



EMPLOYMENT TRIBUNALS

Claimant: Mr Dent

Respondent: Pendragon Plc t/a Stratstone BMW

Heard at: Leeds (by video) **On:** 2 May 2023

Before: Employment Judge Knowles

Representation

Claimant: Mr G Price, Counsel

Respondent: Mr P Sands, Solicitor

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's claim of unfair dismissal is well founded and succeeds.
2. The Claimant shall receive no basic or compensatory award under the provisions of Sections 122(2) and 123(6) of the Employment Rights Act 1996
3. The Claimant's claim of wrongful dismissal is not well founded and fails.

RESERVED REASONS

Issues

1. The Claimant's claims are unfair dismissal and wrongful dismissal.
2. The issues in this matter are as follows:

Unfair dismissal

Was the claimant dismissed?

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.

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:

- there were reasonable grounds for that belief;
- at the time the belief was formed the respondent had carried out a reasonable investigation;
- the respondent otherwise acted in a procedurally fair manner;
- dismissal was within the range of reasonable responses.

Wrongful dismissal / notice pay

What was the claimant's notice period?

Was the claimant paid for that notice period?

If not, was the claimant guilty of gross misconduct or did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Evidence

3. This hearing was heard using HMCTS's cloud video platform.
4. The hearing was scheduled for 1 day but this was insufficient time. By the end of the day we had only progressed through hearing the Claimant's and Respondent's evidence.
5. I agreed with the parties that they would submit their closing submissions in writing and would then deliver a Reserved Judgment with Reasons.
6. I received the written submissions from the Tribunal office on 13 June 2023.
7. It has been difficult to arrange a time for deliberations in the intervening period and I apologise to the parties for the fact that they have had to wait for this Judgment for a period of 4 weeks since I received the written submissions.
8. The parties produced a bundle of documents, 184 pages.
9. References to page numbers in brackets below are to page numbers in the bundle.
10. I heard evidence from Mr Partington who is the Respondent's National Franchise Director BMW & MINI.
11. I heard evidence from the Claimant.
12. Each witness produced a written witness statement.
13. The Claimant produced a witness statement from Mr Harrison, the Respondent's former Sales Executive.
14. The Respondent produced a witness statement from Mr Cummings, the Respondent's Regional Director.
15. However, Mr Harrison and Mr Cummings were not called to attend the hearing. Their evidence can be taken into account through reading their statements but the weight which can be given to their evidence is limited because they have not given evidence under oath and have not answered any questions concerning their evidence.

Findings of fact

16. These are my findings of fact on the issues material to my conclusions. They are not a recital of all of the evidence heard during or produced at the hearing. These findings

are made to the relevant standard of proof which is on the balance of probabilities i.e. what is more likely than not to have happened based on the evidence before me.

17. The Claimant was employed between 17 February 2020 and 16 September 2022 at the Respondent's dealership in Harrogate. Mr Partington had promoted the Claimant to the position of Head of Sales on 13 September 2021.

18. There is no dispute from the Claimant that there are some standard operating procedures or requirements which he and his team must follow when selling a car.

19. The Respondent has an anti-money laundering and counter terrorist financing policy (178-180). This requires their employees to know their customer and verify their identity and to report suspicious transactions.

20. The Respondent is also subject to obligations under their franchise agreement with the manufacturer not to knowingly sell a vehicle to a re-seller, i.e. someone who is purchasing the vehicle to immediately sell it on to another. This would prevent ordinary customers from purchasing new vehicles from an approved retailer and force them to buy from re-sellers at an inflated price and could therefore be damaging to the manufacturer's brand.

21. Not specifically set out in either agreement, so far as the evidence has been presented to me, but part of the Respondent's standard operating procedures, vehicles should be only be handed to the customer that purchased them.

22. 1 September each year marks a change in registration numbers and is traditionally a busy time for car dealerships. Harrogate BMW was due to be busy on that day. I have heard disputes over just how busy they were to be, but I accept that the Claimant had overall responsibility for 17 car handovers that day and that 1 September 2022 was one of the busiest 2 days in their year. Nonetheless this was not out of the ordinary in the industry.

23. On 31 August 2022 the Respondent was contacted by Durham Police concerning Mr A who they advised had been involved in criminal activity.

24. This caused a review of deliveries scheduled for September 2022 to be undertaken by the Claimant.

25. A red list was produced of suspicious and the Claimant admits that he was instructed that orders paid for by a third party should be cancelled. The Claimant further accepts that he was told that he should not release a vehicle to Mr B (one of the people on the red list) without authority.

26. Mr B did arrive to collect the car and the Claimant advised him that he could not release the car to him because the funds for the vehicle had come from a 3rd party individual. However, the Claimant amended the purchase into the 3rd party's name and released the vehicle to Mr B. The Claimant admits that this was wrong.

27. The Claimant's case is that although it was wrong for him to have released the vehicle to Mr B, he should not have been dismissed. It had been a busy day. Mr B had put him under pressure.

28. In his claim of unfair dismissal, the Claimant principally relies on the fact that a colleague who was more senior to him, the Regional Sales Director (RSD), overcame a similar issue concerning the a red-listed vehicle in a similar manner. The RSD had been drafted in to Harrogate that day by Mr Partington because of the potential issues with cancelling deliveries to customers.

29. The RSD had handled a sale which was on the red list because the funds for the vehicle had been provided by a 3rd party company, an independent car retailer, and

therefore appeared on its face to be a strong possibility of a sale to a reseller.

30. The customer who had been due to collect that vehicle, Mr C, applied pressure over that sale. However, Mr D who was by coincidence collecting another vehicle that day offered to overcome the issue by providing the funding for the vehicle and making the purchase. The RSD cancelled Mr C's order and created a new one for Mr D. Mr D was present to collect the keys. Nonetheless, Mr D simply handed the keys to Mr C and Mr C took the vehicle away.

31. In the round, Mr B and Mr C were both able to drive away the vehicles they had set out to take delivery of that day, and BMW Harrogate had been able to sell the vehicles. That is notwithstanding that the transactions were on the red list.

32. Worryingly the anti-money laundering and counter terrorist financing policy and related security processes seem to have been treated by both the Claimant and the RSD simply as hurdles to be cleared. This makes the policy somewhat of a false dawn. I suspect that this Reserved Judgment and Reasons will be an uncomfortable read for the Board and its Audit and Risk sub-committee who have clearly sponsored and approved the policy.

33. There are some distinctions between the transactions done by the Claimant and the RSD. The Claimant accepts that he breached the instruction not to let Mr B take the car away without authority. The Claimant accepts that he did not deliver the car to the purchaser, who never attended the dealership at all.

34. The RSD was the person placed into the business that day with authority, and the RSD had delivered the vehicle to the purchaser who was present in the dealership.

35. The Claimant has stated that his transaction was not quite the same as the RSD's transaction but suggests that it was similar. But see below where the Claimant accepted that there was a fundamental difference.

36. The Claimant attended a preliminary investigation into the circumstances of his transaction on 1 September 2022. The investigation was undertaken by the RSD (74-80).

37. During the discussion, the Claimant stated "*I was trying to find a solution and I've arrived at the wrong answer and I can't account for my actions other than that I seemed to be dealing with a lot of things at the same time and I just lost concentration on the job in hand, which was obviously the important job to get right and I've got it wrong*".

38. The Claimant did not underestimate that he had done something seriously wrong. He described it as a wrong judgment on something that was high priority. He acknowledged that he overlooked the fact that they were not delivering the car to the paying customer. The Claimant's concluding comments were "*I'd like to make it plain that I have not set out to deliberately contravene the company's policy or risk myself or the company. I have made a grave mistake and I, you know, but I've had a busy stressful day and I've made a poor judgement in the heat of the moment*".

39. The Claimant explained some circumstances in mitigation, that he had been busy that day, and that he had dealt with an extremely aggressive customer earlier who had been unhappy with the cleanliness of his new vehicle. He says his mind was elsewhere.

40. The Claimant was suspended. A suspension form was completed (81). The form has a space for entry of comments and the following has been entered "*[Mr C collected a vehicle from Stratstone on the same day authorised by management in similar circumstances – this is unfair*".

41. A letter was given to the Claimant (82).

42. The Claimant was invited to attend a disciplinary hearing with Mr Partington (96).

43. The invitation to the disciplinary hearing suggests that these are the issues:

- BMW Order relating to Mr [B]
- Potential fraudulent payment flagged by group (relating to [3rd party])
- Failing to follow / adhere to senior leadership instruction
- Changing of Documents to match suspected fraudulent payment to enable release of vehicle
- Knowingly or recklessly acting beyond your authority level
- Failing to ensure group processes have been followed
- Releasing a car without proper and correct process being followed / Home Delivery / Showroom collection

44. The disciplinary hearing took place on 14 September 2022. The Claimant was accompanied by a work colleague. Notes were taken (100-116). There is some dispute as to what papers were provided to the Claimant before the hearing. I must say there is no consistency in either parties evidence on what was actually sent to the Claimant. I cannot find as a fact that this makes any difference, the Claimant is not suggesting that he could not set out fully his case. In answer to questioning in this hearing the Claimant did accept that he had the opportunity to put forwards his best case and accepted that his defence was essentially that the offence was not premeditated or for financial gain and that he was advocating for a lesser sanction of a final written warning. The Claimant also accepted that dismissal was a possible sanction. But he accepted when questioning in Tribunal that the lack of authority concerning his transaction was a fundamental difference to the RSD's transaction. At best, the Claimant had mentioned that transaction in passing at the disciplinary hearing (see 103) and had said "*I'm not comparing that as the same*".

45. Mr Partington decided to dismiss the Claimant by letter dated 16 September 2023 (121-123). The letter is effectively dismissal for decisions which place the Respondent at risk of being knowingly involved with money laundering and also knowingly selling to resellers, exposing the franchise to possible penalties and his inability to follow a simple instruction from his Regional Director. It is important to note that at its height this is a decision upholding items 3 and 7 of the list of issues only. There is no finding from Mr Partington on the other issues, including whether or not the actions were undertaken knowingly or recklessly exceeding the Claimant's authority levels.

46. The decision to dismiss appears plain and simple; the Claimant did not obey the instruction not to let the car go without authority and he did not deliver the car to the customer. The Claimant does not dispute that these findings were correct.

47. But upon closer analysis there are also references to startling aspects to the reasons for dismissal. The letter states that "*It is, however, clear to me that decisions made surrounding this incident and arguably decisions that are now coming to light emphasise wider issues, such as selling to problematic customers who show a huge potential risk to our organisation*". No further details are shared as to what was "*now coming to light*". It appears clear that Mr Partington took into account matters not shared with the Claimant in making the decision to dismiss. These were factors that he felt important enough to mention in his letter dismissing the Claimant but they were not part of the issues which were notified to the Claimant in advance of the hearing. It may be that the issues were discussed at the disciplinary hearing, if they are the issues relating to customers from particular addresses referred to in the disciplinary hearing notes (108) but during the hearing Mr Partington described those issues as "*a whole piece we're not even talking about here*".

48. The Claimant was afforded the right to appeal and exercised that right. An appeal hearing took place on 6 December 2022 before Mr Cummings. Notes we taken (137-138). Mr Cummings upheld the dismissal and the decision was confirmed by letter dated 8 December 2022 (144). I have read Mr Cummings' witness statement. I can see that the Claimant had prepared a long and detailed grounds of appeal (126-131). Mr Cummings

does not appear to engage with those issues in his decision letter. The letter instead appears to be confirmation of a simple review of Mr Partington's decision to dismiss. I can see that the Claimant relied heavily on the similarity of his transaction to that of the RSD. Of that Mr Cummings simply wrote that the RSD had the authority to undertake his transaction whereas the Claimant did not therefore the instances were not comparable.

49. The decision of Mr Cummings does however depart from one aspect of Mr Partington's conclusions, in that Mr Cummings finds that "*made a conscious decision to not follow clear instruction from your leader, and allowed the business to be put at risk by acting above your authority*".

50. Mr Partington had found that "*Finally, I can clearly see in the hearing, and throughout the relationship I have had with you, that the decisions made here are very unlikely to have been made for personal gain, or to knowingly de-fraud or compromise the business. Your attitude and approach has always proved to be professional and your commitment to the business is clear*".

51. The reason for Mr Cummings switch in emphasis is not fleshed out in the appeal determination letter. It is not covered in the witness statement which has been produced for Mr Cummings either. It was not an item of discussion according to the notes of the appeal hearing. Nobody appears to have put to the Claimant that he should address whether or not this was a conscious decision or a mistake by someone unlikely to have been to knowingly defraud or compromise the business, as Mr Partington puts it.

52. In that sense, in my conclusion Mr Cummings appears to have escalated the reasons for the dismissal without suggesting to the Claimant that they are issues he should have addressed in his appeal.

53. Whilst Mr Cummings appears to have felt the need to follow up the RSD's transaction, he appears to have accepted the RSD's account that what the Claimant says happened "did not happen". This appears at odds with the evidence. It appears common ground that the RSD's transaction did happen, as the Claimant had explained it happened. There are differences of opinion over how similar the outcome of the transaction is, but there seemed to be no dispute that the RSD's transaction occurred as the Claimant described it. It seems that Mr Cummings cannot have been on top of the distinction as when he went to the RSD after the appeal hearing for an explanation he tells the RSD "*I just need confirmation again from you that this is not the case and a bit more detail please in regards to his comments*". Whilst the RSD replies it did not happen, it plainly did. He provides no details about his transaction whatsoever, and instead repeats a description of the Claimant's transaction which was not in dispute and was not what he had been asked to provide details about (139, 140).

54. I have read and considered Mr Harrison's witness statement. It does not appear to address anything other than matters which are largely agreed by both parties. It was not referred to during the hearing.

Submissions

55. After we adjourned the matter due to insufficient time, I suggested that the parties make written closing submissions and they agreed. I did mention that the parties may need to consider the interplay between negligence and conduct. I had formed no view on the relevance of that but as it was in my mind at the conclusion of the hearing I felt it only fair to ask the parties to also think about that and make submissions about it if they wished to.

56. The Claimant submitted written submissions (9 pages).

57. The Claimant submits that the Claimant does not contend that his actions on 1 September 2022 could not constitute conduct. The Claimant submits that it was no part

of the Respondent's case during the disciplinary process or Mr Partington's evidence that the Claimant acted deliberately. The Claimant submits that he did not choose to disregard management instructions or the Respondent's process, he simply made a decision which he felt reasonable at the time but on reflection he accepts that it was not. The Claimant submits that he accepts that it "*was not reasonable for him to have not consulted with [the RSD] regarding the [Mr B] transaction or to have permitted [Mr B] to leave with the vehicle when [the 3rd party who paid for the vehicle] was not present, or, alternatively, ensure the vehicle was delivered to [the 3rd party who paid for the vehicle]*". The Claimant invites the Tribunal to assess the magnitude of the transaction.

58. The Claimant concedes that the Respondent genuinely believed that the Claimant had

- a. authorised the transaction carried out by [a sales person] without first obtaining express approval from [the RSD] and;
- b. permitted [Mr B] to leave in the car that [the 3rd party who paid for the vehicle] had purchased despite [him] not being present on the site.

59. The Claimant submits that the real reason he was dismissed was not for that conduct but because the business being done by the Harrogate site exposed it to a significant risk to its franchise agreement with BMW and disapproved of that business, and because that agreement would be significantly jeopardised if its RSD was found to have facilitated that business and, further, to have allowed Mr C to leave in the vehicle he was there to collect originally on behalf of a known re-seller. The Claimant refers me to consider the decision letter and the remarks of Mr Partington made during the disciplinary hearing. The Claimant submits that if I am not with him on that (the reason for dismissal), then the investigation was littered with failings and missteps. The Claimant submits that he was misled in to believing that the interview on 1 September 2022 was a preliminary one only, then in fact no further investigation took place. The RSD was not an appropriate person to investigate given his transaction, which can be seen because he gives evidence during the meeting on 1 September 2022. Mr Partington had been involved in the matters previously and was not impartial. Further investigations said to have taken place were not recorded, and no further attempt were made to speak to some witnesses at all. The outcome letter overlooks the RSD's transaction, and refers to "wider issues". The Claimant notes that the appeal took 2 ½ months to hear and the outcome is perfunctory and does not address the grounds of appeal. The Claimant notes that Mr Cummings simply asked the RSD for confirmation that the transaction with Mr C and D did not happen as described [140].

60. The Claimant's submissions in relation to wrongful dismissal are that only "knowingly or recklessly acting beyond your authority" expressly appears in the list of examples of gross misconduct in the Respondent's policy [153]. The Claimant submits that his actions were consistent with the actions of the RSD and that the only difference is that the 3rd party was not present to collect the car whereas in the sale authorised by the RSD Mr D was present when the vehicle was released, albeit to Mr C. The Claimant submits that this was a surprise to Mr Partington during evidence at this hearing. The Claimant submits that it was at worst, a managerial decision which was consistent with the actions of his superior and immediate line manager, but which that person had not expressly sanctioned and a failure to follow a reasonable instruction. The Claimant notes that the Respondent's own policy directs that this might be grounds for dismissal with notice (152). The Claimant submits that the release of the vehicle to Mr B cannot sensibly be said to have repudiated the contract of employment with the Respondent in the circumstances where his transaction and that of the RSD resulted in the same thing.

61. The Respondent produced written submissions (10 pages).

62. The Respondent has produced in its submissions a list of matters which appear to be agreed and a list of key points that the Claimant made during evidence at the hearing. I won't repeat the lists here however they are well prepared and I am grateful for the details

provided.

63. The Respondent submits that whilst the Respondent concluded that the Claimant did not have malicious intentions, it remains that the Claimant's actions placed the business at risk of facilitating criminal transactions of a contravention of the re-selling provisions in the franchise agreement. Acts of gross negligence are capable of warranting dismissal for conduct. The Respondent submits that the Claimant released a vehicle to Mr B in circumstances where they were not the customer, the customer was not present, the Respondent had been warned to be vigilant over potential criminal activity, the Claimant was fully aware of this and had been involved in identifying suspect transactions, and the Claimant acted contrary to clear management instructions "not to release the vehicle to [Mr B]". The Respondent submits that the Claimant accepted when questioned that his behaviour was wrong and that his misconduct warranted some level of disciplinary action, even accepting that it was reasonable for the Respondent to consider dismissal. The Respondent reminds me not to substitute my own decision for the Respondent's but to instead ask if the Respondent's decision to terminate the Claimant's employment is one which, in all the circumstances of this case, another reasonable employer would have taken (i.e. within the range of reasonable responses). The Respondent submits that the Claimant was aware that his actions could have jeopardised the franchise agreement, and could have facilitate further criminal activity. The Respondent submits that there are various examples of similar behaviour under the Respondent's policy which are listed as grounds for summary dismissal (153). The Respondent notes that there is admitted conduct and that it is established law that this will impact on the Respondent's duties to investigate further or to consider every line of defence advanced by the employee. The Respondent submits that the transaction undertaken by the RSM was not truly parallel and that in any event it would be rare for a dismissal to be unfair on the basis of inconsistency of treatment alone. The Respondent submits that "*the test for tribunals is to ask whether the employer's differential treatment of the employees was so irrational that no reasonable employer could have taken that decision*". The Respondent submits that contributory fault should be 100 percent.

64. In relation to the Claimant's claim of wrongful dismissal, the Respondent submits that if the Respondent was correct in categorising the Claimant's behaviour as gross misconduct, which they submit is the clear rational conclusion in this case, it must follow that it was entitled to dismiss Claimant without notice or pay in lieu of notice. The Respondent further submits that to the extent that I am minded to conclude that the Claimant's conduct was not sufficient to amount to gross misconduct/negligence/incompetence, that it is open to me to conclude that the Claimant's actions were tantamount to "serious misconduct/negligence/incompetence" [page 152] and as such, the Claimant's dismissal remains a fair one. However, in those circumstances the Respondent concedes that the Claimant would be entitled to his contractual notice entitlement.

The Law

65. Section 98 of the Employment Rights Act 1996 sets out how this Tribunal should approach the question of whether a dismissal is fair. There are two stages.

66. First, the employer must show the reason for the dismissal and that it is one of the five potentially fair reasons set out in sections 98(1) and 98(2).

67. Second, provided the respondent is successful at the first stage we must then consider whether the employer acted reasonably in dismissing the employee for that reason under section 98(4).

68. A reason for dismissal is a set of facts known to the employer or belief held by him which caused him to dismiss the employee (**Abernethy v Mott Hey & Anderson [1974] IRLR 213 CA**).

69. It is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct. The employer does not have to prove the offence (**Alidair Limited v Taylor [1978] ICR 445 CA**).

70. Guidance applicable to cases of misconduct was given by the EAT in **British Home Stores Limited v Burchell [1980] ICR 303**. The issue of fairness involves three elements:

- 1 Whether the employer believed the employee was guilty of misconduct, and
- 2 Had in his mind reasonable grounds upon which to sustain that belief, and
- 3 At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter was reasonable in the circumstances of the case.

71. This guidance must be read in the light of **Boys & Girls Welfare Society v McDonald [1996] IRLR 129 EAT** which reminds the Tribunal that in considering the question of fairness for the purposes of section 98(4) the burden of proof is neutral.

72. I also reminded myself of the decision in **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT** that the function of the Employment Tribunal as an industrial jury 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.

73. In *Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854* the Employment Appeal Tribunal held that:

“the logical jump from gross misconduct to the proposition that the dismissal must then inevitably fall within the range of reasonable responses gave no room for considering whether, though the misconduct was gross and dismissal almost inevitable, there were mitigating factors that might be such that dismissal was not reasonable. The tribunal’s function was to look at the trust’s conclusion. It was not sufficient to point to the fact that the trust considered the mitigation and rejected it, largely upon the basis that the failure to observe the verbal notice and the letter undermined it, because a tribunal could not abdicate its function to that of the employer. It was the tribunal’s task to assess whether the employer’s behaviour was reasonable having regard to the reason for dismissal. It had to consider the whole of the circumstances with regard to equity and the substantial merits of the case. But that general assessment necessarily included a consideration of those matters that might mitigate, such as long service, the consequences of dismissal and a previous unblemished record. For that reason, there had been an error of direction to itself by the tribunal. The case would be remitted to the same tribunal, which had to take a proper approach in asking whether the gross misconduct justified dismissal in the light of all the mitigation available personally to B.”

74. The Court of Appeal in **Sainsbury’s Supermarkets Limited v Hitt [2003] IRLR 23** held that the range of reasonable responses test applies to both, the decision to dismiss and to the procedure by which that decision is reached.

75. In determining the fairness of dismissal on grounds of misconduct we have regard to the provisions of the ACAS Code of Practice on disciplinary practice and procedure as well as the overall principals of natural justice and fair hearings.

76. Under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, an award may be increased or reduced where the employer or employer unreasonably fails to follow the ACAS code. The amount of the adjustment is up to 25% in the following circumstances:

- the claim concerns a matter to which a relevant code of practice applies
- the employer or employee has failed to comply with the code
- the failure was unreasonable, and
- the tribunal considers it just and equitable in all the circumstances to make an adjustment.

77. Section 122(2) of the Employment Rights Act 1996 provides that “*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.*”

78. In respect of any compensatory, section 123(6) provides that 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. In **Nelson v. BBC (No. 2) 1980 ICR 110 CA**, it was held that three factors must be satisfied if the tribunal is to find contributory conduct:

1. The relevant action must be culpable or blameworthy.
2. It must have actually caused or contributed to the dismissal.
3. It must be just and equitable to reduce the award by the proportion specified.

79. Under section 123(1), the tribunal may also make a reduction to the compensatory award where it considers it just and equitable having regard to the loss sustained by the employee. Under this section, employers often argue that an employee might have been dismissed had a fair procedure been followed, either at the time of or after the dismissal occurred and therefore this should be reflected by reducing or limiting the duration covered by a compensatory award. This is known as the **Polkey** principle (**Polkey v AE Dayton Services Ltd [1988] ICR 142 House of Lords**).

Conclusions

Unfair dismissal

Was the claimant dismissed?

80. The Claimant was dismissed. There is no dispute that the Respondent dismissed the Claimant on 16 September 2022.

What was the reason or principal reason for dismissal?

81. The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

82. In my conclusion the Respondent did have in mind the following set of facts (a) that the Claimant had failed to obey a reasonable instruction, (b) that he had released a vehicle to a person who was not the customer, but also that (c) this was deliberate (when the disciplinary process is read as whole to include the appeal) and (d) that there were “wider issues”.

83. In determining the reason for dismissal, the Respondent does not need to prove the offences, it simply needs to establish that these were the facts known or believed by him which caused him to dismiss the employee.

84. In my conclusion, these are properly to be considered conduct. Whether deliberate or not they are clearly issues of conduct because the Claimant does not dispute that he knew he should not have released the vehicle without authority and should only release

the vehicle to the paying customer. They are not in any sense therefore capability or performance issues.

85. I am therefore satisfied that the reason for dismissal was conduct and only conduct.

Were there were reasonable grounds for that belief?

86. The Respondent had reasonable grounds to believe (a) and (b).

87. The Claimant has never disputed that he did (a) and (b). Indeed he openly admitted it from the beginning.

88. The Respondent did not have reasonable grounds to believe (c) and (d).

89. At no time did the Respondent ever suggest to the Claimant that what he did was deliberate. However that is clearly the finding at the appeal stage.

90. There has been a fundamental break in natural justice here because the reasoning has been introduced in circumstances where the Claimant could reasonably believe that there was no suggestion of deliberacy (Mr Partington said so and confirmed that in the outcome letter) whereas it forms part of the reasoning for upholding the decision at the appeal stage but this was never discussed with the Claimant.

91. The introduction into the decision letter of “wider issues such as selling to problematic customers who show a huge potential risk to our organisation” is remarkable given that Mr Partington had in the disciplinary hearing acknowledged that they were irrelevant and not for discussion.

92. Again, in my conclusion in relation to (d) there has been a fundamental breakdown in natural justice. This is simply not part of the case that was ever put to the Claimant.

At the time the belief was formed the respondent had carried out a reasonable investigation?

93. I cannot see that the failure to hold a further investigation meeting, as might originally have been envisaged, makes any material or actual difference in this case because the conduct was admitted.

94. I do not consider that at the disciplinary hearing stage further investigation into the RSM's transaction would have been required to ensure that the investigation was within the range of reasonable investigations which a reasonable employer may undertake.

95. The Claimant had said there were no issues over authority in that case and that he was not comparing the two. Mr Partington's decision not to look into that was reasonable in the light of what the Claimant told him at that stage.

96. Upon appeal the Claimant had highlighted the RSM/s transaction as a key point of appeal. Mr Cummings had felt the need to follow it up. However, the email he sent to the RSM asked for “confirmation that this is not the case” and a “bit more” detail. The response that followed was what was asked for rather for but there were no details of what happened in relation to the RSD's transaction with Mr C and Mr D.

97. But the Claimant's letter of appeal makes it clear that the RSD's transaction is central to his feelings in relation to this dismissal. It is mentioned in several of the 6 points of appeal that he brings (126-131).

98. In my conclusion the manner in which the RSD's transaction was handled and lack of meaningful investigation into it means that the investigation was outside of the range of reasonable investigations open to a reasonable employer.

Did the respondent otherwise act in a procedurally fair manner?

99. Generally the basic steps of a fair process were observed, an investigation, an invitation clearly stating the reasons for the hearing, a hearing where the employee could state their case fully together with an appeal.

100. I do not see that the Claimant's assertions concerning the impartiality of Mr Partington hold any great weight. Although he had been involved in some discussions about the type of sales being undertaken his prior involvement was trivial.

101. There is an issue concerning the impartiality of the RSD. However that is not really evident until appeal stage and has been dealt with above under the reasonableness of the investigation.

102. That point aside, I consider that there are no other significant issues of process to mention here.

Was dismissal within the range of reasonable responses?

103. There is no indication within the dismissal or appeal decision letters that the conduct for which the Claimant was dismissed were each treated independently of each other and that either the dismissing or appeals officer addressed them independently.

104. In my conclusion, both managers reached a composite decision. Mr Partington took a decision based upon the conduct listed in (a), (b) and (d) and Mr Cummings added (c) to the overall decision making process at the appeal stage.

105. In my conclusion the decision to dismiss fell outside of the band of reasonable responses which a reasonable employer might have adopted because it was based on matters including (c) and (d) for which the Respondent which the Respondent did not have reasonable grounds for belief, and in circumstances where the impact of the RSD's transaction had not been sufficiently investigated to determine its relevance to the decision.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

106. In my conclusion for those reasons the Respondent did not act reasonable in treating (a) to (d) as a sufficient reason to dismiss the Claimant.

107. For that reason I conclude that the dismissal was unfair.

108. However, I do conclude that the Claimant's actions in (a) and (b) were culpable or blameworthy. The Claimant has always acknowledged that in his words he made a big mistake, a hideous lapse of judgment, that day. As the Claimant put it in his disciplinary hearing "*I'm fully aware of the gravity of what is being alleged of me and acknowledging it and therefore the potential outcome is that I will lose my position*".

109. I take into account that the Claimant has accepted that the Respondent was reasonable to consider dismissal albeit that he would contend that a final written warning would have been more appropriate for (a) and (b).

110. These two issues clearly did contribute to the dismissal.

111. In my conclusion, it would be just and equitable to reduce any compensatory award for the Claimant's actions on 1 September 2022 under Section 123(6) of the Employment Rights Act 1996.

112. The amount of the deduction is a matter of fact and degree and is a matter of my

discretion.

113. In my conclusion the Claimant's actions (a) and (b) fall into the category of matters which mean that he was wholly to blame for his dismissal.

114. My reasons are that he fully acknowledges that he failed to obey a specific instruction that the vehicle should not be handed to Mr B under any circumstances. In releasing the vehicle to Mr B he did not release the vehicle to the paying customer. He recognises the gravity of the mistake he made.

115. I doubt any detailed consideration of the RSD's transaction would have made any difference to the Claimant's situation although it may have made a difference to the RSD's situation. I would also have made a deduction of 100% under Polkey principles although the Claimant's compensatory award would stand at zero owing to my conclusions under Section 123(6) (contributory conduct) in any event.

116. In my conclusion, it would be just and equitable to reduce the Claimant's basic award under Section 122(2) for the same reasons that it was just and equitable to make a reduction under Section 123(6).

Wrongful dismissal / notice pay

What was the claimant's notice period?

117. The parties agree it was one month.

Was the claimant paid for that notice period?

118. The parties agree the Claimant was not paid any notice, he was summarily dismissed.

If not, was the claimant guilty of gross misconduct or did the claimant do something so serious that the respondent was entitled to dismiss without notice?

119. In my conclusion, the conclusions concerning conduct under category (a) and (b) have been established as correct and I consider that the Claimant was grossly negligent in handing the vehicle to Mr B contrary to a specific and clear management instruction, and for failing to ensure that it was handed to the 3rd party who paid for the vehicle. The actions were sufficiently serious that the Respondent was entitled to dismiss without notice.

120. The Claimant's complaint of wrongful dismissal is not well founded.

Employment Judge Knowles

17 July 2023