EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Roe	v	Swift Scaffold Partners LLP

Heard at: Nottingham **On:** 9 June 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Mr I Dean (lay representative)
For the respondent: Mr G Bartlett (Senior Partner)

JUDGMENT

1. The claimant's complaint of unfair dismissal succeeds - he was unfairly dismissed due to the respondent's use of an unfair procedure.

2. The claimant engaged in culpable or blameworthy conduct leading to his dismissal and it is considered just and equitable to reduce his basic award to nil as a consequence.

3. The claimant's compensatory award is reduced to nil to reflect the 100% chance he would have been dismissed in any event had a fair procedure been followed.

4. The claimant's claim for unlawful deduction from wages is dismissed because the sums claimed were not properly payable to him.

5. There is no award for injury to feelings because there is no jurisdiction to make such an award under the claims brought.

WRITTEN REASONS

Introduction

1. By a claim form received on 27 November 2020, the claimant brought claims for unfair dismissal, failure to make payment of sums due under his employment, and injury to feelings brought about by the respondent's alleged treatment of him. He says he was dismissed for no fair reason and that the process used was unfair. In his view, he was dismissed because he raised legitimate questions about his and the respondent's tax arrangements. He alleged that he was supposed to receive furlough pay or pay to cover the period when sites were closed due to Covid-19.

2. In its response, the respondent asserted that the claimant was not an employee or worker of the respondent, but a member of the respondent (which operated as a limited liability partnership). It says that, because the claimant was an LLP member, no furlough was claimable or payable to the him during the period the sites were closed and that the claimant did not receive his profit share during the period of business closure.

3. The claimant's employment status was considered by Employment Judge Blackwell at a two day open preliminary hearing on 28 October and 1 November 2021. By a reserved judgment dated 25 November 2021, Employment Judge Blackwell determined that the claimant was both an employee and worker of the respondent from his engagement on 3 April 2018 to his termination on 7 August 2020. That determination and reasons are publicly available, but essentially the tribunal found that the LLP mechanism and documentation used by the respondent masked the true nature of the relationship between the parties. The respondent accepted that judgment and this hearing proceeded on the basis it was bound by the preliminary determination without any problems.

4. Employment Judge Blackwell also remarked that the parties were uncooperative with each other, and that this had prolonged proceedings. I encountered the same issue in terms of the full merits hearing. The parties had not cooperated to produce a trial bundle, and it was clear that directions had not been complied with and there was a long delay before the hearing could begin. Ultimately, we adopted the same bundle of documents as had been available to Employment Judge Blackwell having identified that all of the relevant documentation was contained within it. We also had reference to a smaller bundle of documents prepared by the respondent, which included items it said had been paid to the claimant during the period of payment claimed.

5. The claimant was represented by Mr I Dean, a lay representative, and gave sworn evidence in support of his own case. The respondent was represented by its Senior Partner, Mr G Bartlett, who gave sworn evidence in support of the respondent's case.

Preliminary matters

6. There had been heated and withering correspondence between the parties about preparation of the trial bundle. The respondent had not prepared a trial bundle as ordered even after the intervention of the Employment Tribunal which provided clarity and directions in the weeks leading up to the hearing. Mr Bartlett had produced a smaller bundle containing some of the previous bundle documents and also some written argument. Mr Dean suggested that the previous bundle from the open

preliminary hearing could be adopted because it contained all of the core documents from the time period in dispute. Mr Bartlett did not resist this suggestion once I explained the importance and relevance of some of the documents omitted from the bundle he had prepared.

7. In the written argument prepared for the hearing, Mr Bartlett queried whether the tribunal had jurisdiction to hear the claim because it appeared to have been presented out of time. Mr Dean averred that the claimant had at all times followed the guidance given by ACAS. The claimant's effective date of termination was 7 August 2020. The parties entered ACAS early conciliation on 15 October 2020 and exited it on 30 October 2020. The claim form was received on 27 November 2020 and therefore within the extended period allowed following exit from ACAS early conciliation. The claim form was submitted within time and I ruled that the tribunal does have jurisdiction to hear the claim.

8. The claimant had advanced a claim for compensation as a result of injury to feelings. However, he had not made any claim of a type which would allow such a remedy to be awarded and so the claim was not advanced in evidence at the final hearing.

Witness evidence at the hearing

9. I was presented with a number of witness statements by the parties, although as outlined above only Mr Roe and Mr Bartlett gave oral evidence which could be tested. For the claimant, I have considered witness statements from:-

    9.1. Philip Faulconbridge, who offered evidence about what the respondent knew of matters relating to the claimant's home life;

    9.2. The claimant; and

    9.3. Iain Dean, whose witness statement gave a narrative of the events in question from the point of view of the claimant's adviser, and ought more properly be considered a skeleton argument.

10. For the respondent, I have considered witness statements from:-

    10.1. Caroline Cox, Associate HR Consultant for Pure HR, who offered evidence about her management of the claimant's dismissal;

    10.2. Terence Gormley, Designated Member at of the respondent;

    10.3. First witness statement Guy Bartlett, which offered evidence about the claimant's engagement with the respondent; and

    10.4. Second witness statement of Guy Bartlett, which offered evidence about the claimant's rate of pay and what his salary calculation should be seeing as he is now to be treated as an employee.

Issues to be determined

11. The respondent asserts that the claimant was dismissed for a potentially fair reason and relied on that reason being *"some other substantial reason of a kind such as to*

justify the dismissal of an employee holding the position which the employee held" as outlined by *section 98(1)(b) Employment Rights Act 1996*. Specifically, the respondent says that the claimant's dismissal was justified because his conduct on client sites resulted in enough sites asking him not to attend that it became unviable for the claimant to remain employed. The claimant disputed this reason and asserted that he had been dismissed for an unfair reason in that he had sought clarity about tax arrangements.

12. The issues to be determined were outlined as follows:

12.1. Unfair dismissal –

12.1.1. What was the reason for the claimant's dismissal?

12.1.2. Was the claimant unfairly dismissed contrary to s.98(4) Employment Rights Act 1996?

12.1.3. Was the dismissal unfair in all the circumstances?

12.1.4. Did the respondent fail to follow a fair procedure?

12.1.5. Would the claimant have been dismissed in any event?

12.1.6. Did the claimant commit any culpable or blameworthy conduct which led to his dismissal and is it just and equitable to reduce any award which may follow?

12.1.7. Should the claimant be awarded up to 25% uplift to any sums due as a result of the respondent failing to follow the ACAS Code of Practice?

12.2. Unlawful deduction from wages –

12.2.1. What sums were properly payable to the claimant for the period of described by his claim?

12.2.2. Did the respondent deduct any sums or fail to pay any sums which were properly payable?

12.2.3. Was the respondent contractually entitled to deduct any sums claimed?

12.2.4. Did the claimant give consent in writing for any such sums?

12.2.5. What if anything is ultimately due to the claimant?

Findings of fact

13. The relevant facts as I find them on the balance of probabilities are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are references to the bundle of documents I was provided with prior to the hearing starting.

14. The claimant was employed as a scaffolder from 4 April 2018 until dismissal on 7 August 2020.

The respondent's briefings with updates about its Covid-19 response and opening of sites

15. The bundle contained a number of briefing documents (from page 123 to page 149) outlining its response to the Covid-19 pandemic. These were for distribution to the respondent's 'partners'. The contents of the documents were not disputed and it was not disputed that the respondent sent these to their partners. I accept their contents in full as a consequence.

16. On 18 March 2020, the respondent produced a briefing document which it circulated to all 'partners' (which included the claimant). This reassured partners that the business aimed to operate as normal, but noted that its work relied on clients continuing to work on their construction sites. It also offered guidance on personal safety and how to respond to the virus.

17. On 26 March 2020, in response to the government measures intended to deal with Covid-19, the respondent issued a new briefing document advising that the respondent's operations needed to shut down due to client site closures. It advised that the partners may be eligible for lay off pay and also advised that the respondent would explore the 'furlough' pay scheme when details were announced.

18. On 17 April 2020, the respondent advised that its partners would be eligible for the furlough scheme but it is clear that the position was complicated by the model operated by the respondent which required partners (and therefore the claimant) to take responsibility for their own tax affairs and complete their own tax returns.

19. On 6 May 2020, the respondent advised that clients were beginning to open their sites again and that, by the end of May, it should have a much better idea about its operations and partner work locations. It also advised that HMRC had refused furlough applications for partners (and therefore the claimant) because HMRC considered that the partners (and the claimant) were self-employed. Consequently, the respondent advised that the partners could make their own applications for support available to self-employed workers.

20. On 18 June 2020, the respondent advised that all sites were due to open again shortly. It also updated with the measures being taken to secure funding to pay wages which fall due.

21. The briefings make clear that sites 'opening' does not necessarily mean that the sites would operate at full capacity as normal. It was envisaged that sites might partially reopen and that social distancing might need to be put in place.

The claimant's conduct on sites and towards colleagues, and requests for him to not attend sites

22. The claimant entered into documents and agreements at the outset of his employment. Some of those relating to the operation of the LLP are effectively undone by the determination that the claimant was employed by the respondent. Others, though, are not, and I consider it factually relevant that the claimant agreed that he would:

    22.1. Comply with health and safety requirements and instructions given by the respondent and associated entities (pages 59 to 60); and

    22.2. Endeavour to comply with all site rules (page 63).

23. On 29 January 2020, the claimant was working at the David Wilson Homes (East Midlands) Site at Berry Hill, Mansfield. During his work, the claimant was subject of a health and safety non-conformance report in relation to him having his hood up under a hard hat and not wearing PPE correctly. The report was shown at page 208

and was completed by George Young, the site manager, on 30 January 2020. In his evidence, the claimant admitted that he had committed this breach, but said that it was an extremely minor issue which would not normally result in a non-conformance report. He did, though, accept that it is against health and safety policy.

24. On the same date at the same site, the claimant was subject of a second non-conformance report (page 207) in relation to his work. The reported breach was *"no plan bracing on loading bay despite admitting knowing was a requirement"*. This document was completed by George Young but not signed by the claimant; the report notes that the claimant was not on site to sign non-conformance at the point of its completion. The claimant denies that this issue occurred, noting that he was not spoken to about it, and in evidence he alleged that the report and breach were manufactured by the site manager to remove him from the site without proper reason.

25. In argument, Mr Bartlett submitted that the claimant's reasons for claiming the breach was manufactured did not make realistic sense. He queried why the respondent's client would admit a health and safety breach without proper reason and said it was unlikely that the respondent could procure false evidence from David Wilson Homes as appeared to be suggested. Mr Bartlett relied on an e-mail from Dave Dearden, senior site manager, to support the authenticity of the breach and report. That e-mail is dated 31 January 2021 and was shown at page 205. In it, Mr Dearden writes:

> *"As discussed earlier here is a brief account of what happened with Tom on Wednesday of this week –*
>
> *I received a text message from the Barratt site manager giving me the heads up that Mick Day would be on site within the next 10 mins so I called Tom to let him know and to ensure he wasn't doing anything that he shouldn't be (warning no1). My assistant George then headed out on to the site ahead of myself and Mick to make sure all operatives were working as they should be…. Tom was spotted by George with his hood up and no high viz on so was asked to sort it out (warning no2). When I came to Toms work area I was surprised to see Tom after two warning still not complying with the H&S rules on site which has gone on to the report sent to our head office. Not only was he non compliant with site rules I also lost points for a missing plan brace (again).*
>
> *After a conversation with my contracts manager the decision was made to remove Tom from site as we felt this was a blatant disregard of H&S legislation and disrespectful towards us as a site time which had left us very exposed.*
>
> *It's a shame that it's had to come to this as Tom has provided us with a great quality scaffold but just wouldn't conform to the day to day site rules. I wish Tom all the best in his future endeavours."*

26. It is apparent to me that the site was required to complete the non-conformance report upon noticing the health and safety breaches. I am not persuaded that the second breach was manufactured and I consider the e-mail from Mr Reardon to be persuasive evidence of what happened at the site on the day in question. The upshot

of this event is that the claimant was removed from one of the respondent's key customer's sites and it is clear from the end of Mr Reardon's e-mail that the respondent would not be able to send the claimant to work there again. I am equally satisfied, therefore, that the claimant's failure to adhere to health and safety site rules led to the position that the respondent was placed in.

27. This is another e-mail at page 206 outlining an issue on site with the claimant. It is undated and does not name the claimant, but the claimant did acknowledge in the hearing that he is the subject of the e-mail. In it, Neil Westwood of St Philips Homes writes (in respect of a site at Burton Joyce):-

> *"Hi Curt*
>
> *Carrying on from our conversation about your employee's conduct on our site (Mill Field Close) ie. shouting and driving off at pace I would appreciate you no longer sending him to site.*
>
> *Many thanks".*

28. The claimant said that he had been annoyed in this one off incident when asked about his behaviour in the hearing. Consequently, I find as a fact that the claimant's conduct on another of the respondent's key customer's sites led to the position where the respondent was unable to send him to work there.

29. At pages 202 and 203, the respondent produced signed documents dated 23 July 2020 from its contracts managers confirming that having spoken to the contracts managers of various sites, the claimant was no longer welcome at:-

    29.1. DWH – Mansfield, Bingham (Darrel Marshall);
    29.2. St Philips – Burton Joyce (Neil Westwood);
    29.3. Davidsons – Houghton on the Hill (John Barker); and
    29.4. DWH – Ashbourne (Liam Hathaway).

30. The claimant refutes the information within these documents, noting that they were produced at a time after he raised his grievance about tax and so at a point when the respondent was motivated to dismiss him. He also notes that the respondent had many more client sites where he could have been placed. In reply, Mr Barrett said that these documents are accurate records of the conversations and noted that these sites were most if not all that the claimant could have been sent to within his geographical area. He said that the respondent was unable to send the claimant further afield and would not do so to protect against him working in excess of the Working Time Regulations.

31. In my judgment, given the other documentary evidence about the claimant's conduct (some of which is admitted), I consider it more likely than not that the claimant was not welcome at those sites. I do not think it likely that the respondent would have made up such conversations and then named key individuals, either (1) to the claimant, so that he may make contact and refute them, or (2) in these public proceedings, risking misleading the tribunal, and where those people might themselves discover words being put into their mouths. I also accept Mr Bartlett's assertion that, factually, the respondent was then in a position where the claimant

could not be sent to at least four key sites because his conduct and attitude had led to his enforced removal. I accept the respondent concluded, additionally, that sending the claimant to any other client sites would risk the respondent's reputation, and therefore risk business going forward at what was an incredibly sensitive time for the sector.

32. Further evidence of the claimant's propensity to act inappropriately during disagreement is found in his dealings with his management when raising his queries about tax affairs. Pages 211 to 213 display a text message conversation between the claimant and a manager about attending a disciplinary meeting. On 26 May 2020, the manager tells the claimant that he should stop speaking to them in a sarcastic manner and says that the claimant will get a warning for it. In reply, the claimant sent three messages, two containing laughing face emojis and one saying *"you are funny I'm still giggling"*. He also says, with laughing emojis, *"verbal warning in the post as well… isn't that written???"*. Whether or not the respondent manager made an error in his communications, it is clear to me that the claimant did not alter his tone in line with the management request – and indeed he showed a significant level of derision offered in the direction of his manager.

The claimant's grievance about his tax affairs

33. I am satisfied that there was a fair degree of confusion about the claimant's tax status and affairs. It is clear to me, and the respondent accepts this, that there were weaknesses with the LLP model used by the respondent to engage its staff/workers, and this undoubtedly added to any confusion about tax. I do not consider that the detail of the tax dispute is relevant in this matter, but from the documents I have seen it appears that the respondent retained tax which the claimant was due to pay to HMRC in a separate account, to be paid annually in the usual manner utilised by a limited liability partnership.

34. I am also satisfied that the claimant was and remains completely convinced that there has been some element of tax fraud done on the part of the respondent and/or the advisers used in respect of tax. On the claimant's case, his raising this 'obvious' wrongdoing is what motivated the respondent to bring disciplinary action against him. The claimant said this in his evidence and he committed that view to writing at the time (page 219). This part of the tax issue is relevant, in that if I consider that the claimant was dismissed due to his tax grievance, then his dismissal would be substantively unfair.

35. Under the terms of the engagement between the parties, the claimant was required to submit his own tax returns. He was introduced to the respondent's advisers 'Optimal Compliance', who helped to prepare the claimant's tax return for the 2019/2019 tax year. The claimant authorised the submission of that tax return, which is required before a return is submitted. It is therefore the respondent's assertion that the claimant is responsible for any issue with that tax return. The tax issues came to light when the claimant tried to access the self-employed support as signposted by the respondent. During this process, he discovered what he maintains is a discrepancy with his personal tax affairs due to matters reported by Optimal Compliance and money retained on his behalf by the respondent for the LLP's tax liability.

36. Optimal Compliance has produced a report outlining its dealings with the claimant throughout his employment until they were told by the claimant to no longer deal with his tax affairs. That report was shown at pages 172 to 188. The report outlines the correspondence between the parties and was not challenged in evidence. I accept the account in full, and so I find that the claimant raised issues with his tax on 27 May 2020 when he was unable to access support. He was asked to provide three years' tax returns so that any issues could be investigated. On 9 June 2020, the claimant's adviser Mr Rhodes asserts that there is a potential fraud and threatens the respondent with strike off and imprisonment of directors.

37. On 30 May 2020, two days after being invited to a disciplinary hearing to consider his conduct, the claimant sent an email to the respondent to outline his understanding of his tax affairs. In it, he said that he would need to disclose his payslips and the respondent's tax arrangements unless the issues between the parties could be resolved. The claimant understood that, if he were to disclose his tax affairs to HMRC, the respondent and the respondent's management would be in trouble with HMRC.

38. On 1 July 2020, solicitors appointed by the respondent write to the claimant (page 189) to warn him to cease making threats against the respondent based on unsubstantiated allegations of tax fraud. The claimant is warned that such allegations may be libellous. The claimant contends that this is evidence of the respondent covering its tracks. In my view, the letter is illustrative for a different purpose: the claimant's actions are again putting the respondent in the position where it is required to protect its reputation from his actions.

39. It appears that the claimant or his representative erroneously interpreted the solicitors' letter as a reason not to deal with the respondent's disciplinary process. The solicitors' letter is plainly in relation to the claimant's threats and allegations relating to tax. These are, factually, a different set of issues to the claimant's conduct and attitude when at work and on site. This conflation of the issues has continued through to the hearing.

40. Correspondence and queries in relation to tax and pay continued in July 2020. The claimant did not submit a formal written grievance until 31 July 2020 (page 152), after his invite to a meeting to consider disciplinary action.

The claimant's disciplinary action and dismissal

41. On 28 May 2020, the claimant was sent a letter by Caroline Cox, on behalf of the respondent, inviting him to attend a disciplinary hearing. A copy of that letter is at page 151. The decision was said to follow an investigatory meeting. In fact, it is common ground that the claimant was not asked to attend an investigatory meeting and he was not able to take part in any investigation process into his conduct. The specific allegations were:-

> *"1. That you have been rude (including swearing) both verbally and via text to the Finance Manager, your Contracts Manager and within earshot of the site manager, Neil Westwood.*
> *2. That when asked to stop this behaviour you continued to mock the finance manager by sending texts with emojis."*

42. The letter also referred to the non-conformance reports discussed above, and warned the claimant might receive a final written warning as an outcome of the action. The meeting was to take place on 1 June 2020.

43. The claimant advised that he could not attend the meeting on that date and did not attend. The meeting was rearranged to take place on 5 June 2020. The notes of the meeting were at pages 157 to 158. The meeting was adjourned when it was discovered that the meeting was being recorded (the recording was sent to the claimant after the meeting). In the meeting, it is clear that the claimant refuted all allegations until he had seen documentation and evidence in relation to the allegations. He denied the specific incidents.

44. I find as a fact that the claimant was not provided with any documents or evidence about the allegations prior to the initial disciplinary meeting. Screenshots of messages were provided to the claimant prior to the disciplinary meeting being reconvened. I have not seen evidence of any accounts from colleagues affected by the claimant's behaviour.

45. There then ensued a significant delay to the disciplinary proceedings where, considering the correspondence, the respondent through Optimal Compliance was trying to straighten out the tax issues with the claimant. It is clear from the correspondence and from his live evidence that the claimant does not feel that his questions were being answered adequately. The claimant or his advisers repeatedly accuse the respondent of some sort of fraud and continued to assure the respondent that HMRC would investigate the issues and find against the respondent. It is not clear to me on what basis these comments were made and I have seen no evidence from any party or from HMRC that supports this general contention from the claimant that HMRC were going to intervene in the respondent's affairs.

46. On 31 July 2020, Ms Cox wrote to the claimant to confirm her understanding that the claimant's tax queries had now been resolved as fully as possible (page 221). She therefore proposed to continue with the adjourned disciplinary action against the claimant and invited him to a meeting on 4 August 2020. It is clear to me, and I find as a fact, that the respondent paused its disciplinary action to attempt to resolve the claimant's queries. I am not persuaded by the claimant's contention that the disciplinary action was continued to dismiss him because of his tax queries.

47. On 3 August 2020, Ms Cox sent a meeting link to the claimant. The claimant responded to say that he would not attend the meeting because he did not consider his grievance to be resolved (page 225). Ms Cox advised that the respondent was not required to pause disciplinary action in the circumstances so the meeting would go ahead (page 224). The claimant e-mailed again to disagree with the position (page 223), to reiterate he would not attend, and ended the e-mail with: *"With respect please only respond to me with answers to my questions including the ones I have made over mistakes with my tax"*.

48. The respondent proceeded with the meeting in the claimant's absence. An outcome letter was sent on 7 August 2020 informing the claimant that he was dismissed (page 230 to 231). He was said to be dismissed for some other substantial reason, being that he was removed from client sites and there was not suitable alternative work. The letter also outlined the allegations made and the evidence considered,

including the client communications requiring the claimant to not attend their sites. The claimant was advised that he would receive notice pay and accrued but untaken holiday pay.

49. Importantly, in relation to the claimant's dismissal, I find as a fact that the claimant was not informed that he may be dismissed as a part of the disciplinary process. I also find that he was not given the opportunity to contribute to the investigation stage which led to the disciplinary process being instigated.

The appeal against dismissal

50. The claimant appealed his dismissal by a letter dated 17 August 2020 (pages 233 to 234). The appeal was lodged on the grounds that the procedure followed was unfair and not compliant with the relevant law and guidance. It also referenced the tax dispute and failure to address the grievance submitted. It also alleged that false allegations had been made about the claimant and that the respondent had failed to check on his welfare.

51. Mr Bartlett oversaw the appeal stage of the process, having not been involved previously. He exchanged emails with the claimant prior to the hearing and there was some negotiation about how would be on the panel for the respondent. It is clear to me that Mr Bartlett responded to the claimant's concerns about the number of people proposed to be on the panel. He also invited the claimant to make further submissions in writing.

52. The claimant's appeal took place on 8 August 2020. Notes are shown at pages 258 to 260. It is apparent that, following the hearing, Mr Bartlett sought the views of others at the respondent and Optimal Compliance about the points raised. Mr Bartlett upheld the claimant's dismissal following the appeal, although he conceded that the letters sent to the claimant about the process and allegations prior to the appeal were *"not sufficiently detailed to allow you to understand all of the supporting evidence behind each of the points outlined"*. Mr Bartlett considered that that deficiency had been remedied by the appeal.

The claimant's contractual terms as to payment

53. The claimant did not sign any documentation agreeing to forgo monies due when the respondent's business activities ceased in response to the Covid-19 measures. He received no payment for work during the period of non-working, save for some minor assistance offered by the respondent and then, ultimately, the sums paid upon his dismissal. I am satisfied that the claimant received no government support which might be considered to have been paid in lieu of wages from the respondent.

54. From the documentation available at the hearing, it appeared to me that the claimant was paid effectively a salary regularly by the respondent, albeit that that was labelled as a 'profit share' to reflect the respondent's position that the claimant was not an employee. Mr Bartlett appeared to concur with my preliminary view, as he had suggested that the claimant should be considered to have earned a regular salary when responding to the claimant's claim for wages.

55. However, the claimant was utterly forthright in the hearing that he was only ever paid for days on site and jobs completed. He was animated in his evidence that he was not paid unless he completed the tasks set, and when prompted and questioned about this, he was certain that he was a 'piece worker' in practice. He said this explained why his wages fluctuated, and why he worked so much and so quickly over the period of his employment. It is apparent that the respondent's documents are not reliable in terms of outlining the true relationship between the parties. Consequently, I must accept on the balance of probabilities that what the claimant says about his terms of payment are true.

Relevant law

Unfair dismissal

56. Under s98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal and that it is either for a reason falling with section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee. The respondent asserts that the claimant was dismissed by reason of the claimant's conduct. Dismissal for conduct is a potentially fair reason falling within section 98(2).

57. Where the employer has shown a reason for the dismissal and that it is for a potentially fair reason, section 98(4) of the Employment Rights Act 1996 states that the determination of the question whether the dismissal was fair or unfair depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and must be determined in accordance with the equity and substantial merits of the case.

58. In *Iceland Frozen Foods v Jones [1982] IRLR 439*, it was held that, when considering s98(4), the tribunal should consider the reasonableness of the employer's conduct and not simply whether the dismissal is fair. In doing so, the tribunal should not substitute its view about what the employer should have done. The case also outlined that there is a range of responses open to a reasonable employer; although different employers could come to different decisions in the same circumstances, all might be reasonable. Consequently, the tribunal must consider whether, in the particular circumstances of the case, the decision to dismiss the employee fell within the reasonable range of responses which a reasonable employer might have adopted. If a dismissal falls outside that band, then it is unfair.

59. For a dismissal for 'some other substantial reason' to be fair, there must be a finding that the reason relied upon *could* justify dismissal (*Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256)*. The consideration of whether the decision is actually fair in all the circumstances then follows this finding (*Cobley v Forward Technology Industries Plc [2003] ICR 1050 CA*).

Reductions to any award for unfair dismissal

60. If a finding of unfair dismissal is made as a result of an unfair procedure, then the tribunal should consider the likelihood that the employee would have been dismissed in any case had a fair procedure been followed. The compensation to be awarded

should be reduced to reflect that likelihood (*Polkey v AE Dayton Services Ltd [1987] UKHL 8)*.

61. *Section 122(2) of the Employment Rights Act 1996* provides that the tribunal should reduce the basic award to reflect any circumstances where the tribunal considers the conduct of the claimant before the dismissal makes it just and equitable to do so. This issue falls to be considered in cases such as this, where the reason for dismissal relied upon is not conduct but where the substance of the 'substantial other reason' relied upon relates in some way to the conduct of the dismissed employee (*Perkin v St George's Healthcare NHS Trust [2006] ICR 617)*. The principle also applies in situations where the actions of the employee endanger the reputation of the employer, and this is part of the reasoning behind the dismissal (*AB v Commissioners of HMRC [2019] ET 2502368/19*).

62. By *s123(6) ERA 1996*, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. The tribunal must make a reduction where there is a finding of contributory fault (*Optikinetics Limited v Whooley [1999] ICR 984*). The reduction may be as much as 100% (*W Devis & Sons Ltd v Atkins [1977] ICR 662*).

63. When considering whether or not to make a reduction for contributory conduct, it is helpful to keep in mind guidance from *Nelson v BBC (No 2) [1980] ICR 110* which said:

    63.1. the relevant action must be culpable and blameworthy;
    63.2. it must have caused or contributed to the dismissal;
    63.3. it must be just an equitable to reduce the award by the proportion specified.

64. Broadly, it is understood that the reduction should be: (1) 100% where the employee's conduct is wholly to blame for the dismissal; (2) 75% where the employee is mostly to blame; (3) 50% where there is equal blame; and (4) 25% where the employee is partly to blame.

Unlawful deduction from wages

65. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996)*. Wages must be 'properly payable' to count as a deduction (*section 13(3)*). Determining whether wages claimed are 'properly payable' requires the tribunal to consider the circumstances of the case and what the contract of employment means for those circumstances (*Agarwal v Cardiff University and anor [2019] ICR 433 CA; Delaney v Staples (t/a De Montfort Recruitment) [1991[ICR 331 CA)*.

Conclusion – unfair dismissal

Substantive decision to dismiss

66. As is often the case with non-lawyer parties and representatives, the submissions made following the evidence were not focused on the relevant legal test. I am required to decide whether the claimant was dismissed for a potentially fair 'some other substantial reason'. The claimant contends that the reason relied upon in the dismissal letter is false, and that the respondent has manufactured and exaggerated matters it would otherwise have ignored in order to mask having dismissed him for asking awkward questions about tax.

67. In my judgment, the clamant is wrong on this point. I have found that the claimant had concerns about his tax affairs and those of the respondent. I have also found that the respondent sought to alleviate those concerns and only when it realised it could not do so did it seek to continue separate and unrelated disciplinary proceedings in respect of issues raised by third party clients. I do not consider that the respondent manufactured or exaggerated any issues – the e-mails disclosed and the claimant's own admissions about his conduct show that there were problems with the way the claimant interacted with others on client sites.

68. Instead, I am with the respondent and its case on the reason for dismissal. The respondent was faced with having an employee who was being removed and banned from client sites, and I accept almost all sites in his local area. When unhappy with efforts to deal with a tax issue, that employee then belittled and derided a member of his management team even after being asked to change his tone. In my view, each of these matters could be reasons enough to justify dismissing the claimant for some other substantial reason. For the same reasons, I am also satisfied that this was the true reason for the claimant's dismissal. The dismissal was not, in my judgment, related to his queries and grievance about his tax affairs.

69. In all the circumstances of this case, did the decision to dismiss fall within the band of reasonable responses available to a reasonable employer and, as such, was it ultimately a fair decision? I consider that the decision to dismiss the claimant would have been open to a reasonable employer. Leaving aside the procedural defects discussed below, this is a case where the claimant has quite clearly encountered issues with clients on site and is not able to work on sites. He could not carry out his duties for the respondent on most if not all of the sites within reach of him, and so it must remain a reasonable response to dismiss him. It cannot be expected that an employer must hold on to an employee in such circumstances.

Unfair procedure

70. However, a substantively fair decision to dismiss may still result in an unfair dismissal where the procedure used was found to be unfair. In this case, I consider that the claimant's was significantly disadvantaged by the respondent's procedure. The letters from the respondent up to the appeal stage are clearly confusing and littered with inaccuracies. The claimant was unable to contribute to any investigation stage. I consider that there was no effective investigation, even though one was referred to in the letter inviting the claimant to his disciplinary hearing. The claimant was then unable to consider the evidence against him prior to the disciplinary hearing because it was not sent to him until after that meeting had been adjourned.

71. Mr Bartlett submits that any procedural defects were cured upon appeal, whereby the claimant was able to state his case fully and Mr Bartlett was able to speak to the

relevant people about what the claimant had said. It is true that procedural defects, particularly deficiencies in an investigation, can be cured on appeal. However, in this case, the claimant was cut out of any opportunity to put his side of his case up until the disciplinary hearing itself. Even then, it was the initial expectation to do a hearing and make a decision prior to the claimant having the opportunity to consider and reflect and refute any evidence. The only reason why the first disciplinary meeting was adjourned, it seems to me, was because it was discovered that it was being recorded.

72. In those circumstances, by a fairly narrow margin, the procedure adopted by the respondent in the claimant's dismissal was in my judgment unfair. Consequently, I find that the claimant has been unfairly dismissed.

Reductions for Polkey and contributory conduct

73. In my view, a fair procedure would have given the claimant the opportunity to consider and respond to the evidence prior to the decision to instigate an investigation stage. This would have allowed the claimant the opportunity to try to mitigate any sanction levelled against him. However, keeping in mind that a fair procedure would not have altered the allegations against the claimant, or the facts that the claimant was not welcome on client sites within his area, I do not consider that the use of a fair procedure would have changed the outcome. Indeed, at no point has the claimant outlined areas of investigation which he felt were missed and which could have uncovered evidence leading to a different outcome. Instead, the claimant got completely side-tracked by his tax issues and did not engage with the respondent's disciplinary case against him.

74. Even if the claimant had been able to engage with the procedure entirely at every stage, the dismissing officer and Mr Bartlett on appeal would have had the same information. It follows that the decision to dismiss, which I have found in itself to be fair and justified above, would have been made in any case. Consequently, *Polkey* applies to reduce the compensatory award to nil to reflect my judgment that there was a 100% chance the claimant would have been dismissed even had a fair procedure been followed.

75. In my view, there are two elements to the claimant's blameworthy or culpable conduct which both led to his dismissal. The first is his conduct which led to him (1) being asked to leave sites and being unable to return, and (2) having to face action in relation to his behaviour towards his colleagues. With each of these, the claimant himself was entirely responsible for his actions. He, to his credit, admitted his behaviour in the hearing. However, this only serves to confirm that he alone was responsible for giving rise to the events that led to disciplinary action being instigated against him. The second element of the claimant's blameworthy or culpable conduct relates to his effective withdrawal of engagement with the disciplinary proceedings against him. His refusal to offer any evidence or argument about why a sanction should not be applied against him clearly contributed to his dismissal.

76. Taken together, I consider that these instances of conduct contributed wholly to his decision. The respondent would not have started disciplinary action against the claimant if he had not acted in a way to give rise to it. This is not the sort of case where the facts simply do not support a dismissal; here, the claimant's conduct and

actions have led to a situation where he could have been fairly dismissed. Where there is a high degree of culpability contributing to dismissal, then the reduction required to come to a just and equitable dismissal must also be high. In my judgment, the claimant is entirely responsible for the reasons which gave rise to his dismissal, and so the reduction to the basic award under *s122 ERA 1996* is 100% in this case.

77. There is no compensatory award to reduce following consideration of *Polkey* but, for clarity, I make clear that I would have reduced that element of the award by 100% for the same reasons as outlined in the paragraph above.

Conclusion – unlawful deduction from wages

78. The claimant's clear evidence was that he would not get paid for work which was not completed and that he was paid only for jobs done. He was incredulous that the respondent might pay him a salary which was fixed by the days of the week. In those circumstances, where the claimant is paid according to his work output, it follows that he cannot earn his wage when he is not working. I am bound to conclude, in those circumstances, that no wages are properly payable to the claimant for the days that he was not on site. It follows that his claim for unlawful deduction from wages must fail because he had not earned the wages that he is claiming were deducted.

Final conclusions

79. It follows that, despite having been unfairly dismissed, for the reasons outlined above, no award is payable to the claimant. The claim for unlawful deduction from wages fails and is dismissed.

80. I am keen that this judgment and its reference to tax affairs is not used or cited as evidence that the respondent has committed any sort of tax fraud. I have not considered or found any wrongdoing in relation to tax affairs in the context of this employment tribunal dispute. Equally, I am not saying that the claimant should have no complaints about the way his tax was arranged – particularly in circumstances where he has been found to be an employee of the respondent after having been treated as a self-employed LLP member.

Employment Judge Fredericks

8 September 2022