



EMPLOYMENT TRIBUNALS

Claimants:

Mr S Fuller
Mr L Jackson

v

Respondent:

Kingsley Cars Limited

Heard at: Reading (by CVP)

On: 21 and 22 September 2022

Before: Employment Judge Hawksworth (sitting alone)

Appearances

For the Claimant: Mr J West (solicitor)

For the Respondent: Mr T Goldup (legal advocate)

RESERVED JUDGMENT

The decision of the tribunal is that:

1. The claimants were unfairly dismissed; their complaints of unfair dismissal are well-founded and succeed.
2. Mr Fuller's complaint of unauthorised deduction from wages is not well-founded and is dismissed.
3. A remedy hearing will be arranged. Case management orders to prepare for that hearing have been sent separately.

REASONS

Claims and responses

1. The claimants were employed by the respondent from 7 April 2014 (Mr Fuller) and 27 April 2015 (Mr Jackson) until their dismissal in early 2020. The claims are for unfair dismissal and unauthorised deduction from wages.
2. Early conciliation started on 1 April 2020 in Mr Fuller's case and 8 April 2020 in Mr Jackson's case. It ended on 29 April 2020 in both cases. Mr Fuller's

claim form (ET1) was presented on 28 May 2020, Mr Jackson's on 29 May 2020.

3. The response was presented on 21 July 2020 in Mr Fuller's case and 22 July 2020 in Mr Jackson's. The respondent defends the claim and says that the claimants were dismissed for gross misconduct.

Hearing and evidence

4. The hearing was heard by video (CVP) on 21 and 22 September 2022. This was a reduced time allocation but as the issues had also reduced, there was sufficient time to hear the evidence and submissions on liability. It was agreed that remedy issues would be left to another hearing, if needed, except for issues 3.6.3, 3.6.4 and 3.6.5 in the list below, in summary those points are:
 - 4.1 whether there a chance that the claimants would have been fairly dismissed anyway if a fair procedure had been followed;
 - 4.2 whether there was an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures;
 - 4.3 whether the claimants caused or contributed to dismissal by blameworthy conduct.
5. There was an agreed bundle with 457 pages. Page references in these reasons are references to page numbers in the bundle. I was also provided with two audio files which were audio recordings of events on 7 February 2022. (There were agreed transcripts of these recordings in the bundle as well.)
6. On the first day of the hearing, after reading the witness statements and listening to the audio recordings, I heard evidence from the respondent's witnesses Mrs Oorloff, Mr Oorloff and Mr Hartland. On the second day of the hearing I heard the evidence of Mr Fuller, followed by Mr Jackson. The parties' representatives then made their submissions. Mr West made written submissions and both representatives made oral submissions.
7. Because of the reduced time allocation, there was not enough time for me to deliberate and give judgment, and so I reserved judgment. I apologise to the parties and their representatives for the delay in promulgating this judgment. This reflects the general caseload in the employment tribunal at present.

Issues for me to decide

8. The claimants' complaints are of 'ordinary' unfair dismissal and unauthorised deduction from wages. The parties agree that the claimants were dismissed.
9. The claims initially included complaints of automatic unfair dismissal (and possibly detriment) because of whistleblowing or raising health and safety matters. At a preliminary hearing before me on 23 September 2021 I made an order for the claimants to provide more information about the

whistleblowing disclosures, the health and safety matters, and any detriments. At a preliminary hearing before Employment Judge Anstis on 28 February 2022 the claimants withdrew their complaints that the principal reason for the dismissal was whistleblowing or raising health and safety matters, and they also withdrew any associated complaints about unlawful detriments. A withdrawal judgment in respect of those complaints was sent to the parties on 15 March 2022.

10. EJ Anstis confirmed that the claimant's remaining two complaints are 'ordinary' unfair dismissal and unauthorised deduction from wages.
11. At the start of the hearing before me on 21 September 2022 the parties thought that the claims may include complaints of breach of contract in respect of notice, but Mr West confirmed in submissions that no such complaint has been brought by either claimant.
12. Mr West confirmed that the complaint of unauthorised deduction from wages relates to Mr Fuller only, Mr Jackson having now been paid for the period for which he was claiming.
13. The issues to be decided in the claimants' complaints were set out in the case summary sent after the preliminary hearing before me on 23 September 2021. The issues identified in the remaining complaints are set out below. As explained above, I am not dealing with issues relating to remedy except for the points identified at paragraph 4 above.

1. Unfair dismissal (sections 94 and 98 of the Employment Rights Act 1996)

- 1.1 When was the claimant dismissed? The claimants say they were dismissed on 7 February 2020. The respondent says the claimants were dismissed on 30 March 2020.
- 1.2 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
- 1.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - 1.3.1 there were reasonable grounds for that belief;
 - 1.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 1.3.3 the respondent otherwise acted in a procedurally fair manner;
 - 1.3.4 dismissal was within the range of reasonable responses.

2. Unauthorised deductions (Mr Fuller only)

- 2.1 Did the respondent make unauthorised deductions from the claimant's wages by not paying him during the period 1 to 30 March 2020 when he was suspended from work?
- 2.2 If so how much is the claimant owed? Mr Fuller says that his pay slip for March 2020 (page 365) was short by £105.30.

3. Remedy for unfair dismissal

- 3.1 Does the claimant wish to be reinstated to their previous employment?
- 3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- 3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 3.5 What should the terms of the re-engagement order be?
- 3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 3.6.1 What financial losses has the dismissal caused the claimant?
 - 3.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?
 - 3.6.3 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?
 - 3.6.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent or the claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant? If so, by what proportion, up to 25%?

- 3.6.5 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - 3.6.6 Does the statutory cap of fifty-two weeks' pay or £86,444 apply?
 - 3.7 What basic award is payable to the claimant, if any?
 - 3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
14. If the claim succeeds, I need to consider what remedy should be awarded.

Findings of fact

- 15. The respondent is a company specialising in the restoration of Range Rovers. In early 2020 there were approximately 15 employees. Damon Oorloff and Michelle Oorloff are the directors of the company. Mrs Oorloff has responsibility for accounts, finance and human resources.
- 16. The first claimant Steve Fuller started working with the respondent on 7 April 2014. He was Head of Welding. The second claimant Lee Jackson joined the respondent on 27 April 2015, working alongside Mr Fuller doing welding work. Mr Jackson also did MOT testing.
- 17. Before the incidents in question in these claims, both claimants had clean disciplinary records.

Concerns about treatment by Mr Oorloff

- 18. In the second half of 2019, Mr Fuller raised some concerns with Mrs Oorloff. Broadly, the concerns were about health and safety, technical issues, and Mr Oorloff's treatment of Mr Fuller and Mr Jackson which Mr Fuller said was bullying and harassment. Mrs Oorloff met with Mr Fuller to discuss these concerns on 14 October 2019 (page 147). Mrs Oorloff concluded the meeting by saying they would catch up again on 21 October 2019, and Mr Fuller should update her on how he was feeling and any other concerns.
- 19. On 21 October 2019 Mrs Oorloff went to see Mr Fuller for the meeting. He had not been in touch since the last meeting. He said there had been another incident with Mr Oorloff. He said he felt there was no point going ahead with a meeting. The discussion moved to productivity and proposed operational changes to the business. Mrs Oorloff felt that Mr Fuller was reluctant to embrace change.
- 20. Mrs Oorloff also spoke to Mr Jackson on 21 October, and again on 24 October 2019. She raised some concerns about his behaviour at work, including that he was distracting others. In those meetings Mr Jackson raised concerns

about Mr Oorloff's attitude to him, similar to those raised by Mr Fuller. Mrs Oorloff felt the concerns did not amount to a grievance, but she undertook some investigations, including speaking to other staff about them.

21. On 1 November 2019 Mrs Oorloff wrote to Mr Fuller (page 150). She said:

“...you have presented no evidence or examples of where you have been bullied or harassed and I have been unable to identify any corroborated instances that could be considered so.

I have exhausted this informal process and found that there is no further investigation or action required on behalf of the company however, I have provided you with a copy of the company grievance procedure should you wish to raise a formal grievance. I must make you aware that these are very serious allegations and if it is established that these are fraudulent, could constitute misconduct or gross misconduct as outlined in our disciplinary procedure.”

22. She went on to say that from the process and the findings of her investigation, she believed Mr Fuller's behaviour in the workplace to be obstructive and preventing the company from progressing and growing. She said she must therefore insist that he follow all reasonable management instructions and the existing rules of the workplace, concluding:

“Should you continue to be obstructive and refuse to follow reasonable management instructions we will be forced to consider dealing with these matters within the company disciplinary procedures.”

23. Mrs Oorloff wrote to Mr Jackson on the same day (page 154). She said that she had found no evidence that Mr Oorloff was victimising him, and in fact she had received confirmation that Mr Jackson distracted and disrupted his colleagues.

24. She continued by saying that the informal process was exhausted, and that no further investigation or action was required on behalf of the company. She warned Mr Jackson:

“I remain of the opinion that your behaviour in the workplace is distracting and disruptive to the colleagues around you and I must insist that you refrain from complaining to your colleagues and distracting them from their work. You must follow all reasonable management instructions.”

25. She said if there were further instances of misconduct, she would be forced to consider company procedures.

26. Mrs Oorloff had some further communications with the respondent about this. They replied to Mrs Oorloff, reiterating that their concerns were about their

treatment by Mr Oorloff (pages 156, 159). Mrs Oorloff responded to them both again on 21 November 2019 (pages 161, 164). In her letter to Mr Fuller, Mrs Oorloff proposed to address the situation through mediation with the support of a professional independent mediator. In the event, that did not take place.

Proposed changes to terms and conditions

27. On or about 19 December 2019, Mrs Oorloff gave staff including the claimants a new Statement of Particulars of Employment (141-143), a new Employee Handbook (123-138) and a new Restrictive Covenant Agreement (144-146). She asked them to sign and return the particulars and the restrictive covenant to her.
28. Mrs Oorloff spoke to Mr Fuller about this in early January 2020 because the claimants had not signed the proposed new terms and conditions. On 4 February Mrs Oorloff called into the welding workshop and asked the claimants again why they had not returned the signed documents. Mr Fuller said that they thought that the new terms were unfair.

The first interaction on 7 February 2020

29. On 7 February 2020 Mrs Oorloff and Robert Randall, who was in charge of the paint shop, went to the welding workshop to speak to the claimants when they arrived at work. The claimants arrived at about 7.30am.
30. As the discussion started, Mrs Oorloff handed letters to the claimants. One was a letter to Mr Jackson about lateness (dated 6 February 2020) (page 190). Mrs Oorloff also handed a letter to each of the claimants about the proposed new terms and conditions (those letters are at pages 192-194).
31. Mrs Oorloff said that the letters about the contracts followed on from their discussions on 4 February. She said she required the claimants to put their objections to signing the contract in writing within 7 days.
32. In her statement made on 7 February 2020 after the incident (page 202), Mrs Oorloff described what happened next. She said that Mr Jackson became red faced and angry and was pacing, glaring at her and shouting. She tried to stop him by saying his name, 'Lee', a few times, but he shouted 'Michelle' back at her. Mrs Oorloff said that Mr Fuller began to back up Mr Jackson and approached her space, pointed his finger at her and shouted.
33. Mrs Oorloff felt the meeting was aggressive and intimidating. She began crying after the meeting. Mr Oorloff came to speak to Mrs Oorloff and Mr Randall and they decided that the claimants' behaviour was unacceptable, and they should be asked to leave.
34. Mr Randall also wrote a statement about the incident on the same day (page 204). In his statement he described the claimants' actions as 'aggressive behaviour'.

The second interaction on 7 February 2020 and whether there was a dismissal

35. About thirty minutes after the first discussion on 7 February 2020, Mr Oorloff went to the welding workshop to speak to the claimants. He was accompanied by Mr Randall and another employee.
36. Mr Fuller recorded the second discussion on his phone. An agreed transcript of the audio recording was at page 425 of the bundle. Neither the recording nor the transcript was available to the respondent at the time of the decision to dismiss. I have included here findings of fact based on the recording and transcript, not in connection with the fairness of the dismissal, but in relation to the question of whether there was a dismissal on this date.
37. At the start of the conversation, Mr Oorloff told the claimants they could not talk to Mrs Oorloff like that. There was an exchange about this, leading to Mr Oorloff saying:
- “You both need to leave the premises now.”
38. He repeated this twice and then said,
- “What’s going to happen is we will write to you formally and we’ll go from there. But you’re not to come back at the moment.”
39. I find as a fact that Mr Oorloff did not use words of dismissal on 7 February 2020. It was not clear from his first requests for the claimants to leave the premises whether he meant that the claimants should leave permanently or not, and he did not use the words ‘dismissal’ or ‘suspension’. However, he went on to say that they were not to come back ‘at the moment’ and that a letter would follow. From this it was unambiguously clear that the claimants were not being dismissed. The words ‘at the moment’ made it clear that they were not being asked to leave for good. They are words which are consistent with suspension, not dismissal.
40. The claimants gathered up their belongings and left the respondent’s premises.

Disciplinary procedure

41. At around 2.30pm on the same day Mrs Oorloff sent both claimants an email with a letter from her (pages 195 to 200). The letter confirmed that the claimants had been suspended on full pay to allow a disciplinary investigation to take place. The allegations against the claimants were that:
- “On Friday 7 February 2020 you reacted inappropriately when presented with a letter from the business.
 - This behaviour was abusive, violent and threatening.”

42. Between 9 and 14 February 2020 Mrs Oorloff exchanged some email correspondence with the claimants about the new terms and conditions (pages 205 to 217).
43. On 18 February 2020 Mrs Oorloff emailed the claimants at about 4.00pm to invite them to a disciplinary investigation meeting at 10.00am the next day with Derek Hartland (foreman) (pages 219 to 225).
44. At his investigatory meeting with Mr Hartland on 19 February 2020 (page 227), Mr Fuller confirmed that tensions had been high on 7 February 2020, but he said there was no violent or aggressive behaviour. He confirmed that the discussion had been recorded.
45. Mr Jackson's meeting was rescheduled to 20 February 2020 (page 241) as he said he did not receive the email in time to attend the investigatory meeting on 19 February 2020 (page 230). At the meeting, Mr Jackson told Mr Hartland that he had not been violent, threatening or abusive on 7 February 2020. He said he also had a recording of events on 7 February 2020.
46. After Mr Hartland had met with the claimants, Mrs Oorloff emailed the claimants to ask for a copy of the recordings. Mr Fuller said he would provide it to an independent party in the future, but he did not want to send it to Mrs Oorloff. He said she knew what happened because she was there (page 237). Mr Jackson said he had been told he didn't need to give Mrs Oorloff a copy of the recording yet, but he would send it with a written transcript when required (page 251). Mrs Oorloff asked for the recording again on 25 February 2020 (page 253) but neither claimant sent it to her.
47. On 20 March 2020 Mrs Oorloff sent the claimants an invitation to a disciplinary hearing on 25 March 2020 (pages 258 to 259 and 262 to 263). Mr Fuller's letter was wrongly addressed 'Dear Lee' (page 258). The letters repeated the allegations from the suspension letters and said that if substantiated, they would be regarded as gross misconduct and the claimants' employment may be terminated without notice.
48. The letters said the disciplinary hearings would be conducted by Mr Oorloff with another employee in attendance as a note taker. However, prior to the hearing, on advice from the respondent's HR advisors, the respondent decided that Mr Oorloff was not the right person to deal with this, and that Mrs Oorloff should conduct the hearings.
49. The first national lockdown for covid was announced on 23 March 2020. People were asked to leave their home for only one form of exercise per day, or for essential work or supplies (page 108).
50. On 23 March 2020 Mrs Oorloff received an email from Mr Jackson to say he was unable to attend the disciplinary hearing because he had to self isolate, as his father had been sent home from work with suspected coronavirus (page 267). Mrs Oorloff replied to say that the hearing had been rearranged for 6 April 2020 (page 274).

51. On 24 March 2020 Mrs Oorloff received an email from Mr Fuller to say that he would not be attending in light of the recent government restrictions and because he had not had sufficient time to prepare. He said he would attend when restrictions were lifted, but he would require more notice of the hearing date. He asked for a copy of the disciplinary rules and procedures (page 269). In an email on 25 March 2020 at 4.50pm Mrs Oorloff said that Mr Fuller could attend by phone or Facetime, or present written submissions by email. She asked for confirmation by 10.00am on 26 March 2020 (page 271). She confirmed that Kingsley Cars remained open as advised by the government.
52. On 26 March 2020 Mr Hartland sent an email to Mr and Mrs Oorloff which said that he did not think Mr Jackson's father was too ill, as he had seen him drive past his house (page 277). Mrs Oorloff asked Mr Jackson for a proof of absence certificate. Mr Jackson replied to say that he had looked on the NHS 111 website and followed the steps and was told that he did not need a note. He sent copies of the webpages (page 280). Mrs Oorloff did not believe Mr Jackson when he said that he had to self isolate.
53. Mrs Oorloff received another email from Mr Fuller on 26 March 2020 to say that he would attend in person as he did not think a phone hearing or email submissions would be fair. He asked for five working days' notice of the hearing because of the circumstances. He asked again for a copy of the disciplinary procedure because the one he had been sent was the new version (page 286).
54. On 27 March 2020 the respondent closed temporarily because of the pandemic (page 288).
55. On 30 March 2020 Mrs Oorloff wrote to the claimants to say they had been dismissed with immediate effect (pages 294 to 299). The reasons given for dismissing Mr Fuller were:

"Your failure to follow reasonable instructions to attend [the disciplinary] meeting amounted to a further act of misconduct, and in view of this breach, we would be entitled to terminate your contract.

However because you failed to attend the hearing I also had to make a decision on the matters of concern which were outlined in my letter of 20 March 2020 and are stated above.

This decision was based on the information and evidence we had to hand at that time. The witness testimony clearly indicated to me that you behaved in the manner alleged. You claim to have a recording of the incident which you state contradicts the witness testimony but you have refused to provide us with a copy in your defence. This leads me to believe that there is in fact no such recording.

I have given careful consideration to these allegations and the evidence gathered and I have formed a reasonable belief that your

actions amount to gross misconduct justifying the summary termination of your employment with immediate effect.

You have the right to appeal against my decision and should you wish to do so you should write to Michelle Oorloff - director within five days of receiving this letter.”

56. The reasons given for dismissing Mr Jackson were the same, but the letter also said:

“You contacted us on 23rd March 2020 and advised us that you were not leaving the house because your father was showing symptoms of [Covid-19]. You indicated that you and your father were going into isolation for 14 days so would be unable to attend the hearing.

However it has come to our attention that both you and your father have been seen driving around. This would indicate that you were not in fact in isolation as per government instruction, and we believe you fraudulently used the current situation to avoid attendance at the hearing.

...

Your attempts to delay the process by using the Covid-19 situation also indicates to me that information you provide is not always truthful.”

57. Mr and Mrs Oorloff were both involved in the decisions to dismiss. Mrs Oorloff led the decision making. She decided to dismiss the claimants after discussions with the respondent’s HR advisors. She discussed her decisions with Mr Oorloff and he agreed. The dismissal letters were written and sent by Mrs Oorloff.
58. Mr Fuller sent an email to Mrs Oorloff on 1 April asking how to appeal (page 302). He sent his full appeal document on 4 April (pages 306 to 310). The respondent did not reply to either email.
59. Mr Jackson emailed his appeal to Mrs Oorloff on 3 April 2020 (page 304). The respondent did not reply.

Findings relevant to the question of contributory fault

60. I make the following findings of fact about what happened at the incident on 7 February 2020. These findings are based on the audio recording and the agreed transcript (page 421). This information was not available to the respondent at the time of dismissal because the recordings and transcripts had not been provided to the respondent by the claimants. These findings are not relevant to the question of whether the dismissal was unfair. They are only relevant to my decision on the question of contributory fault.

61. At the start of the discussion, Mrs Oorloff handed the claimants their letters and asked them to put their concerns about the contracts in writing in 7 days. Mr Jackson said that he thought that at their previous meeting Mrs Oorloff had agreed to change the few points they had concerns about, and that was OK. Mrs Oorloff said no, she had to pass it by the powers that be, HR law and so on.
62. Mr Jackson asked whether HR would deal with Mr Oorloff, giving an example of how Mr Oorloff had spoken to him a few days previously. Mr Jackson became upset and began speaking fast as he was explaining what had happened and why he was unhappy about the treatment. He said he could not trust Mr Oorloff and this was why he did not feel he could sign the new contract. When Mrs Oorloff tried to interject, saying 'Lee' a few times, Mr Jackson replied by saying 'Michelle', in a raised voice.
63. Mr Jackson continued with his account of Mr Oorloff's treatment, and, with a raised voice, asked Mrs Oorloff what he had done wrong to deserve that treatment. In reply, Mrs Oorloff repeated a few times that he should put his objections in writing. Mr Jackson carried on talking before she had finished.
64. Mr Fuller interjected without raising his voice, saying that Mr Jackson was not talking about the contract. Mr Jackson agreed, adding that he was talking about the level of trust. Mrs Oorloff said that he had the right to make a formal grievance. Mr Fuller said, 'And if you decide [the grievance is] not right, then it's gross misconduct, which means I'm gone'. Mrs Oorloff suggested raising it with a representative, to which Mr Fuller said, 'How, because there's nobody else here?'. He said to Mrs Oorloff, with a raised voice, 'You sat there when he's been how he is, and you denied it's happened'.
65. As he made this last comment Mr Fuller pointed at Mrs Oorloff. There was a dispute about how close he was to Mrs Oorloff when he did so. Mrs Oorloff said in the hearing before me that Mr Fuller's finger was about a centimetre away from her face. She did not say this in her statement made on the day, or in her witness statement for these proceedings. The claimants said Mr Fuller was not as close at this to Mrs Oorloff. I find that Mr Fuller's finger was about a foot away from Mrs Oorloff's face. I reach this finding because that is what Mr Randall said in his statement (page 204). Mr Randall was a neutral person Mrs Oorloff had asked to accompany her, and he had no reason to exaggerate this point either way. Also, Mr Randall's statement is contemporaneous as it was made on the day of the incident.
66. Mrs Oorloff and Mr Randall left the room as Mr Jackson began talking again about his complaints. The whole interaction took around 3 and half minutes, with the more heated part of the discussion just over 2 minutes.

The law

67. I set out here a summary of the legal principles which apply in unfair dismissal cases where the employer says the dismissal was for conduct related reasons.

68. Section 98(2) of the Employment Rights Act 1996 sets out reasons for dismissal which are potentially fair reasons. These include reasons which “*relate to the conduct of the employee.*”
69. In a complaint of unfair dismissal which the employer says is for conduct reasons, the role of the tribunal is not to examine whether the employee is guilty of the alleged misconduct. Instead, in line with guidance set out in the case of British Home Stores v Burchell, the tribunal must consider the following issues:
- 69.1 whether, at the time of dismissal, the employer genuinely believed the employee to be guilty of misconduct;
- 69.2 whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
- 69.3 whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.
70. Where there is a potentially fair reason for dismissal, the tribunal has to consider (under section 98(4) of the Employment Rights Act 1996):
- “whether in the circumstances (taking into account the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a fair reason for dismissal.”*
71. This is determined in accordance with equity and the substantial merits of the case. The tribunal considers whether dismissal was within the range of reasonable responses open to the employer. The tribunal must not substitute its own view of the appropriate penalty for that of the employer.

Conclusions

72. This section explains how I have applied the legal principles to the facts in this case to reach my conclusions on the issues I have to decide.
73. I first have to decide when the claimants were dismissed. I have found that Mr Oorloff did not use express words of dismissal on 7 February 2020, or words which were ambiguous as to whether the claimants were being dismissed. I have found that in telling the claimants, ‘You’re not to come back at the moment’, Mr Oorloff was suspending the claimants, not dismissing them.
74. I have decided therefore that the claimants were dismissed by letter on 30 March 2020.
75. I next have to consider the reason for dismissal and whether it was a potentially fair reason. The respondent says the reason was a reason related

to the claimants' conduct. A conduct related reason is a potentially fair reason for dismissal as set out in section 98(2) of the Employment Rights Act.

76. In a complaint of unfair dismissal which the employer says is for a reason relating to conduct, my role is not to examine whether the employee is guilty of the misconduct, or to consider whether I would have dismissed the employee in the same circumstances. I have a more limited role. Guidance on the scope of that role is set out in the case of British Home Stores v Burchell and that requires me to consider three questions:
 - 76.1 first, whether at the time of dismissal the employer genuinely believed the employee to be guilty of misconduct;
 - 76.2 secondly, whether at the time of dismissal the employer had reasonable grounds for that belief; and
 - 76.3 thirdly, whether at the time the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.
77. As set out in the issues above, I then go on to consider whether the procedure adopted by the respondent was otherwise fair, and whether the decision to dismiss was within the range of reasonable responses.
78. The first question in the Burchell test is whether the respondent genuinely believed the claimants to be guilty of misconduct.
79. The dismissal letters explained the reasons for dismissal. Mr Fuller was dismissed because of his conduct on 7 February 2020. The reason for the dismissal of Mr Jackson was the same, and in addition his allegedly fraudulent behaviour about his and his father's need to isolate when they had both been seen 'driving around'. I accept that both Mr and Mrs Oorloff genuinely believed that the claimants were guilty of the misconduct on 7 February 2020. While Mrs Oorloff genuinely believed that Mr Jackson had not been honest with her about having to self isolate, she did not believe that Mr Jackson himself had been seen 'driving around'.
80. The second question for me is whether the respondent had reasonable grounds for the genuine belief. I have concluded that both Mr and Mrs Oorloff had reasonable grounds for their belief that the conduct of both claimants on 7 February 2020 amounted to misconduct. Mrs Oorloff had been present at the time. She had been frightened and upset by the behaviour of the claimants. Mr Randall, who was also present, described the claimants' actions as 'aggressive behaviour'.
81. However, neither Mr nor Mrs Oorloff had reasonable grounds for their belief that Mr Jackson had been seen 'driving around' when he said he was self isolating. The only information they had received about this allegation was from Mr Hartland, who had only seen Mr Jackson's father driving around. He had not seen Mr Jackson himself. This allegation was extended to include Mr Jackson himself, without any reasonable ground for doing so.

82. The third question for me when considering cases where the employer relies on a conduct reason for dismissal is whether the respondent's belief on those grounds was reached after carrying out as much investigation as was reasonable in the circumstances. I have concluded that the respondent did carry out as much investigation as was reasonable in respect of the incident on 7 February 2020. Mrs Oorloff and Mr Randall had made statements, and Mr Hartland held investigatory meetings with both the claimants. The respondent asked the claimants to provide copies of the recordings but they declined to provide them at that time.
83. The respondent did not carry out as much investigation as was reasonable in relation to the second allegation against Mr Jackson (about him and his father driving around). The respondent made no enquiries at all after Mr Hartland's information was provided. In particular, it did not ask the claimant for his comments. He was not provided with a copy of the information Mr Hartland provided.
84. Therefore, the respondent has not met the three requirements set out in the Burchell test in relation to the allegation about Mr Jackson 'driving around'. It has met the test in relation to the incident on 7 January 2020, in relation to both claimants.
85. I also have to consider whether the respondent otherwise acted in a procedurally fair manner. I have concluded that in deciding to dismiss the claimants on 30 March 2022, the respondent failed to act in a procedurally fair manner. I reach this conclusion because:
- 85.1 The claimants were given very little notice of the disciplinary hearing. They were told about it on the Friday (20 March) before the hearing on the following Wednesday (25 March). This gave them very little time to arrange to be accompanied or to seek advice. This would have been short notice even in normal circumstances, but it was all the more difficult in the days before the first national lockdown. There was no explanation from the respondent as to why it took no steps between 25 February and 20 March, or why it was then necessary to hold a disciplinary meeting so quickly after 20 March 2020;
- 85.2 The decision to dismiss was made before either claimant had been given the opportunity to attend a disciplinary hearing to answer the allegations against them. A reasonable employer would have acknowledged the importance of this fundamental procedural step, and would have taken account of the exceptional circumstances which applied at the time of the first national lockdown. A reasonable employer would have recognised that employees might have had concerns or difficulties with attending a disciplinary hearing in person at that time. Mr Fuller had said on 26 March 2020 that he would attend a hearing in person as he felt that a phone or paper hearing would not be fair. However, he was then dismissed without a further hearing being rearranged. Mr Jackson was dismissed before the date of his re-scheduled hearing on 6 April 2020. A reasonable employer would have

- rescheduled Mr Fuller's hearing, and would have allowed Mr Jackson's hearing to take place before making the decision as to whether to dismiss the claimants;
- 85.3 Mrs Oorloff led the decision making in relation to a conduct matter at which she had been a witness and complainant about the claimants' conduct, and she dealt with the process throughout. This was not procedurally fair. Although the respondent is a small family-run business, it would have been possible for someone else to have led the process, and made the decision. For example, the respondent could have engaged an external consultant. This procedural unfairness was highlighted by the issues with the recordings. Mr Fuller was unhappy about providing a copy of the recording to Mrs Oorloff, as she had been present, but he offered to provide it to an independent third party. This should have alerted the respondent to the difficulties arising from having a person who was involved in the incident leading the disciplinary procedure and decision making process;
- 85.4 The respondents failed to provide the claimants with any appeal, despite saying they would.
86. The procedure adopted by the respondent was outside the range of responses of a reasonable employer in these circumstances. The respondent failed to comply with the ACAS Code of Practice on disciplinary procedures, in particular in relation to the failure to hold a hearing before dismissal (paragraph 11 of the Code) and the failure to provide an appeal (paragraph 26).
87. I next consider whether in the circumstances, taking into account the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating the reason for dismissal as a fair reason for dismissal. Another way of putting this is that I have to consider whether the dismissal was within the range of reasonable responses open to the employer in these circumstances.
88. I have concluded that the respondent did not act reasonably in dismissing the claimants in these circumstances. Dismissal of the claimants was not within the range of reasonable responses for the following reasons:
- 88.1 The procedure adopted by the respondent was not a reasonable one, as explained above;
- 88.2 It was not reasonable to consider, as the respondent did, that the claimants were obstructive in relation to the disciplinary process. Both attended investigatory meetings with very little notice. Neither were persistently unwilling to attend a disciplinary hearing. It would have been reasonable to have recognised the exceptional circumstances around the first national lockdown, and to have allowed the claimants more time to attend a disciplinary hearing. A reasonable employer would have recognised the importance of allowing the claimants to attend a hearing before dismissing them. In the circumstances, it was unreasonable to treat their non-attendance as a further act of misconduct;

88.3 It was unreasonable to base the dismissal of Mr Jackson on an allegation that he and his father had been seen driving around when he had said he was self-isolating. Part of the allegation was not based on any evidence at all, and the allegation was not put to Mr Jackson at all;

88.4 There was no indication that the respondent gave any consideration to the claimants' clean disciplinary record over periods of service of 5 years (Mr Fuller) and 4 years (Mr Jackson). A reasonable employer would have considered this factor. Similarly, there was no evidence that the respondent gave any consideration of sanctions short of dismissal. A reasonable employer would have considered this.

89. For these reasons, I have concluded that the decisions to dismiss the claimants fell outside the range of reasonable responses. Even taking the small size of the respondent into account, the respondent did not act reasonably in treating the reasons for dismissal as a fair reason to dismiss the claimants. The claimants' complaints of unfair dismissal are well founded and succeed.

Could the claimants have been fairly dismissed anyway?

90. I have considered whether there is a chance that the claimants could have been fairly dismissed anyway if a fair procedure had been followed.

91. I have decided that the procedural and other failings in this case are such that I cannot say that the claimants would have been dismissed in any event. They go to the heart of the matter. A fair procedure would have involved an independent person being appointed to conduct the disciplinary hearing, and the claimants could have provided their recordings of the incident on 7 February to that person. It would also have involved rescheduled disciplinary hearings, at which the claimants could have explained their responses to the allegations. An independent person having listened to the recordings, and having taken the claimants' accounts and all relevant factors into consideration, may well have formed a different view to the respondent of the appropriate sanction in these circumstances.

92. For these reasons, it is not possible for me to say that there was a chance that the claimants could have been fairly dismissed in any event.

Acas Code of Practice on Disciplinary and Grievance Procedures

93. The ACAS Code of Practice on Disciplinary and Grievance Procedures applies to dismissals for misconduct. The respondent took some steps in line with the Code, for example by holding investigation meetings with the claimants which were conducted by a neutral person (Mr Hartland).

94. However, the respondent failed to comply with other requirements of the Code. In particular, the respondent failed to provide the claimants with the opportunity to answer the allegations at a disciplinary hearing (paragraph 11) and failed to provide an appeal (paragraph 26). These are fundamental

features of the protections which the Code requires. The failure to comply deprived the claimants of a full opportunity to challenge the allegations against them.

95. These failures were unreasonable. Although the procedure was taking place in the exceptional circumstances of the first national lockdown, both claimants were willing to attend meetings in person, which would have permitted the disciplinary hearings to go ahead. A written response to the appeals could have been provided. Even taking into account the small size of the respondent, it was unreasonable to fail to provide a disciplinary hearing and an appeal, having offered both.
96. I have decided that it is just and equitable to increase the award payable to the claimants by 15% in respect of these failings. The reduction from the maximum increase of 25% reflects the fact that the respondent did take some steps to comply with the Code.

Contributory conduct

97. Section 123(6) of the Employment Rights Act 1996 says, in relation to the compensatory award: 'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.'
98. Section 122(2) of the Employment Rights Act 1996 says, in relation to the basic award: 'Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.'
99. I have considered whether the conduct of either of the claimants is blameworthy or culpable such that a reduction should be made. I appreciate that tensions were high and both sides were upset and frustrated on 7 February 2020. However, whatever the claimants' reasons for acting as they did, I accept the evidence of Mr Randall that their conduct came across as aggressive, and Mrs Oorloff's evidence that she found this behaviour frightening.
100. I have concluded that Mr Fuller's conduct on that day did amount to blameworthy conduct. Although some of Mr Fuller's interactions with Mrs Oorloff were calm, he did raise his voice towards the end of the incident and he pointed at Mrs Oorloff from quite a close distance. This part of the incident took a very short time, less than 30 seconds.
101. Mr Jackson's conduct on that day also amounted to blameworthy conduct. He raised his voice for a longer period, around 2 minutes in all, and he spoke over Mrs Oorloff when she was trying to speak.

102. Both claimants' conduct took place before their dismissal and contributed to it, as the incident on 7 February 2020 was the trigger for the respondent's decision to dismiss.
103. I have decided that it is just and equitable to reduce the claimants' compensatory and basic awards. Mr Fuller's awards should be reduced by 10% and Mr Jackson's by 20%.
104. A remedy hearing will be listed to decide the remedy to be awarded to the claimants. Case management orders for that hearing will be sent separately.

Findings and conclusions on unauthorised deduction from wages

105. Mr Fuller also complained of unauthorised deduction from wages. He said that he was paid £105.30 less by way of net pay for March 2020 than in previous months. The respondent said that his gross monthly payment for March 2020 was the same, and he was not owed any more pay for March 2020. Mr Fuller's payslips (pages 312 to 324) showed some slight variations in his net pay from month to month.
106. There was insufficient evidence for me to make a finding that there had been an unauthorised deduction in respect of Mr Fuller's pay for March 2020. The complaint is not well-founded and is dismissed.

Employment Judge Hawksworth

Date: 19 December 2022

Sent to the parties on: 22 December 22

For the Tribunal Office

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