EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr Adebambo Ayileka	**v**	**(1) Ministry of Justice** **(2) Secretary of State for Justice** **(3) The National Offender Management Service** **(4) HM Prison and Probation Service**

Heard at: London Central
On: 23 – 28 November 2022

Before: EJ G Hodgson
Ms D Keyms
Mr R Miller

Representation
For the claimant: in person
For the respondent: Mr C Canning, counsel

JUDGMENT

<u>The claimant's claims</u>

1. **The claim of unfair dismissal fails and is dismissed.**
2. **The claims of direct race discrimination fails and is dismissed.**
3. **The claim of wrongful dismissal fails and is dismissed.**
4. **All claims are dismissed against all respondents**

<u>The respondent's claims</u>

1. **The employer's contract claim succeeds. The claimant shall pay to the Secretary of State for Justice the sum of £863.25.**

REASONS

Introduction

1.1 By a claim form presented on 18 January 2022, the claimant brought claims of wrongful dismissal, unfair dismissal, and direct race discrimination.

1.2 The claimant has issued against four respondents. It is the position of the respondents that it is the Secretary of State for Justice who is the employer. We have not received specific argument on this. For the purposes of this decision, we will simply refer to all the respondents as the respondent.

1.3 The respondent counterclaims.

The Issues

2.1 The claimant alleges unfair dismissal. The respondent alleges that it was a fair dismissal by reason of conduct.

2.2 The claimant alleges direct race discrimination. For the purposes of race discrimination, the claimant described himself as a black African whose nationality is Nigerian.

2.3 The claimant alleges three acts of direct race discrimination as follows:

2.3.1 Allegation one - was the investigation an act of discrimination either in its inception, its conduct, or its conclusion?

2.3.2 Allegation two – by deciding to dismiss the claimant.

2.3.3 Allegation three – by failing to uphold the appeal.

2.4 The claimant alleges he was wrongfully dismissed and seeks payment of his notice period.

2.5 The employer alleges the claimant is in breach of contract and seeks damages.

Evidence

3.1 The claimant gave evidence.

3.2 For the respondent, the following gave evidence: Ms Abigail Speedie, Ms Amy Frost; Mr Dom Ceglowski; and Mr Jonathan French.

3.3 We received a bundle of documents.

3.4 Both parties filed written submissions.

Orders

4.1 The respondent was required to file a schedule detailing the counterclaim. This was filed on day two.

The Facts

5.1 The claimant worked as a prison officer at HMP Wormwood Scrubs from 8 June 2018, until his dismissal on 30 April 2021.

5.2 If a prisoner is unwell, and required to attend hospital, the prisoner must be supervised by a prison officer. The claimant was eligible to undertake bed watch. The claimant could, and did, volunteer to undertake bed watch for prisons other than Wormwood Scrubs.

5.3 Undertaking bed watch duties is not a contractual requirement, but the pay received is governed by contract. Bed watch duties attract payments for the following: overtime pay, including pay when travelling; travel expenses in the form of mileage; incidental travel expenses, including toll fees; and parking.

5.4 The monies due are claimed using two distinct systems. Travel expenses are claimed by completing an online expenses claim form and are governed by the respondent's National Offender Management Service Travel and Subsistence Policy otherwise known as PSI 15/2021. This was available to the claimant at all times. He was unclear in his evidence about whether he had read it, all but he had read parts of it. Moreover, each time he completed an expenses form, he was required to make the following declaration:

> **I have read and understand the Departmental or its associated agencies policies relating to travel, subsistence and expenses.**
>
> **The expenses claimed are in strict accordance with Departmental or its associated agencies policies and were necessarily incurred in the most economical and efficient manner.**
>
> **I acknowledge that to knowingly provide false information, to make a false statement, or to fail to notify the department of a change in circumstances for the purposes of obtaining monies to which I am not entitled may lead to action by the department or its associated agencies. This may include disciplinary and/or criminal action and will result in recovery of any outstanding overpayment.**
>
> **The original receipts to support this claim will be retained by me until the end of the current financial year plus the following two years and the receipts will be provided as requested for approval or audit process.**

> **I understand that by submitting this claim I have read and understood and am complying with the above declaration.**

5.5 In addition to claiming expenses, overtime, including all or part of the time taken to undertake a journey to and from bed watch, were claimed on a time sheet, which we understand was processed through Payment Plus . Claiming through that system would lead to payment through the payroll and to the overtime being taxed.

5.6 Sometime around June 2021, the claimant stopped claiming pay, for time spent travelling, through payroll. Instead, he claimed a sum equivalent to payment of wages at £22 per hour using the expenses system. There was no specific field or dropbox option which permitted this. Instead, the claimant used an option to seek miscellaneous sums for expenses, and in that option include multiples of £22, being the hourly rate. We have limited detail of this. Neither the claimant, nor the respondent, has put the text of those claims before us and we relied on the best evidence available.

5.7 The claimant made the change because he was alerted to the possibility, which the claimant described as a "loophole," by a friend and colleague. The claimant knew that he would avoid paying tax on the pay he received for travelling. It is the claimant's case that this was authorised by the travel policy. We were referred to paragraph 8.12.2 of the travel and subsistence revised policy PSI 15/2012. At paragraph 8.12.2, the policy says the following:

> **You should note that if your journey from home to the hospital is broadly the same as the journey from your home to your permanent workplace then travel expenses claimed are taxable and must be taxed through pay. Although the application of this rule will depend on the particular circumstances, HMRC will accept that where the *extra* distance travelled from home to the hospital is more than 10 miles each way, the journey is not taxable. Where the journey is less than 10 miles each way and is largely in the same or similar direction as the prison, any travel expenses will be taxable (even if a different route is taken). Establishments may wish to publish locally specific information to staff detailing information on hospital journeys and possible tax implications.**

5.8 The claimant alleges that he read the reference to travel expenses not being taxable as including a reference to overtime being included within the meaning of travel expense. We are satisfied the claimant did not seek confirmation of his interpretation from a manager. The claimant tells us that he made contact with SSCL.[1] The claimant's evidence as to what advice he received is entirely unsatisfactory and is not supported by any documentary evidence. We find he was never told by anyone in authority, at any time, that overtime could be claimed as a travel expense. At all times the claimant was conscious that claiming pay as an expense was “loophole” in the legitimate use of the expense claim form. The only

[1] Shared Service Connected Limited, which conducts HR services for HMPPS.

proper inference is that he understood it was a way of claiming pay and avoiding tax.

5.9 The claimant sought reimbursement of expenses in the form of mileage, car park expenses, and Dartford crossing toll fees. He did not seek authorisation for use of a private car rate, which he was required to do. In principle, he was entitled to seek reimbursement for mileage, car parking, and toll fees. He was also entitled to seek payment of overtime for those hours legitimately worked and in accordance with the relevant policy, including overtime when travelling.

5.10 The claimant states that all expenses were actively approved by a manager before being finally authorised. There was no such filter. No manager looked at the claimant's expenses on submission. The reality is the management had no system in place to routinely monitor expenses submitted. We understand that limited arrangement have now been put in place whereby large claims are identified and are reviewed. When the claimant submitted his expenses, there was a serious lack of monitoring. The respondent relied on the integrity on of the person claiming.

5.11 In or around August/September 2020, the respondent's "people hub" identified a large mileage expense claim by another prison officer. This was brought to the attention of Deputy Governor Amy Frost. She in turn instructed Ms Abigail Speedie, a senior investigation officer for the counter fraud investigation government internal audit agency, to investigate. The allegation was that that the officer had abused his position by inflating expenses and overtime claims for bed watch duties, and thereby made a personal gain.

5.12 As part of that investigation, she considered whether that prison officer may have given lifts to colleagues. She requested details from HMP Leicester regarding other officers, to test her theory. Three other officers at Wormwood Scrubs were identified (including the claimant), and she decided to consider their expenses, primarily to understand whether there may have been shared lifts, which could have explained the first officer's large expenses. She wished to see if their duties overlapped, as there was a possibility of shared lifts, which would have increased the distance travelled. In considering this matter, she observed that there appeared to be excessive claims by the three other officers, including the claimant. Ms Speedie reported this to Mr Dom Ceglowski. He had received an intelligence report which also identified a fifth prison officer. Mr Ceglowski authorised an expansion of terms of reference to include four other officers, including the claimant.

5.13 Ms Speedie commenced her investigation on 7 December 2020 and concluded on 5 March 2021. The investigation took longer than envisaged by the policy, which is 28 days; at the time, there were difficulties caused by the pandemic. It was also a complicated and involved investigation.

5.14 We accept her evidence the claimant was investigated because his expense claims were identified as excessive in volume and value, and they were potentially fraudulent.

5.15 We accept the claimant's evidence that all five subject to this investigation were either Nigerian or of Nigerian origin. We accept Ms Speedie had no direct knowledge of the race or ethnicity of any of those investigated. However, she conceded in evidence that the names of the individuals were all typically Nigerian and it would have been possible to make conscious or subconscious assumptions about race.

5.16 She had in mind various policies. We note that her statement refers to PSI 15/2021 Travel and Subsistence NOMS; this appears to be the same document as the claimant has referred to, as the same page reference number is given.[2] Therefore it appears that the claimant was considering the document which was in force at the time.

5.17 She had regard to the additional paid hours protocol – 2017.

5.18 Ms Speedie was authorised to undertake witness interviews, and gather relevant data, including data from other establishments. The purpose was to analyse the expense claims to consider whether there had been fraudulent activity.

5.19 Ms Speedie reviewed the claimant's expense claims for the period from 1 April 2020 to 31 October 2020. He had undertaken 100 bed watch duties. In particular she considered the "Invision" shift history from HMP Wormwood Scrubs, we understand that this would identify the times he arrived at and left Wormwood Scrubs. She looked at the bed watch logs and considered his overtime expenses claims. In addition, she made enquiries with third parties, including Shared Service Connected Limited (SSCL) and Highways England. The enquiry with Highways England provided information as to when the claimant's vehicle had used the Dartford crossing. This was compared to his claims.

5.20 The claimant was interviewed by telephone on 8 February 2021 from 12:18 to 16:27. The claimant was accompanied by a union official.

5.21 Ms Speedie submitted a report on 18 March 2021. The report established, on the balance of past probabilities, a number of discrepancies which included:

5.21.1 Of the 100 mileage claims, 97 claims appeared to be inflated in the region of 20%, to a value of approximately £771.25.

5.21.2 The claimant had claimed journeys totalling £6,404.60 at the standard mileage rate, without seeking authority from his line

[2] Being the policy headed policy PSI 15/2012.

manager to use his own car and claim mileage at the enhanced rate.

5.21.3 The claimant had submitted 31 parking charges totalling £613.70, for which no receipts were produced, when he was obliged to retain receipts.

5.21.4 The claimant had overstated his Dartford crossing charges by a total £92. This included making claims at times when there was no record of his car crossing.

5.21.5 The claimant had claimed travel time as an expense rather than as part of his salaried overtime payments; he had received £5,676 without payment of tax.

5.21.6 He had claimed £1,210.24 subsistence, which was in line with policy.

5.22 She concluded that the claimant had a case to answer as it appeared there may have been a breach of professional standards and the HMPPS professional standards in the civil service code.

HMPPS Professional Standards statement states:

'…staff must be 'honest, open and transparent' and Staff must carry out their duties loyally, conscientiously, honestly and with integrity. They must take responsibility and be accountable for their actions.'

The Civil Service Code states:

· Integrity

• You must always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings

· Honesty

• You must set out the facts and relevant issues truthfully, and correct any errors as soon as possible
• Use resources only for the authorised public purposes for which they are provided

You must not:
• deceive or knowingly mislead ministers, Parliament or others
• be influenced by improper pressures from others or the prospect of personal gain

5.23 She recommended the recovery of overpayments.

5.24 The claimant sought to identify comparators, in this case two officers, being Prison Officer Kerr and Prison Officer Todd. He did not identify those officers during the investigation or he disciplinary or the appeal.

5.25 The claimant informs us that the Dartford crossing is paid for on a prepaid system which was supported by an account. The record of the account the claimant used was never produced to the respondent and has not been produced to us.

5.26 For the car park claim, the claimant alleges he kept no receipts and in some manner, was unable to obtain receipts, or retain parking tickets. He offered no evidence to the respondent, or the tribunal, in the form of photographs of tickets or receipts, or payment from any card.

5.27 On 22 March 2021, Governor Jonathan French informed the claimant he would be required to attend a disciplinary hearing. He set out the charges and confirmed that the allegations raised questions of gross misconduct. He was informed that he may be dismissed.

5.28 On 19 April 2021 he confirmed the disciplinary was scheduled for 28 April 2021 and the misconduct appeared to fall within the Cabinet Office definition of fraud being "Dishonest or fraudulent conduct, in the course of employment in the civil service, with a view to gain for the employee or another person." The disciplinary hearing took place on 28 and 30 April 2021.

5.29 Governor French had regard to the investigation report. He also considered the claimant's evidence. As a result of the first meeting, he adjourned to ascertain further information and obtain evidence before reaching his final decision. He had regard to the relevant policies. He noted that each time the claimant submitted an expense claim he declared that he had understood the policies, retained receipts, and knew that false claims could lead to disciplinary and criminal action.

5.30 Governor French found the claimant to be guilty of five charges being the following:

5.30.1 Submitting inflated mileage claims.

5.30.2 Claiming for journeys at the standard mileage rate without seeking appropriate authority.

5.30.3 Submitting expense claims for which no receipts were produced.

5.30.4 Overstating the Dartford crossing charges resulting in overpayment.

5.30.5 Claiming travel time as an expense rather than as part of salary overtime with a view to avoid tax.

5.31 He found that the claimant action’s in inflating the travel mileage, overstating the Dartford crossing charges, and claiming travel time as an expense were dishonest and fraudualent.

5.32 It is apparent that Governor French considered the evidence forensically.

5.33 As for the parking expenses, he found they amounted to £613.70, Governor French queried the lack of digital evidence, and the failure to retain receipts, despite the claimant‘s confirmation that he had done so. He considered this to be a breach of policy.

5.34 He found the claimant had not sought permission to use the rate of 45p per mile, which needed management approval. The claimant sought no approval for any journey. He categorised this is a breach of policy.

5.35 He found the claimant avoided tax by claiming pay as a travel expense. He decided this was improper and for personal gain. He considered the claimant's explanation that he had not understood the policy, and his inconsistent contrary claim that he had received advice from SSCL that he could proceed in this manner. Governor French made enquiries with SSCL; he was informed the claimant had been told to contact the finance team. Governor French did not accept the claimant had demonstrated that he had made contact with the finance team. He found that the claimant was in breach of policy and the claim was proven. He rejected the notion that there was some form of legitimate "loophole" in the policy. He was mindful that other prison officers may have behaved in the same way

5.36 He considered the claim for mileage. It was apparent that the claimant routinely and almost universally claimed mileage for a distance which was approximately 20% longer than the route recommended by AA route planner. He considered the claimant's explanation, which was to the effect that, on each occasion, the claimant chose the route which was fastest and not the shortest. He concluded that the claimant's explanation was unsatisfactory and whilst there was room for a margin of error, and journeys may be longer if routed to avoid congestion or accident, the sheer volume of excess claims, and the consistent nature of the excess claims, suggested deliberate inflation, rather than error or accurate recording of optimal routes.

5.37 In addition, he identified several claims which were of particular concern.

5.38 On 3 April 2020, the claimant undertook a bed watch at Medway Maritime Hospital. This was approximately 5 miles from the claimant's home address in Rochester. The bed watch took place on the claimant's rest day. The claimant had claimed mileage of 170 miles on 3 April 2020. Essentially, this had been calculated as mileage from the prison, and not from home. Governor French checked the "Trakka" key system which recorded when the claimant was at Wormwood Scrubs. There was no record of the claimant attending HMP Wormwood Scrubs on 3 April. This was put to the claimant at the reconvened meeting on 30 April; the claimant had no explanation.

5.39 Governor French explored further apparent contradictions. The claimant claimed overtime via payment plus on 2 April 2020 showing he had

worked at Wormwood Scrubs until 17:45 followed by a bed watch duty at Leicester at 19:00. That envisaged a journey of approximately 100 miles taking over two hours, which the claimant appeared to have undertaken in 75 minutes, during rush hour. Further the claim for travel was made from the claimant's home, and not Wormwood Scrubs. He received no satisfactory explanation. Governor French concluded this alleged journey was fabricated.

5.40 The claimant also claimed for Dartford toll crossing on 2 April, but there was no independent record of a Dartford charge on 2 April 2020. He concluded this indicated the claimant had not travelled from his home to Leicester on 2 April 2020, but had made a claim for that journey.

5.41 Governor French concluded the claimant had not been able to provide a plausible explanation for the journeys and the overlapping claims. He concluded that the claimant had made a number of claims of journeys which he had not undertaken and the claims were fictitious and fraudulent. We do not need to cover the detail of all the discrepancies. It is clear that Governor French found clear evidence of examples of invented claims.

5.42 As for the Dartford crossing claims, the claimant had claimed 80 journeys at £5 return journey. In fact the claimant paid £2 for each journey, because he used a pre-authorised account. He was not satisfied the claimant had accounted for this, or that the claimant had made a genuine error. However, of greater concern was the claimant could not provide evidence for all 80 journeys. Independent evidence showed 75 records of crossings, and not all of those corresponded with the dates of the claimant's claims. There was evidence therefore that he had made claims for journeys which he never undertook for the purposes of his employment.

5.43 At all times the claimant maintained that no claim had been invented or unreasonably inflated.

5.44 Governor French considered the appropriate sanction. He considered some Dartford crossing claims were fraudulent. He considered there had been deliberate inflation of mileage, and there had been invention of journeys, which was fraudulent. As a result, he found the trust and confidence in the employment relationship was so undermined that summary dismissal was an appropriate sanction.

5.45 The dismissal was confirmed by letter of 9 June 2021. 470

5.46 The claimant appealed the dismissal. It was dealt with by prison group director, Governor Ian Bickers.

5.47 The claimant was required to appeal within one week; there were then a further two weeks for giving, in writing, the grounds; there were limited grounds of appeal.

5.48 The claimant submitted an appeal on 11 June 2021. He relied on four grounds as follows: "unduly severe penalty, new evidence has come to light which could affect the original decision, the disciplinary proceedings were unfair and breached the rules of natural justice, and the original finding was against the weight of evidence."

5.49 The claimant failed to attend the hearing on 5 August 2021. It was rescheduled to 3 September 2021 top take place via Microsoft Teams. Governor Bickers sent a follow-up email at 13:09 on 1 September 2021 which confirmed the conversation earlier in the day with Ms Wallace during which the claimant acknowledged receipt of the invitation to the hearing on 3 September 2021. The claimant was warned if he failed to attend this second rescheduled meeting, it may go ahead in his absence.

5.50 The claimant failed to attend on 3 September 2021. The claimant was sent a letter confirming it would be arranged for a third time. Again, the claimant was told that the respondent would proceed if he did not attend.

5.51 The hearing was rescheduled for 24 September 2021 via teams. On 21 September 2021, the claimant declined the meeting and said he wanted it to be face-to-face.

5.52 A further meeting was arranged for Tuesday, 12 October 2021. On or around 11 October 2021, the claimant sent a letter stating he could not attend his appeal[3] and he submitted a fitness note dated 31 August 2021.

5.53 The fitness note stated he was suffering from mixed anxiety and depressive disorder.

5.54 That note had been submitted earlier around 31 August, although it is not clear it was brought to Governor Bickers attention.

5.55 The claimant letter, sent around 11 October, fails to state clearly he cannot attend because of ill health. It gives some detail of his defence. It objects to use of his private email. The purpose of the letter is unclear.

5.56 In the bundle there is a letter from the claimant's GP of 27 August 2021. This is not supportive of any allegation that the claimant was not fit to attend a meeting. It describes his condition as improved. It does not appear that the letter was given to Governor Bickers. Governor Bickers was entitled to conclude that the fit note was insufficient evidence of unfitness to attend an interview. In any event, there was no reason why the claimant could not have set out his argument in wrting or sent in additional evidence.

5.57 Governor Bickers sent the claimant an email on 11 October 2021, indicating the hearing would proceed on 12 October 2021. We note the claimant has complained that his email address was used. We are

[3] The letter is undated.

satisfied that the email came to his attention. It may have caused some distress. However, we are not satisfied that it would cause more distress than receiving a letter. We accept that the respondent considered it was important to let the claimant know the hearing would go ahead and there was no practicable alternative to email.

5.58 The claimant was being paid during this time. The respondent provides for continuing payment during the appeal period. We are satisfied that the claimant was actively avoiding participating in the appeal. The claimant did not send any written documentation, or provide any written evidence. At the time, the claimant was actively seeking employment and obtained employment shortly after. We are satisfied that he could have attended had he wished to.

5.59 Governor Bickers concluded that the claimant was making it very difficult to progress the appeal, and that he was doing so deliberately. He went ahead with the appeal. He reviewed all relevant documents, including the investigation report, the transcript of the disciplinary hearing, the disciplinary decision of Mr French, and the appeal form. He noted the claimant failed to submit proper details, despite being requested on multiple occasions to do so. He concluded the disciplinary procedure was correctly followed and the claimant had sufficient opportunity to present his case. He concluded there was no new evidence. He concluded there were ample grounds for Governor French to reach his decision and that his decision was both reasonable and proportionate. He did not accept that any decision, whether to investigate, or proceed with this disciplinary action, or to dismiss, had been influenced by the claimant's race. Governor Bickers informed the claimant that his appeal failed by letter of 15 April 2021.

The law

6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.2 In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 the Court of Appeal held:

> **A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.**

6.3 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.

6.4 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.5 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

6.6 Pursuant to section 207 Trade Union and Labour Relations (Consolidation) Act 1992 the ACAS Code on Disciplinary and Grievance Procedures 2015 ('the Code') is admissible in any employment tribunal proceedings, and the tribunal is obliged to take into account any relevant provisions of the Code. A failure to observe any provision of the Code shall not in itself render that respondent liable to any proceedings.

6.7 If the employee is in repudiatory breach of contract, the employer may affirm the contract or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory and it is accepted by the respondent the employee will have no right to payment for his or her notice period.

6.8 In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicated Newspapers) Ltd 1959 1WLR 698, CA.**

6.9 The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal to decide. In **Briscoe v Lubrizol Ltd 2002 IRLR 607** the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster 1999 IRLR 288, ECJ** where the special Commissioner asserted that the conduct "*must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment*." There are no hard and fast rules as to what can be taken into account. Many factors may be relevant. It may be appropriate to consider the nature of employment and the employee's past conduct. It may be relevant to consider the terms of the employee's contract and whether certain matters are set out as warranting summary dismissal. General circumstances including provocation may be relevant. It may be appropriate to consider whether there has been a deliberate refusal to obey a lawful and reasonable instruction. Clearly dishonesty serious negligence and wilful disobedience may justify summary dismissal but these are examples of the potential circumstances and each case must be considered on its facts.

6.10 If it is alleged the respondent affirmed the contract, it may be appropriate to look at the full circumstances. The nature of any affirmation in the circumstances surrounding it may need to be considered.

6.11 Direct discrimination is defined by section 13 Equality Act 2010.

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

6.12 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. (para 10)**

6.13 The burden of proof is found at section 136 Equality Act 2010

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.14 In considering the burden of proof**,** we have particular regard to the amended guidance which is set out at the Appendix of **Igen Ltd & Others v Wong** [2005] IRLR 258. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts he or she will fail.**
>
> **(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.**
>
> **(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.**
>
> **(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.**
>
> **(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.**
>
> **(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.**

> **(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.**
>
> **(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.**
>
> **(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.**
>
> **(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.**
>
> **(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.**
>
> **(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.**

Conclusions

7.1 It is part of the claimant's case that the dismissal was unfair because it was tainted by race discrimination. It is therefore appropriate to consider the claim of race discrimination first.

7.2 As to why discrimination should be inferred the claimant says this in his submissions.

> **6. It is the claimant's submission that the decision to investigate and or to dismiss was because of his race namely for the following:**
>
> **a. The respondent only took the decision to investigate Nigerian officers.**
>
> **b. It is the claimant's submission that Officer's Kerr and Todd, who are White British, and who did the same as the claimant were not investigated or subject to any disciplinary proceedings whatsoever.**
>
> **7. It is the claimant's submission that reasonable inference can be drawn from their decision to not investigate Officer Kerr and Todd that the respondent chose only to investigate Nigerian Officers.**

7.3 We have considered whether the claimant identifies any other facts from which we could infer discrimination. It appears that he relies on no other

facts, apart from the general assertion that the dismissal process was unreasonable. It may be inferred that he alleges that there is no proper explanation for any unreasonableness, and that the failure of explanation for unreasonableness is a matter from which we can infer discrimination.

7.4 We accept that the claimant's expenses came under scrutiny because an investigation started in relation to another individual, and whilst researching the circumstances related to that individual, other officers, including the claimant, came under scrutiny, and it was identified that there were questions about their expenses. This ultimately led to an investigation which involved five people.

7.5 We have no detail whether other individuals were investigated for other matters at any other time.

7.6 The claimant describes himself as a black African who is Nigerian. We accept his evidence that the four other individuals were also Nigerians, or of Nigerian origin, and were black men. We accept that this specific investigation, which started with one person, escalated, and only included four others who were Nigerian or of Nigerian origin.

7.7 We accept that three of those individuals were identified by Ms Speedie and one appears to have been identified by Mr Ceglowski.. We accept that Ms Speedie did not know the claimant's nationality or ethnicity. However, as noted, it is possible that the names may have led to assumptions, whether conscious or subconscious. However, we do not accept that knowledge of someone's ethnicity, whether conscious or subconscious, is in itself sufficient to turn the burden.

7.8 The claimant asserts that officers Kerr and Todd are white British and that they "did the same as the claimant." As to the way the claimant behaved, he relies on a number of key assertions: first, he did not overcharge for mileage; second, he did not invent journeys; third, he legitimately incurred car park expenses; fourth, he legitimately charged for toll expenses; fifth, he genuinely believed that he had a right to claim, as miscellaneous travelling expenses, wages as an hourly rate, and that he could legitimately avoid tax; sixth, it is implicit he claims to have been truthful during the investigation, the subsequent disciplinary, and the appeal.

7.9 The claimant gives no direct evidence as to the behaviours of officers Kerr and Todd. He has made a number of assertions. It appears that he may assert that they also made claims for wages, which were framed as travel expenses. However, the claimant is not explicit about what he says they did, and his only evidence is a bare assertion.

7.10 The central allegation is that officers Kerr and Todd behaved in the same way as the claimant. On his case about himself, we would have to assume that they did not overcharge, invent mileage, behave in any manner that was fraudulent, or seek to avoid paying tax when they knew

they should not. Put simply, they would be as innocent of wrongdoing as the claimant.

7.11 We have no evidence on which we can find any facts in relation to the behaviours of officers Kerr and Todd at all. To the extent the claimant assertion provides evidence, we view that evidence with extreme caution. For the reasons we will come to, we have found that the claimant has behaved dishonestly in his approach to expenses. Further, he actively misled the respondent during the investigation, the disciplinary process, and the appeal. We have reached the conclusion that at times his answers were evasive and appeared to deliberately avoid answering questions, particularly in relation to important details: including his explanation for appearing to claim mileage for journeys where there was evidence those journeys could not have occurred. That does not mean to say that the claimant has been dishonest in all of his evidence, but we have concluded he has been dishonest in aspects of his evidence, and it is appropriate to treat his assertions with some caution.

7.12 If the claimant were right, and officers Kerr and Todd had behaved in the same ways he claims to have behaved, that may be proper evidence on which we could infer discrimination. However, we do not have evidence on which we could find that officers Kerr and Ted behaved in same way as the claimant. The claimant's characterisation of his own behaviour is unsustainable. The reality, for the reasons we will come to, is that we are satisfied that the claimant substantially, knowingly, and dishonestly inflated his claims for mileage. He invented a number of journeys. We have concluded, on the balance of probability, he knowingly avoided tax in circumstances when he knew it should be payable, and when he had failed to make any adequate enquiry.

7.13 The claimant does not make those accusations of officers Kerr and Ted. It follows that even on the claimant's best case, officers Kerr and Ted are in a fundamentally different position, and failure to investigate them cannot support an inference of discrimination. Put simply, they were in a material the different position the claimant.

7.14 We will consider the reasonableness of the procedure more fully below. We have found that it was not unreasonable to consider the claimant's expenses when investigating the first officer. There was legitimate reason to do so. That officer’s expenses where inflated, and it was legitimate to consider whether he may have been offering lifts to another officer. It was reasonable to identify that the claimant's expenses appeared to be questionable and warranted investigation. The investigations itself was reasonable. The approach of Governor French was fair, careful, and thorough. The appeal process was equally reasonable. We find no unreasonableness is in the process. It follows there is no unreasonableness to explain, and no failure of explanation. No inference can be drawn from the alleged failure to explain unreasonableness.

7.15 We now consider the allegations of discrimination in light of our findings.

Allegation one - was the investigation an act of discrimination either in its inception, its conduct, or its conclusion?

7.16 We have set out above, in our finding of fact, why Ms Speedie expanded the original investigation, and thereby identified issues with the claimant's expenses. She reported her concern to Mr Ceglowski who authorized the investigation; he had proper grounds for doing so.

7.17 The investigation was thorough. The relevant internal documents were obtained. The procedures were considered carefully. External documents were sought, including information from Highways England. There was strong prima facie evidence of the claimant having made dishonest and fraudulent claims.

7.18 The evidence was recorded carefully and adequately in the report and forwarded properly under the respondent's procedure.

7.19 The claimant criticises the length of the procedure, which under the policy should take 28 days. We are satisfied by Ms Speedie's explanation for the delays. It occurred during the pandemic. There were a number of individuals involved. The information was complex and needed careful analysis. It was necessary to interview a number of people. Information from external organisations was obtained. The time engaged was reasonable. The reality is the claimant is entitled to a fair and thorough investigation. To achieve that fairness, it was necessary to spend time, and the time undertaken was reasonable.

7.20 The claimant's expenses were included as part of the investigation because there were clear difficulties with his expenses. Race was not a material reason. There was evidence of breach of policies, and potentially, breach of contract. The mileage claims appeared to be overinflated, there were no receipts for the car parking, and it was unclear why travel time had been claimed as a miscellaneous travel expense, rather than as wages.

7.21 The respondent's explanation is established. Allegation one fails.

Allegation two – by deciding to dismiss the claimant.

7.22 We have accepted Mr French's evidence. He reviewed all the relevant documents and procedures. He interviewed the claimant. He considered whether there had been a breach of policy, and whether there had been a breach of contract. He identified specific occasions when it appeared that the claimant had made claims which were invented. These included claims for toll fees which did not correspond to any days when the claimant had in fact travelled for work. He identified journeys which were invented. These included the occasion when the claimant alleged he travelled from work to Medway Maritime Hospital, when in fact he never

attended Wormwood Scrubs on that day. This was an example of pure invention.

7.23 Governor French took into account the fact the claimant had maintained his innocence throughout. He took a generous view of several matters which he found to be a breach of procedure. He took a similarly generous approach to others. The key reason why the claimant was dismissed was because there were clear fraudulent claims which went beyond a simple breach of procedure. Those individuals whom he did not dismiss did not demonstrate such clear fraudulent activity.

7.24 This is not a case where the claimant has identified an actual comparator. For the reasons we have given, we do not accept that officers Kerr or Ted are comparators. It is not necessary for any of these allegations to construct a hypothetical comparator, as the explanations are clear and well founded.

7.25 We observe that for the purposes of any comparison, any comparator must be under the same material circumstances. Those material circumstances would include finding that the individual had acted fraudulently by making exaggerated claims for journeys undertaken, and inventing journeys which did not occur and thereby making fraudulent claims for travel and toll fees. (The same key material facts hold true for all the allegations of discrimination.)

7.26 We find that Mr French dismissed the claimant because he found that he acted fraudulently and lied at during the disciplinary hearing. We find he would have acted in the same way regardless of race. The explanation is made out. The allegation fails.

Allegation three – by failing to uphold the appeal.

7.27 No specific reason is identified for why Mr Bickers is said to have discriminated. The claimant did not address this in cross-examination, or in any submissions. It may be his intention to say that the appeal was discriminatory because the investigation and dismissal underpinning it were discriminatory. We have found they were not. It may also be his intention to suggest that in some manner the conduct of the appeal was unreasonable, and that such unreasonableness is not explained. We do not accept that.

7.28 The appeal was received and the claimant was informed of his rights and his obligation to file further information and/or documents. The claimant failed to cooperate at all. He did not provide either supporting arguments or documents. He failed to make good his assertion that there was new evidence. He withheld evidence that was obviously relevant, particularly the records of the Dartford crossing account.

7.29 The claimant says that he was contacted by email when he wanted to be contacted by post. It is apparent that the respondent sought to contacted

him by post. Leading up to the final appeal hearing, email was used. The claimant's letter, which appear to enclose for a second time the fit note, which was sent, it would appear, shortly before 11 October. We do not know the exact date. Time was short. It was decided that the hearing should go ahead. Contacting the claimant by email at that point was reasonable, and was made necessary by the claimant's actions.

7.30 We do not accept the claimant suffered particular distress by receiving documentation by email rather than by letters. There is little relevant evidence. The medical evidence to which we have referred to is not supported. The reality is that the claimant prevaricated and avoided attending at an appeal hearing with no good reason. The respondent was patient. Governor Bickers rearranged the meeting several occasions. It was reasonable to take the view that the claimant was deliberately undermining the process. It was reasonable to go ahead with the appeal hearing. A reasonable review of all the documentation could lead to only one conclusion, and that was that the claimant had acted fraudulently. There can be no criticism of the appeal process. Governor Bickers evidence is that he rejected the appeal because he considered the strength of the appeal on the basis of the documents before him. We accept that explanation. In no sense whatsoever was race a material reason for rejecting the appeal. This allegation fails.

7.31 We next consider the allegation of unfair dismissal. This is an alleged conduct dismissal and it is appropriate to have regard to **Burchell**.

7.32 First, we consider whether the respondent has made out its reason. We accept Mr French had an honest belief that the claimant had acted fraudulently in the way he had inflated his travel claim, invented journeys, and claimed toll fees which he had not been incurred. He dismissed for that reason. The reason is established.

7.33 The next question is whether he had grounds. He had access to a careful and thorough report. He considered the relevant procedures. He sought information from the claimant. He sought an explanation. When it became clear that there appeared to be a number of claims which had been invented, he undertook further research and then allowed the claimant an opportunity to give an explanation. He was reasonable to conclude that the claimant gave no adequate explanation for the invented claims. It is clear he had grounds.

7.34 At the time he formed his belief based on those grounds, had there been an investigation undertaken which was open to a reasonable employer? We have described the process already. It appears the claimant is critical of the fact that he was included in the investigation because he was not part of the original terms of reference. There may be occasions when one investigation starts and it reveals a number of areas of wrongdoing, whether by the person being investigated or by someone else. It matters not how the potential misconduct is discovered. Once discovered, it is legitimate to investigate. The respondent went through the proper

process. The terms of reference were expanded. Ms Speedie obtained the claimant's records. She obtained appropriate external records. She allowed the claimant to explain and followed the disciplinary process. The disciplinary process also identified further lines of enquiry which were properly legitimately pursued by Governor French. We have no doubt that this investigation was one open to a reasonable employer. It was within the band of reasonable invistigations. The result of the investigation provided grounds for the belief.

7.35 The claimant has made a number of further criticisms and we should deal with those.

7.36 We reject the claimant's assertion that he should not be subject to investigation, as he was not part of the original investigation. We have dealt with at above.

7.37 We do not accept there is any evidence of inconsistent treatment. The claimant relies on an assertion that others behaved in a similar way. For the reasons we have already given, there is no evidence of that.

7.38 There is no evidence of discrimination. On this occasion, five people were investigated. They were identified because of the nature of their expense claims, not because of their race. It is also notable that only two were dismissed; three were not.

7.39 We reject the assertion that there was unfairness because the investigation took more than 28 days. There may be occasions when a delay in investigation could create unfairness. However, when the reason for the delay revolves around ensuring that there has been a thorough process with all relevant information obtained, it is difficult to see how that can be unfair to claimant. The thoroughness of the investigation is, generally, more important than the length of time, particularly when the delay is short, as in this case. There may be occasions when an individual may suffer particular distress because of delay; there is no evidence for that in this case. There may be a particular onus to complete an investigation if someone is suspended. Here the delay was relatively short and explained. Further delays, such as occurred during the appeal, were entirely because of the claimant's lack of cooperation. No delay in this process rendered the dismissal unfair.

7.40 The claimant alleges inconsistency of treatment; there is no evidence of inconsistent treatment.

7.41 We do not accept the investigation was outside the terms of reference.

7.42 The claimant raises a point about considering the costs of the implementing the investigation report. He refers to PSO 1300. It is unclear what point he is making, and he does not expand on it in his submissions. He may mean that he believes that the penalty should have been limited to recovery of expenses. If that is the case that is a clear misunderstanding of the policies in the process. The investigation gave

grounds to believe there may have been fraud. It was appropriate to proceed to a disciplinary. For the reasons given the decision was rational and fair. We reject his assertion that there are no grounds for concluding there was a basis for summary dismissal.

7.43 The claimant alleges a breach of the 2015 ACAS code of practice. He did not develop this in his submissions. We have considered the code. We are satisfied that there is not material breach. It appears the claimant may be critical of the investigation process. However, we find that process was fair and thorough the claimant had ample opportunity to explain and to participate.

7.44 The claimant says that the dismissal was outside the band of reasonable responses. We do not accept that submission. There was clear evidence that the claimant had acted fraudulently in his claim for expenses and that he then deliberately misled the respondent throughout the investigation and the disciplinary process. In the circumstances we cannot say this dismissal was outside the band of reasonable responses.

7.45 We do not accept there is any unfairness with the appeal and we have dealt with this above.

7.46 We should note that we have considered the medical position. The evidence the claimant gave to the respondent fell far short of suggesting that there was any reason why he could not attend. Governor Bickers was reasonable to go ahead. The fact that the fitness note refers to depression and anxiety is not in itself conclusive. Having anxiety and depression does not itself prevent participation in a process. In any event, although it is less clear that this was disclosed to the respondent, there was medical evidence that he had largely recovered by August. There was no sufficient evidence before the respondent to suggest that the claimant had any specific difficulty in attending the appeal hearing, and it was appropriate to proceed. This is particularly so given that the employees and the claimant's position paid by this respondent to conclusion of the appeal. In those circumstances there was an onus of the claimant to cooperate. It is clear that he did not.

7.47 We next consider the claim of wrongful dismissal. It is necessary for us to make factual findings about the claimant's behaviour. We can deal with this briefly. We are satisfied that the claimant made a series of inflated claims for mileage. Whilst he has indicated to us that on a number of occasions he was advised, by satnav, to follow a different route to Leicester, we note that the mileage claimed on each occasion was the same. It is inherently unlikely that the claimant, on numerous occasions, would have encountered similar difficulties on the road in the form of congestion or accident, which would have led to a diversion of more than 20% from the shortest journey. We accept that he systematically inflated his claims for no good reason. We accept that he claimed toll charges which he did not incur. We accept that there is evidence that he invented journeys which he did not undertake, for example on 2 April 2021. We

have found, on the balance of probability, the claimant did not believe the policy allowed him to claim his wages as travel expenses. He has given us no adequate any explanation about advice received, if received at all, from finance. Either the claimant has not disclosed negative advice, or he did not seek that advice. In any event, he did not raise the matter with his managers. His description of the process as being a loophole is telling. We infer from that that he knew this process avoided tax. We consider his behaviour to be dishonest.

7.48 We are satisfied that the claimant's behaviour fundamentally undermined the mutual trust and confidence between the parties. This was exacerbated by his refusal to accept wrongdoing, and his continuing insistence that he was innocent. His breach was repudiatory. The respondent was entitled to accept that breach. The dismissal was not wrongful. He is not entitled to notice pay.

7.49 We have considered the counterclaim. It is necessary for the respondent to establish, first, a breach of contract, and second, loss. The respondent's position on this has varied during the course of the hearing. We required the respondent to provide a schedule of loss and we have considered that schedule of loss, the evidence provided, the written submissions, and the expansion of those submissions orally. We can summarise the position briefly and state our conclusions.

7.50 We accept that the claiming of expenses is a contractual right. It matters not that he was not required to undertake bed watch duties. When he did so, it was governed by his contract of employment. He was entitled to receive wages. He was entitled to make a claim for expenses. Equally, as those rights were contractual rights, failure to make honest claims may amount to a breach of contract.

7.51 We find the obligation to claim only actual mileage incurred was a contractual obligation. We accept there was a right to claim mileage actually incurred. We have considered whether it is possible that some of the claims included an element of mileage legitimately incurred which may be in excess of the mileage predicted by the most direct route. However, the claimant fails to establish, in relation to any specific journey, that he legitimately claimed for mileage incurred, as opposed to deliberately inflating the mileage. We have considered the respondent's calculation. It is clear that the calculation is generous to the claimant. It does include a number of journeys which we have found did not occur. The inclusion of those journeys in our view far outweighs any potential arguments that the journeys were in fact longer than the relevant direct route.

7.52 We have considered the evidence provided by Ms Speedie. Her report demonstrates the actual mileage claimed against the true mileage the mileage claimed was 17,618, against an assessed actual mileage of 14,533. This included 3,085 excess miles. The respondent has made a generous assumption that all the excess miles were claimed at the rate of .25p per mile, although in fact some were claimed as more. The

respondent seeks damages of £771.25 being 3085 miles at 25p. In our view this is an underestimate of the sum to be recovered and this aspect damages is proven and awarded.

7.53 There was a breach of policy in claiming at the rate of 45p per mile without prior authorisation. The respondent has not persisted in recovering this. We therefore do not need to decide whether it is a breach of contract.

7.54 The claimant failed to provide receipts for his parking expenses. However, the respondent does not allege that the claimant breached contract in making the claims, or that the failure to keep the receipts was a breach of contract. We accept that he may have incurred parking charges. If required to stay in a hospital car park, the charge may be significant. However, the respondent does not continue to allege breach of contract and does not seek damages for car parking fees.

7.55 We accept the claimant was entitled to reimbursement of toll fees incurred when attending on bed watch duties. By over claiming, he breached contract. He claimed for 80 separate journeys in the sum of £200. We accept the respondent's case that there is evidence of 54 journeys being undertaken. We also note that he claimed at the rate of £2.50 per journey, when in fact he incurred only £2 per journey. He was entitled to £108 (£2x 54). He received £200. He must repay £92.

7.56 We accept that the claimant claimed travel time as an expense and received a total of £5,676. No tax was deducted pursuant to PAYE.

7.57 The respondent has not sought to argue that any of that time was not validly incurred. Undoubtedly, there is an argument that, if the claimant invented a journey, he should not receive a claim for wages supposedly incurred during that journey. However, the respondent has not pursued that point and has not given any evidence. Instead, the respondent has accepted that the £5,676 represents wages which were legitimately owed. It is not for us to decide whether that sum was taxable. It is the respondent's position that tax should be paid, and that it failed to deduct tax pursuant to PAYE because it was unaware that the claim for wages was being put through as a claim for miscellaneous travel expenses. There was a serious failure on the part of the respondent in allowing the situation to occur and in failing to monitor expense claims. That said, the primary fault lies with the claimant who made a claim applying what he considered to be a "loophole" with the express purpose of avoiding tax.

7.58 It is the respondent's position that the method used by the claimant to claim his wages was a breach of procedure. The evidence we have falls short of saying it was a breach of contract; instead, it was said to be a breach of policy. The claimant was entitled to claim wages. On the respondent's evidence, therefore, the claimant's approach was not a breach of contract, and therefore no damages can be awarded.

7.59 Lest we be wrong in that finding, we will assume that the claimant's failure to record travel time on a timesheet for payment through payroll, was a breach of contract. In those circumstances the question arises as to whether there is a loss.

7.60 The respondent seeks the sum of £2,270.40. This is based on the sum of £5,676, being the wages wrongly claimed as miscellaneous travel expenses, subject to tax at 40% as there has been "no tax or NIC paid". In oral submissions, Mr Canning explained it was the respondent's intention to recover the money and then pay it to the revenue. It follows that no sum has been paid to the Revenue, on account of tax, in relation to the £5,676.

7.61 The starting point is the £5,676, as conceded by the respondent, is wages. The respondent should have deducted tax and National Insurance contributions in accordance with the relevant PAYE regulations. It failed to do so. The respondent may or may not have breached its obligations to the Revenue. That is not a matter for us. It would have been open to the respondent to make a payment to the Revenue. There is no evidence it is done so. The submissions would indicate that no payment has been made, as it is not proposed to make a payment until recovery is made from the claimant. Had payment been made to the Revenue, it is at least arguable that it would have been payment of wages, and therefore the respondent should have produced a payslip. The result would be the claimant would have been overpaid, and it may be legitimate for the respondent to recover that overpayment. But there has been no overpayment.

7.62 Has the respondent suffered a loss? The reality is the claimant has received as wages. Wages are always the property of the employee. The fact that tax is deducted simply reflects the PAYE system. Deducting tax in accordance with the relevant regulations is an obligation and a defence to a claim for unlawful deduction from wages. The respondent has made no deduction. In the circumstances, it appears to us that the position is as follows. The claimant has received wages. The respondent has failed to make a deduction. The respondent may be in breach of its obligations. That is a matter between the respondent and the Revenue. Regardless of whether PAYE deductions are made, the money represents wages in the hands of the claimant, and is taxable. If he has underpaid tax, he is obliged to account for it. The net result is that there are no damages payable to the respondent. We therefore decline to make an award for the un-deducted tax.

7.63 It is not the role of this tribunal to act in a manner which seeks to enforce payment of tax by treating as a loss to the respondent the sum which it has failed to deduct and send to the revenue.

7.64 The respondent's counterclaim succeeds. The claimant will pay the sum of £771.25 and £92 = £863.25.

7.65 We should record one further point. No party drew to our attention the fact that all of these claims may be out of time. This possibility became apparent when we were in chambers. We have received no explanation from the claimant as to why any claim may be out of time or why any claim could not be brought earlier. We have not extended time in relation to any matter. However, as we have considered the case on its merits, we do not consider it necessary to seek submissions from the parties as to whether any claim is out of time. Should this matter be remitted, any jurisdictional issue would remain live, as submissions have been received and no decision has been made.

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Employment Judge Hodgson

Dated: 7 December 2022

Sent to the parties on:

07/12/2022

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For the Tribunal Office