EMPLOYMENT TRIBUNALS

Claimant D Wales

v

Respondent Grange Motors (Brentwood) Limited

Heard at: East London by CVP **On**: 22,23,24 November 2022
Before: Employment Judge Anderson

Appearances For the Claimant: In Person **For the Respondent:** J Tunley (Counsel)

JUDGMENT

1. The claimant's claim of unfair dismissal is dismissed.

2. The claimant's claim of wrongful dismissal is dismissed.

3. The claimant's claim that there was an unlawful deduction from his wages by the respondent during the period 3 April 2020 to 2 August 2020 is dismissed.

4. The claimant's claim that the respondent unlawfully withheld a bonus payment is dismissed.

REASONS

Claim

1. By way of a claim filed on 22 December 2020 the claimant, David Wales, brought a claim of unfair dismissal, wrongful dismissal and unlawful deduction from wages against the respondent, Grange Motors (Brentwood) Limited.

2. A preliminary hearing took place on 9 July 2021 before EJ Hallen and it was clarified by the claimant that he did not seek to bring a claim of discrimination against the respondent. The claim was described by EJ Hallen as one of

unfair dismissal, and unlawful deduction from wages in respect of an unpaid bonus and failure to pay a full wage when the claimant was on sick leave from April 2020.

3. At a second case management hearing on 28 March 2022 before EJ Housego the claim is set out as being for unfair dismissal and notice pay only. Mr Tunley, for the respondent, said that to his knowledge the unpaid wages claim had not been withdrawn, though it was not raised by the claimant in his witness statement, but the respondent was prepared to defend the claim. The claimant confirmed that he pursued this head of claim.

4. A third preliminary hearing took place on 31 October 2022 before EJ ShastriHurst to consider the claimant's request for specific disclosure. Some further documents were ordered to be added to the bundle.

5. At the hearing I was provided with an agreed bundle and index, a witness statement bundle, a chronology and a remedy bundle. Mr Tunley of counsel represented the respondent. The claimant was a litigant in person. The respondent's witnesses were Christopher Roberts and Richard Hubbard. The claimant was a witness and had two additional witnesses, Daniel Hunt and Charlie Galert. All witnesses attended the hearing and gave oral evidence. I gave an oral judgment on 24 November 2022. The claimant has since requested written reasons.

List of Issues

6. A list of issues in respect of the unfair dismissal claim was set out in the case management order of EJ Housego dated 28 March 2022 as follows:

    a. The Claimant was dismissed:
    b. What was the reason or principal reason for dismissal? The Respondent says the reason was gross conduct, gross negligence or some other substantial reason. The Claimant accepts that the sole reason was the mistake in pricing two lhd Land Rovers.
    c. 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:
        i. there were reasonable grounds for that belief;
        ii. at the time the belief was formed the Respondent had carried out ' a reasonable investigation;
        iii. the Respondent otherwise acted in a procedurally fair manner; and (the real issue in this claim)
        iv. dismissal was within the range of reasonable responses.
    d. The Respondent says, in the alternative that the reason was capability (performance) or some other substantial reason.
    e. if the reason was capability, 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:

i. The Respondent was obliged to, and if it was so obliged, adequately warned the Claimant and gave the Claimant a chance to improve; ii. Dismissal was within the range of reasonable responses.

f. Thirdly, the Respondent says the reason was a substantial reason capable of justifying dismissal, namely breach of mutual trust and confidence arising from the expensive error that was made by the Claimant.

g. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

7. As the claims of unpaid wages and notice pay and were maintained, the following issues also fell to be determined by the tribunal:

   a. Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

   b. What was the claimant's notice period?

   c. Was the claimant paid for that notice period?

   d. If not, was the claimant guilty of gross misconduct?

Findings of Fact

8. The claimant, David Wales, was employed by the respondent, a car dealership company, from 1 April 2005. From around 2007 he was a sales manager and he worked at a site where he sold new Land Rovers, the Woodford site.

9. The claimant's contract contained the following clauses:

   Bonus/commission
   You benefit from a non-contractual bonus/commission scheme; this does not form part of your contract of employment.
   This is completely discretionary and will be subject to such terms and conditions as the company considers appropriate.
   …
   Deductions
   You expressly authorised the company, whether during or upon termination of your employment, to deduct from your salary or other payments due to you any sums which you may owe the company including but not limited to any overpayment of salary or expenses, any debt or loans, any overpaid holiday entitlement or any other sums which may require authorisation.

10. The respondent has a disciplinary policy containing the following clauses:

gross misconduct
The following are examples of gross misconduct; However ,this list is not exhaustive :
…
Gross negligence in the performances an associate's duties.
…
Dismissal or action short of dismissal
…
Gross misconduct may result in immediate dismissal without pay or pay in lieu of notice.

Suspension
If appropriate the company may by written notice suspend an associate while any investigation takes place. If the associate is suspended, the contract of employment will continue, together with all their rights under the contract (including the payment of salary but excluding any payment in lieu of Commission)…

11. The respondent's staff handbook sets out its policy on bonuses and pay and the following clauses are relevant:

Pay
You expressly authorised the company, whether during or upon termination of your employment, to deduct from your salary or other payments due to you any sums which you may owe the company including but not limited to any overpayment of salary or expenses, any debt or loans, any overpaid holiday entitlement or any other sums which may require authorisation.

There may be occasions where you have been negligent in the performance of your duties and this has resulted in a financial loss for the company. In these circumstances you may be asked to cover all or part of this course cost by way of an agreed repayment plan. This figure will be a reasonable amount taking into consideration your basic earnings bonus and similar cases of negligence in the business.

Commission and Bonus
Non contractual Commission and incentive bonus schemes operate in some department. Any schemes are completely discretionary and will be subject to such terms and conditions as the company considers appropriate. new paragraph it is a condition of any bonus Commission payment that you continue to be employed by the company and are not under notice at the date on which any bonus Commission is payable.

12. In March 2018 a Land Rover car was sold by a salesman, Charlie Galert, at the Woodford site. The car was stolen in August 2018. The customer ordered a replacement but was unable to claim for the stolen car as the car's tracker did not comply with the specification stipulated in the customer's insurance policy. The customer sought recompense from the respondent,

claiming that Mr Galert had told him that the car was equipped with a Category 5 tracker, when it was not. The customer provided a recording of a conversation between Mr Galert and the customer, made at the time he collected the vehicle in March 2018. The respondent investigated and found that there was no proof that Mr Galert had provided incorrect information at that time. No disciplinary action was taken against Mr Galert. A significant financial loss was sustained by the respondent. Mr Galert did later provide incorrect information about a car's tracker in respect of the replacement vehicle ordered by the customer, as is evidenced in an email from Mr Galert to the customer dated 11 September 2018. Mr Galert said that he raised the issue over the tracker with management after he became aware of it. He said this took place four years ago and he could not remember when it was raised, whether it was days, weeks, or months, but he had raised it with management as that is what he did with any complaints and issues.

13. In October 2019 the claimant ordered two left hand drive cars for a long standing customer. On receiving quotes for these vehicles, he noticed that they were much more expensive than he had expected and contacted Land Rover, the manufacturer, about this. The vehicles had to be built and there were no slots for building until February or March 2020.

14. In November 2019, before the claimant had received verification of the higher price of the vehicles, Land Rover contacted him to offer him immediate cancellation slots for the building of the vehicles. He accepted these and on 26 November 2019 the claimant sent quotes to the customer for the vehicles, which were similar to the cost of right hand drive vehicles but noting that there would be '*a little allowance for the LHD build'*.

15. In December 2019 Land Rover invoiced the respondent for the vehicles at the higher price it had quoted when the claimant first placed an order. The claimant said that he spent the time from receipt of the quotes until his email to his line manager Paul Greenwood in March 2020 trying to resolve this issue with Land Rover. There is no evidence of this within the bundle, but it is accepted by the respondent, and I find that the claimant did try to resolve the matter with Land Rover and the customer during this period. He was unable to do so.

16. He did not raise the matter with any of his managers until in March 2020 when the customer said that he would only pay the original price quoted or he would go elsewhere. The claimant sent an email to Paul Greenwood on 13 March 2020 after raising the matter with him verbally. He explains the situation and finishes:

As I said on the phone I am 100% responsible I can apologise a million times but I know I have messed this up. I have exhausted all I can think of to put it right and I apologise. I just have not been able to discuss it as I was hoping beyond everything I could sort it out as I was worried what might happen. Silly of me I know as it should have been discussed earlier I now realise.

17. On 23 March 2020 the COVID lockdown commenced, and the respondent's premises were closed.

18. On 3 April 2020 the respondent instigated an investigation into the matter of the supply of the two left hand drive vehicles and the claimant was invited to an investigation meeting on 6 April 2020. The meeting did not take place as the claimant commenced a period of sickness, due to stress and anxiety, on 6 April 2020.

19. As the claimant had not returned to work by 12 May 2020 the investigating manager, Dan Yeates, wrote to him on that date proposing to continue with the investigation either by telephone or in writing, as the claimant preferred. The claimant elected to continue by email and on 18 May 2020 Mr Yeates emailed questions to him which he answered. Mr Yeates sought clarification of some answers which the claimant provided on 1 June 2022. Of particular relevance in this correspondence is an exchange about process, one of the charges against the claimant when disciplinary proceedings were instigated. Specifically, the issue was about obtaining a deposit before confirming an order with a manufacturer. Mr Yeates asked about the process from enquiry to delivery, and in response to the claimant's first answer to this question he asked:

    Just to simplify your reply to question 1 so the process would be: receive inquiry - obtain cost price - quote - take deposit - allocate for build -obtain full payment - deliver vehicle. Can you confirm whether that's the correct process.

20. The claimant's response is:

    in theory this would be the process - however as I'm sure you know in this industry and working with JLG not everything flows as simply as it should.

21. On 28 June 2020 the respondent's parent company issued a document referred to by the parties as the reset document. This set out a plan to reduce staff in the wake of the impact of lockdown and Brexit and included a reference to the level of staff in a role such as the claimant's. Where there were currently two sales managers at a site, the plan was to reduce this to one. It is the claimant's case, based solely on the fact that this document existed before the disciplinary process against him began on 9 July 2020, and that he was ultimately dismissed, that his dismissal was predetermined as the respondent wanted to reduce staff numbers. Mr Roberts, the disciplinary hearing manager, did not know the claimant before he was asked to take on his role. Whilst Mr Hubbard, the appeal manager, did know him, he was not part of the claimant's direct line management chain. Mr Hubbard said he was aware of the reset document, but it had no place in his decision making. There was no evidence before me of a link between the

reset document and the claimant's dismissal and I find that the respondent's downsizing plans were unconnected to the claimant's dismissal.

22. On 9 July 2020 Dan Yeates advised the claimant that he had recommended that the matter progress to a disciplinary hearing. In his investigation report (incorrectly dated as 1 April 2020 in the index but clearly written after the claimant had provided information to the investigation in May and June 2020) Mr Yeates concludes that:

    The evidence shows that DW failed to follow company policy by requesting the build of 2x left hand drive vehicles prior to quoting a price to the customer and taking a deposit.

23. The claimant was on sick leave until 3 August 2020. He raised a grievance against Paul Greenberg on 3 August when he returned. He was suspended from work on 4 August 2020 pending the outcome of the disciplinary hearing.

24. It is the claimant's case that he should have been suspended at the point that the investigation was instigated, which was 3 April 2020. He relies on the claimant's disciplinary policy which sets out that if appropriate the company may suspend an employee while an investigation takes place. If the claimant had been suspended, he would have received full pay between 3 April 2020 and 3 August 2020. The respondent did not suspend the claimant because he was not at work as clarified by Chris Roberts in a letter dated 8 September 2020. I find that respondent was under no obligation to suspend the claimant whilst he was absent from work on sick leave. I find that the fact that the claimant was not suspended did not preclude the respondent from suspending him when he returned from sick leave, where a disciplinary process was still taking place. It is clear from the wording of the disciplinary policy that the purpose of suspension is to protect the business and that it is envisaged that suspension can continue throughout the disciplinary process.

25. On 11 August 2020 Chris Roberts, a director of the respondent for the North West region appointed as disciplinary meeting manager, wrote to the claimant inviting him to attend a disciplinary meeting to discuss the allegations against him which were:

    Gross negligence

    - *the ordering of two left hand drive vehicles without checking the purchase price from the manufacturer.*
    - *not informing senior management of the pricing error in good time so that significant losses to the business may have been mitigated or avoided in totality.*

26. The letter goes on to advise the claimant that the allegations are classed as gross misconduct which could result in summary dismissal. Also, that the proceedings would be stayed until the grievance was resolved.

27. The respondent wrote to the claimant on 11 September 2020 after the claimant's grievance was decided and invited him to a disciplinary meeting on 15 September 2020. The meeting took place on that date and the claimant was accompanied by his colleague Danny Hunt. The meeting was recorded by both parties and a transcript was prepared from the respondent's recording.

28. The claimant was invited to a follow up meeting on 21 September 2020. The notes of that meeting are recorded as being made on 18 September 2020, but I find that meeting took place on 21 September 2020. Mr Roberts advised the claimant that he had found the allegations against him proven and he had decided that the claimant would be summarily dismissed. He identified four areas of concern: that the vehicles were ordered without taking a deposit, that the quotes to the customer were inaccurate, that an issue about VAT on the quotes had not been referred to a financial controller for clarification and that the matter was not escalated until the last minute leaving the respondent with no opportunity to mitigate the loss. Evidence before me on these matters is considered below.

29. Confirmation of dismissal was provided in writing on 25 September 2020. The two allegations of gross negligence are set out as in the letter of 11 August 2020 and Mr Roberts clarifies that the negligence as regarding ordering is:

    Fact that you ordered this without an order from the guest or deposit.

    quotations were incorrect

    misunderstanding of the VAT element not checked with accounts.

30. The claimant appealed the decision, and an appeal hearing took place on 19 October 2020. The appeal manager was Robert Hubbard, a director of the respondent who knew the claimant but did not work with him on a day-to-day basis. Mr Hunt attended the meeting with the claimant and both parties made a recording of the hearing. In a letter dated 2 November 2020 Mr Hubbard upheld the claimant's dismissal.

31. The claimant was dismissed and a bonus payment of £2900, which became payable to the claimant in February 2020, was withheld. The claimant's case is that the bonus was payable as it was earned before the disciplinary proceedings began. The respondent's policy is clear that where there is evidence of negligence causing a financial loss an employee can be held responsible for covering all or some of the loss and that all bonus payments

are discretionary. The claimant did not provide any evidence to show that there were other arrangements in place, or that the bonus was not discretionary, and I find that under the claimant's contract and the respondent's policy the respondent had no obligation to pay the bonus.

32. Of the four areas of concern identified by Mr Roberts on 21 September 2020 when he advised the claimant of his decision to dismiss, the parties are in dispute as follows:

33. Deposit - it is the claimant's case that there was no policy of taking a deposit before finalising an order for a vehicle build with a supplier. The respondent has provided no written policy and I was not assisted by the list of fines to which Mr Roberts pointed. Both of the respondent's witnesses, experienced in the industry and senior to the claimant at the time of the disciplinary process, were of the view that an order should not be finalised without a deposit being taken. Mr Roberts, with substantial experience in the industry said he had never worked anywhere where a deposit was not taken. The claimant's evidence was that that was the usual process but there were many exceptions. He acknowledged to Mr Yeates that there was a process of taking deposits but qualified it as being 'in theory'. In oral evidence and to Mr Roberts in the disciplinary hearing he said that he had, on a number of occasions, ordered without a deposit for regular customers. It was put to him that although this may happen it should only do so with the approval of a Head of Business. He said that in practice this was not always the case. Mr Hunt, in the disciplinary hearing, said that orders could be taken without deposits, with the knowledge of the Heads of Business. In oral evidence he repeated this but then went on to say said that the sales managers operated autonomously and could make the decision if the Head of Business was not there at the time. I found his evidence unconvincing. I find on the evidence that there was a process in place of obtaining a deposit before an order was placed. It was not written but the claimant and Mr Hunt acknowledged that that was the process, that it could be amended with authorisation of senior management, and in addition to that the sales managers did not always follow the process where they felt confident to do so. There is no evidence that the respondent authorised the departure from process in this case and I do not find that it did.

34. On the matter of the claimant failing to clarify an issue on the quotes from Land Rover about VAT and whether it had been incorrectly applied, the claimant said that there was no financial controller to whom he could speak at the time and even if he had discussed it with finance the finance colleagues would not have known the answer. I agree with Mr Tunley on this point that the claimant could not have known they would be unable to assist, and I do not accept that there was no-one with the requisite financial experience in the respondent's business to whom the claimant could have gone for advice. The point in dispute is not that the claimant did not seek advice. He admits that he did not. It is that he should have done and there were appropriate people to consult. I accept that.

35. Also in dispute are the claimant's reasons for failing to escalate the matter until March 2020 which in turn led to the conclusion of Mr Roberts, upheld by Mr Hubbard, that there could be no trust and confidence in the claimant's ability to do his job going forward or confidence that such a mistake would not be repeated. The claimant has put forward a number of reasons for this. He said to Mr Greenberg in his email in March 2019:

    'I have just not been able to discuss it as I was hoping beyond everything I could sort it out and I was worried what might happen'.

    In his witness statement he said that

    '…*the company was run by making fines and belittling employees who made mistakes. So I was left in turmoil trying to deal with this myself.*'

    and

    '*as soon as I told the company it was no less than I feared and within weeks I was invited to an investigation hearing.'*

36. He also said in evidence that there was no point in telling his line manager as his line manager would not have known what to do. He said in oral evidence that in hindsight it may be that he could have acted differently but he was not sure. I find on the evidence that the claimant did not escalate the matter because he thought he could sort it out without anyone discovering the error and he sought to do so as he believed it was a serious matter which may lead to disciplinary action. I make no finding on the skills or otherwise of the claimant's manager and accept that the claimant may have held the view that Mr Greenwood could not assist, but in my view, that was not his decision to make and he could have spoken to another manager.

37. The claimant alleges that there was an inconsistency of approach from the respondent in its decision to discipline and dismiss him. It is the claimant's case that he was treated differently to other employees who have caused the company to incur significant losses. He relied on two specific examples. One was a matter where an employee committed accounting fraud to benefit another employee. It was accepted by the claimant in evidence that the employee who committed the fraud was dismissed by the respondent and that the one who benefited, or stood to benefit, resigned so that no action could be taken. I do not find that a comparison of that case with this shows a difference in treatment.

38. The second is that he was treated differently to Mr Galert who, the claimant says, caused the company to incur a much greater loss. It is apparent from the documents in the bundle that the respondent investigated due to a customer complaint, and there was no evidence of wrongdoing by Mr Galert

at the relevant time. The claimant and both of his witnesses, including Mr Galert himself, relied on an email dated 11 September 2018 which they incorrectly referred to as being in March 2019, as showing that Mr Galert had provided information to the customer which was incorrect. The email does not show that. It shows that Mr Galert provided incorrect information at a later date about a different car, and there is no evidence that that information caused a loss to the company. Mr Galert and Mr Hunt accepted that they had been mistaken in cross examination. I find on the evidence before me that the respondent had no clear evidence of wrongdoing by Mr Galert, and note he did not admit to any wrongdoing in relation to the vehicle that was delivered in March 2018. This is materially different from the claimant's case in which he admitted that he had made an error and there was evidence that he had done so.

39. On the matter of when it came to Mr Galert's attention that the customer alleged that he had made a mistake and when he then reported that to management, the evidence is unclear. He again said that he could not remember when he raised it with management but that he had, because that is what 'we are supposed to do'. He did this before the correspondence in March 2019 resulting from the customer complaint. While there is no conclusive evidence of whether he tried to hide the matter or failed to escalate it that would assist the claimant's case I note that in any event he was a young man with a relatively short experience in the industry, unlike the claimant who was in a senior position with many years' experience. I find that there are substantial differences between the two incidents.

Submissions

40. The claimant said he had been a loyal employee for 15 years with an exemplary disciplinary record. He said he had made a genuine mistake and he had taken steps to remedy this to a degree that made him unwell. He said there had been no intent or malice. The claimant said that the respondent, on its own admission, did not have a process for the order of left hand drive vehicles and it was not always the case that there was a signed order and deposit before placing an order with a manufacturer. The claimant said that he did not accept that his actions constituted gross negligence warranting dismissal. The different treatment of Charlie Galert was evidence that the claimant had been treated unfairly. The reset document is evidence that his dismissal was predetermined, and his mistake played into the respondent's hands. He said that Charlie Galert did not tell managers about his mistake for six months whereas he had taken three months and had tried to resolve the matter. The claimant said he had been scared about what would happen as he knew the way the respondent treated people. It was a genuine mistake and he had ordered thousands of cars and made the respondent millions of pounds. He said that a warning would have sufficed and would have been enough of an impact to ensure the same thing never happened again. He said that he and Mr Hunt had run

the Woodford site successfully for 15 years. The claimant said that he could see from the handbook why his bonus was deducted but he questioned why they would as it seemed unfair. He said he was told to go off sick and he was off sick with worry. If he had been suspended on 3 April, he would have received full pay rather than SSP.

41. Mr Tunley said that the respondent dismissed the claimant due to the decisions he made in late 2019 to March 2020 which constituted gross negligence. He said that was the only reason and the claimant's only evidence against that is the existence of the reset plan. This showed the respondent envisaged a reduction in head count but was not evidence that this led to the claimant's disciplinary process or that it was predetermined. He said the respondent carried out a reasonable investigation and had reasonable grounds to believe the claimant's conduct was grossly negligent. The claimant admitted his errors and said that he was 100% responsible. The claimant suggested that Land Rover should have been contacted as part of the investigation, but this was not necessary as the respondent did not dispute that the claimant had contacted Land Rover to try and resolve the matter. The respondent found that there were four areas of concern: the claimant did not take a deposit for the vehicles, the quotes he gave were not accurate, he did not resolve the VAT issue and he failed to escalate the matter. Mr Tunley said that all of these matters amounted to a gross failure on the part of the claimant to perform his duties. He said that no particular issues about the process had been raised by the claimant other than the late suspension. There was no contractual right to suspension. Mr Tunley said that the facts of the incident in which Charlie Galert was involved are not sufficiently similar to give rise to any finding of unfair dismissal on the basis that two similar situations were decided differently. As the claimant's conduct was found to amount to gross misconduct this warranted summary dismissal. Mr Tunley said that the claimant was unable to show that he had a right to suspension, and the respondent had shown that it was entitled to deduct money to recover its losses so that the claims of unlawful deduction from wages along with the other claims should be dismissed.

Law, decision and reasons

Unfair dismissal

42. The question I need to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

43. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(b) the conduct of the employee. I am satisfied on the evidence that the claimant was dismissed for misconduct.

44. The claimant's case in his ET1 and still at the preliminary hearing on 9 July 2021 was in part that the respondent's decision was influenced by his

sickness absence. This matter was not raised by the claimant in his cross examination of the witnesses or in his witness statement. I was taken to no documents that would show that his sickness absence was relevant and I find it played no part in the respondent's decision to dismiss him.

45. The claimant also said that the reason for his dismissal was that the respondent used it as an opportunity to reduce staff numbers as part of its post Covid/post Brexit downsizing plan. I have made findings about the evidence provided by the claimant in this respect and find that this played no part in the respondent's decision to dismiss him.

46. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair or unfair, having regard to the reason shown by the employer and whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

47. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions *in Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23*, *and London Ambulance Service NHS Trust v Small 2009 IRLR 563*).

48. In relation to the first part of the Burchell test I am satisfied that the respondent had a genuine belief in the claimant's misconduct. The claimant has admitted that he made serious errors in quoting an incorrect price to a customer and despite being aware that there was an issue about the correct price, ordering two vehicles for the customer without resolving that issue. When the price crystallised at a higher price than he had quoted the customer he then failed to tell management about this until three months later when the customer refused to pay.

49. I must then consider whether the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation.

50. As noted, the claimant has admitted wrongdoing. The respondent carried out an investigation in which the claimant was given the opportunity to state his case. Danny Hunt and Paul Greenberg were also spoken to. The claimant was asked by Mr Hubbard at the appeal hearing whether there was anyone else he thought the respondent should have contacted. He said that the respondent could have contacted Land Rover to verify his version of events. The respondent said that it did not contact Land Rover as it accepted his version of events. I accept that there was nothing to gain from the respondent speaking to Land Rover on that point. The claimant makes no other criticism of the investigation except that he says it and the whole disciplinary process took too long. Mr Hubbard confirmed this was because of availability on both sides and the pandemic. There is no evidence that the length of time taken to conclude the process affected the investigation or the outcome of the disciplinary process.

51. Following the investigation there was a disciplinary hearing and an appeal hearing. The claimant had the opportunity to say whatever he wanted to say at each hearing and was accompanied by his colleague Danny Hunt at each hearing.

52. The claimant says that the matter was predetermined as the respondent used the dismissal process in its plan to reduce headcount, presumably to avoid a redundancy exercise. There is no evidence of this and I find that it is an unlikely scenario, where in a large company there was a possible redundancy exercise approaching and one employee was targeted to be dismissed outside of that process. I accept the evidence of the decision makers that their decisions were made independently, on the evidence before them.

53. The claimant has commented on the respondent's lack of care towards him in respect of his ill health. He said in oral evidence that he should not have been asked to contribute to the investigation process when he was on sick leave. This was not something he said to the respondent at the time and on the documents he has engaged properly and seriously with the investigation process. The disciplinary part of the process was delayed until his return to work and his grievance was heard.

54. I find on the evidence that the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation

55. I must then consider whether the decision to dismiss was within the range of reasonable responses. Mr Roberts found on the evidence before him that the allegations were proven and that they fell within the category of gross negligence, which is a gross misconduct matter under the respondent's policy. He stated that he took mitigation into consideration, namely the fact that the claimant had a 15-year unblemished and successful employment

record with the respondent, but he found that on balance trust in the employee had been broken. Mr Hubbard said that he had also considered mitigation, the respondent could live with a mistake but that there had not been an acknowledgement from the claimant throughout the process that his failure to escalate the matter quickly was the problem from the respondent's point of view. In oral evidence the claimant was still equivocal about how and whether he would act differently in the future.

56. As noted, the tribunal cannot substitute its own decision for that of the employer. It must consider whether the decision was within the band of reasonable responses. The acts of the claimant were negligent and caused a substantial financial loss to the respondent. The claimant admitted that he had made errors. Even where there is evidence that some sales managers had a history of departing from the process of obtaining a deposit before placing an order, there are other significant errors. Gross negligence is clearly set out in the respondent's disciplinary policy as an example of gross misconduct. The respondent was, I would say reasonably, unconvinced that the claimant accepted that he should have acted differently in terms of escalating the matter more quickly. I find that the decision to dismiss was within the band of reasonable responses open to the respondent. I conclude that the dismissal of the claimant by the respondent on 21 September 2020 was fair, and the claimant's claim of unfair dismissal is dismissed.

Wrongful dismissal

57. I find that as the claimant was guilty of gross misconduct it was open to the respondent to dismiss him without notice. It is stated clearly in the claimant's contract that a finding of gross misconduct may result in immediate dismissal without pay or pay in lieu of notice.

58. The claimant's claim of wrongful dismissal is dismissed.

Unlawful deduction from wages.

59. S13(1) of the Employment Rights Act 1996 is as follows:

An employer shall not make a deduction from wages of a worker employed by him unless

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

60. *Payment during the sickness period 3 April 2020 to 2 August 2020* – the claimant was on sick leave at this time and received statutory sick pay. No evidence has been presented which shows that the claimant was entitled to be suspended on full pay during this time and I conclude that the respondent did not make an unauthorised deduction of the difference

between full contractual pay and statutory sick pay from the claimant's wages during this time.

61. *Payment of bonus* – the respondent's policies and the claimant's contract set out clearly that the payment of a bonus is discretionary and that losses incurred due to the negligence of an employee can be recovered from the employee. I heard no evidence on whether the bonus had been declared and quantified, the point being that at that stage it becomes 'wages' for the purposes of s13 of the Employment Rights Act (*Mouradian v Tradition Securities and Futures [2009] EWCA Civ 60 Court of Appeal)*. However, I heard no evidence from the claimant that the deduction was anything other than in accordance with the respondent's policy on recovery of losses and he seemed to accept that it was, in oral evidence. I therefore find that deduction from wages of the bonus payment, if it had been declared and quantified, was not unlawful. Alternatively, the bonus payment was discretionary, and the respondent had the right to withhold it.

62. The claimant's claim of unlawful deduction from wages is dismissed.

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Employment Judge Anderson

Date: 16 December 2022