill Rental Payment of £110K**
>
> **• It is alleged that you did not get authorisation for payment to DeliFrance £8,056.94 payment made 05/01/21**
>
> **• It is alleged that you received authorisation for Italia Coffee for a credit limit of £3k but instead issued a credit limit of £10K own risk, which is outside of your authorization level.**

The letter also indicated that matters the Claimant had complained about (essentially a grievance about the disciplinary) would also be considered.

52. The Claimant's disciplinary hearing took place on 3 March 2021, with Ms Bayliss, Sales Operation Director, as decision-maker. The Claimant was accompanied by a work colleague, although that person became unwell and the hearing could not continue. The disciplinary resumed on 5 March 2021. The Claimant maintained his stance. Whilst he admitted some errors, he also said others were at fault (staff below him and Mr Hodgetts). As Ms Stroud suggested to him in the Tribunal, the Claimant showed no remorse. This was partly because he thought it might be used against him but mainly because he believed he was in the right. Following the hearing Ms Bayliss carried out interviews with various other members of staff. She did not revert to the Claimant for his comments on this and whilst such a failing might lead to an unfair dismissal, it is not relevant to my determination of this breach of contract claim.

53. Ms Bayliss met with the Claimant on 10 March 2021 to give her decision. She found him guilty of gross misconduct and decided to dismiss without notice. The decision was confirmed in a letter of the same date, which included:

> **At the hearing your explanations were**
>
> > **That the 25th December is Christmas Day and therefore it is not possible to take collections on that day. When asked if you had changed the date you said no, it couldn't be done and that AR put the dates on and naturally if it is a bank holiday then collection is on the next working day, in this case 29th December, you therefore processed it on the date you were given by AR, you trusted that they had given you the correct date. You stated that you were amazed at the allegation. You stated that Sheila and Supreet prepare the file and pass to you for processing. You don't understand why you are in trouble for something AR did. In terms of January, you confirmed this was the first month Supreet had prepared the process on her own and that the date could have**

**been left as the 29th and not changed back to 25th , you asked where your ownership ends. You stated that at the time there was still 1.7 million available in the bank so there was no risk to the business.**

**In terms of the significant payments without approval:**

> **For Southall rent you stated that there was an email exchange between yourself and Thierry on 22nd December to confirm the payment was £264K and then you said he was aware of it but couldn't say that he had confirmed it. You also stated that Anthea was aware but confirmed that you did not put her on copy of the email you sent Thierry on the 22nd December. You feel that they should have thanked you for making the payment and that if you hadn't made the payment you would have been in the wrong. You confirmed that this payment was not made through the regular pay run and was thus a manual payment.**
>
> **For Lineage, you stated that apparently you had made the payment without approval, this payment was for £110K. You stated there was an email from Anthea on 11th December confirming it looks OK and that you took that as confirmation that she was OK for it to be paid. You stated that Martin Sturgess, another board member, wanted it paid as he was doing some negotiation with Lineage & that he was chasing for payment & there are a number of emails to that affect. You said that there was an e- mail from Adam on 22nd December saying that there needed to be a manual payment so they all knew about this, you feel there is another agenda here and it stressing you out.**
>
> **In terms of Aryzta, originally this allegation was about not having approval then it changed to it being paid early. This payment was long overdue and at the time the company had over 7 million in the bank. You paid it on 23rd as you stated that Anthea's intention was for the £500k to have cleared the bank by the 31st December. You said that you had e-mail approval to make the payment from Anthea on 18th December. You said Adam was aware of this on 4th January when you sent him an email with the holding balance and confirming that payment had gone out.**

**In terms of the DeliFrance payment of £8056.94, you talked me through the approval process and stated that Thierry and yourself go through what's to be paid and sometimes Anthea & Adam are involved. You said that for DeliFrance Melita had prepared that file under time pressure, she sent the file to you and Adam for checking. You are not sure who noticed that £12k had been paid instead of the £4k that Thierry understood would be paid. You feel that you and Adam had dual accountability so don't understand why this allegation is just against you and that Melita has confirmed this was her error. It just meant that £8k was paid that Thierry didn't want paying and that from your perspective nothing was lost by the business.**

**• In terms of the Italia coffee credit limit of £3k, you stated that you haven't been able to look at your e-mails so you were not sure what the limit was . It was a hard account to set up, all you've done wrong was set up the credit limit wrong and left it at 10k. Everyone had the opportunity to see this and it wasn't picked up by anyone. What has the business actually lost. You then talked about how the credit risk job was 80% FTE when the role was conducted in Ireland and you are doing it in 10% of your time . You agreed it was your error but that the business didn't lose anything.**

**Following the meeting, further investigations have been carried out which include:**

**• Investigation meetings with Thierry Cacaly, Anthea Chia, Adam Hodgetts, Sheila Patel, Supreet Kaur and Lisa Meyer**

**I considered your explanations to be unsatisfactory because:-**

**• Sheila and Supreet both confirmed that as they were unsure of what date to raise the December monthly DDs they discussed it with you when you were all present in Southall you verbally told them to use the date of the 29th for the December collections. In terms of ownership, your role carries a level of accountability whereby it is responsible for this process, furthermore both Sheila and Supreet are both fairly new to the business and had only recently taken on responsibility for preparing DD collections so there is an expectation that your role in the process is more than to merely 'rubberstamp' others work.**

**• In terms of the significant payments with no evidence of approval:**

**Southall. Anthea confirmed that she did not give authorisation for the payment to be made from the bank. The email you sent to Thierry on the 22nd December does show the Southall rent as a payment to be made but there is no email authorisation from Thierry for this payment. Adam confirmed that 2 payments of £132k were made by you on Bankline on the 24th December but has not seen a SAP approval email. Nor has Adam seen email approval from Thierry or Anthea and has asked you on numerous occasions to provide those authorisation emails which you have not done.**

**Aryzta. 2 payments of £250K were made on Bankline on the 21st December by you. All email chains clearly show the £500K as still being owed as at the 31st December. You have not been able to provide any evidence to support that payment on any date had been approved.**

**Lineage. £110K payment was made on Bankline on 18th December by you. An email was sent by you on the 22nd December to Martin Sturgess confirming payment had been made & cleared. On that same email trail you have written to Melita on the 18th December at 16:45 to say Lineage payment was authorised. There is no attachment on this**

> **email trail with approval. In additional Thierry, Anthea and Adam have no email evidence to support that authorisation was given.**
>
> **DeliFrance. You confirmed to Anthea & Adam by email on the 13th January at 13:23 that the payment was made without sign off.**
>
> **Italia coffee credit limit. All paperwork (emails, own risk) confirm that the own risk approved by Thierry was for £3k. You agreed during our meeting that you had made an error. As part of the investigation conducted by Adam he took a statement from Nick Wilkes who confirmed that you contacted Nick to say it was at his request the credit limit had been placed at £10K.**
>
> **Nick having initiated the own risk requesting the £3k and having had significant dealings with the customer is clear that at no point did he request a £10k limit to be applied. Only Thierry and Anthea have the authority for own risks to be applied at any value.**
>
> **[…]**
>
> **Furthermore, given your role as Head of Cash Flow Management, you were very clear on the need to manage cashflow closely, your actions left the company in a vulnerable position, throughout the process you have shown little remorse for your actions and have been keen to place blame on newer and more junior colleagues within your team demonstrating a lack of accountability in such a senior position.**
>
> **Having carefully reviewed the circumstances and considered your responses, I have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. The appropriate sanction to this breach is summary dismissal. I have referred to our standard disciplinary procedure when making this decision, which does not permit recourse to a lesser disciplinary sanction.**
>
> **You are therefore dismissed with immediate effect. You are not entitled to notice or pay in lieu of notice.**

54. The Claimant appealed against his dismissal. Mr Jenvey did not uphold this.

Good Faith

55. In his witness statement, the Claimant suggested that his dismissal was procured by Ms Chia, who had decided that he was surplus to requirements and furthermore, the Respondent had sought to build a disciplinary case to avoid making a redundancy payment. He did not put this allegation to Mr Hodgetts who was the investigator, Ms Bayliss, who decided to dismiss or Mr Jenvey who rejected his appeal and I accept that all three were acting in good faith, for the reasons they gave in evidence.

## Law

56. Guidance on the test for gross misconduct was provided in **Neary v Dean of Westminster [1999] IRLR 288**, per Lord Jauncey:

> **What degree of misconduct justifies summary dismissal? I have already referred to the statement by Lord James of Hereford in Clouston & Co Ltd. v Corry. That case was applied in Laws v London Chronicle (Indicator Newspa- pers) Ltd [1959] 1 WLR 698, where Lord Evershed MR, at p.700, said: 'It follows that the question must be - if summary dismissal is claimed to be justified - whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.' In Sinclair v Neighbour, Sellers LJ, at p.287F, said: 'The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way - incompatible - with the employment in which he had been engaged as a manager.' Sachs LJ referred to the 'well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them'. In Lewis v Motorworld Garages Ltd [1985] IRLR 465, Glidewell LJ, at 469, 38, stated the question as whether the conduct of the employer 'constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment . . . and claiming that he had been dismissed.' This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.**

## Conclusion

57. With respect to Italia Coffee, the Claimant made a mistake. He entered the wrong credit limit, giving the customer a facility of £10,000 and then £13,000, when only £3,000 had been authorised. Whilst the Claimant is correct in saying that he is "human" and "everyone makes mistakes" it does not follow there is no fault or blame. Similarly whilst the Claimant says no loss was suffered, it does not follow there was no wrong done. Extending credit is an exercise in balancing risk, the prospect of more orders as against the risk that bills might go unpaid. The Respondent had good reason to keep the limit here at a low level, give their credit ratings provider had advised a zero limit and any loss would, therefore, be uninsured. The Claimant's defence to this allegation was also unattractive. Beyond a lack of remorse, he contended the Respondent should be grateful to him because a higher credit limit would encourage the customer to spend more. This is a poor argument. The Respondent was entitled to balance risks and had a clear procedure for doing so. That no loss was suffered in this instance is fortuitous but scarcely demands thanks for person who's error breached the procedure in place.

58. With respect to the direct debits, I am not satisfied the Claimant did anything wrong in December 2020. Whilst Ms Bayliss appears to have alighted upon the difference between the Claimant and his subordinates as to who made the

relevant decision, no substantive fault in this has been shown. There is no evidence of the Respondent having a procedure or rule that required direct debits to be deducted early if the due date was a non-banking day. The 29th was the first day after the 25th when the payment could be taken. There could be no change in the bank balance between these dates and, as two days fell in the same week there was no need to update the cash flow forecast. The same cannot, however, be said for January 2021. The direct debit collection dates having been amended solely because of the coincidence on non-banking days, these would have been expected to revert to the original dates in January. Furthermore, the Claimant having made the relevant decision in December then he would or should have been alert to the need to ensure this was corrected back in January. Given a spreadsheet prepared by those reporting to him, this is an instance when he would be required to scrutinise these particular transactions because of his specific knowledge of them. He was at fault in this regard, in failing to check or amend the dates. Whilst the Claimant's point about this collection delay not preventing any payments out from being made is relevant to the seriousness of this default, it does not provide a complete answer. A careful balancing act was underway in terms of money in and money out, which the Claimant was aware of even if he was not the decision-maker, by virtue of his regular meetings with Ms Chia or Mr Cacaly, in which decisions would be made about which payments to make, when and in what amount. The Claimant's error delayed the receipt of funds.

59. As far as the Southall rent payment is concerned, the position is somewhat ambiguous. The Claimant believed that Mr Cacaly was content for him to make the rent payment. He had reasonable grounds for this belief, as he had told Mr Cacaly about the payment and it was referred to in email traffic. Mr Cacaly had not, however, provided an express approval, whether orally or in writing. Whilst there was a dispute about the terms of the Respondent's procedures, there being no written document in this regard, it was common ground that an approval was required. To that extent, the Claimant acted in breach of the procedure, albeit he was making a payment which he believed Mr Cacaly wished to be paid. He was not, as Ms Stroud suggested, simply deciding to exercise his own discretion. There is fault on the Claimant's part because an approval was required, albeit there is mitigation in this regard because he had reasonable grounds to believe he was doing what his senior wished.

60. As far as Aryzta is concerned, the Claimant had written approval for this payment and there was no fault.

61. As far as Lineage is concerned, the Claimant had at least oral approval and there was no fault.

62. As far as DeliFrance is concerned, the Claimant was at fault. Given Mr Cacaly had expressly declined this payment, he should have checked this on the spreadsheet and did not do so.

63. Drawing these matters together, the Claimant was at fault to the following extent:

    63.1 by mistake, he gave Italia Coffee a credit facility of £10,000 and then £13,000 when this should have been limited to £3,000 (albeit the customer did not default before this was corrected);

63.2 by mistake, he failed to amend the collection date of circa £100,000 in direct debits from 29 to 25 January 2021;

63.3 he permitted a rent payment of £500,000 to be made on 23 December 2021 (when it would otherwise not have been paid before 31 December 2021) without express approval, albeit where he had reasonable grounds to believe Mr Cacaly was content with this;

63.4 by mistake, he permitted a payment of £8.056.94 to be made to DeliFrance, without any approval (albeit with respect to an invoice which was due).

64. The question then is whether, objectively, that satisfies the tests expounded in **Neary** such that the Respondent was entitled to summarily dismiss. The first, second and fourth matters are slips. Matters which should have been picked up and corrected, which were not. The third was in the nature of a technical breach, whilst there was not strict compliance with the approval procedure (which could be verbal or on writing) the Claimant came as close to this as could be, without actual compliance, having a reasonable belief Mr Cacaly was content for the payment to be made. There was not in this, or in any of the other matters, an intention by the Claimant to exercise his own discretion or become the decision-maker. I am not satisfied that by these defaults, the Claimant was shown to have disregarded the essential conditions of his contract of service. Whilst conduct of this sort would, if prolonged, be inconsistent in a grave way or incompatible with the Claimant's employment, even Ms Stroud accepted it was a question of degree and one such default may not suffice. I am not satisfied that these matters taken together reached that threshold. For the same reasons, I am not satisfied that, objectively, this conduct would tend undermine trust and confidence.

65. The Claimant's response to these allegations domestically was robust and in some respects unattractive. If this had been a case where, objectively, the Claimant's default had brought him to the brink of undermining trust and confidence, then a failure to recognise the same might take him over the edge. An employer cannot have confidence that such errors will not be repeated where the employee sees no fault. That was not, however, the case here. The Claimant's conduct was not so grave. Trust and confidence was not very close to be undermined. Furthermore, the Respondent pursued various matters which were not, objectively, well-founded and a defensive reaction on the Claimant's part was, therefore, understandable to some extent.

**Remedy**

66. On the last occasion, Ms Stroud told me that remedy was likely to be agreed, subject to a finding by the Tribunal question of liability. When I asked her whether this had been agreed, she began to make representations about what the correct figure should be. I pointed out that my question had been whether the figure was agreed, not what her argument on it was. Ms Stroud then sought to ask the Claimant a question about this. From this I deduced that no agreement had been reached and the Respondent had not sought to agree this with the Claimant before the hearing. I reminded her that this did not appear to be first occasion when the Respondent's preparation was lacking. I also pointed out that

the order I had made for the Respondent to prepare a bundle of documents in connection with the Claimant's preparation time order application, had not been complied with. Instead the Respondent had sent a series of emails with various separate attachments, which I had then spent time compiling into a bundle that proved to be incomplete. All of this tended to waste of judicial resources.

67. Whilst Ms Stroud disputed the Claimant's figure, on the basis he sought gross pay. I asked what she said the correct figure was and she could not offer one. She then asked for an adjournment in which to take instructions from the Respondent. Given the Respondent had several months in which to come up with a figure and time was pressing (there was still the Claimant's preparation time order to deal with) I did not grant an adjournment, instead I retired to consider my decision.

68. When I returned to give judgment on remedy, Ms Stroud sought to make further representations on the amount. I declined to reopen the argument on this point and informed the parties of my decision on remedy.

69. The Respondent is correct about the basis assessment. Damages for wrongful dismissal are calculated on the basis of net rather than gross pay. In the absence of any payslip evidence or calculation from the parties, I used the Government's online tax calculator. Based on monthly gross pay of £6,250, in the tax year 2020 / 2021 this gave a net figure of £4,345, which for 3 months totalled £13,035.

EJ Maxwell

Date: 9 September 2022

Sent to the parties on:

22/9/2022

For the Tribunal Office:

N Gotecha