# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr B Graves**

**Respondent:** **Concord Lifting Equipment Limited**

**Heard at:** **East London Hearing Centre (by CVP)**

**On:** **10 and 11 August 2023**

**Before:** **Employment Judge Mr J S Burns**
**Members:** **Ms S Harwood**
**Ms P Alford**

Representation
Claimant: in person
Respondent: Mr J Buckle (Counsel)

# JUDGMENT

1. **The name of the Respondent is amended so it reads as above.**

2. **The claim of unfair dismissal succeeds.**

3. **The Respondent must pay the Claimant £22000.91 compensation by 25/8/23.**

4. **The claim of direct associative disability discrimination fails and is dismissed.**

# REASONS

1. The name of the Respondent has been amended by adding the word "*Limited*" to the end of the name given in the ET1. It is not disputed that the Respondent is a limited company. It should be called by its proper name.

2. The Claimant was employed by the Respondent, a company that hires and repairs lifting equipment, as a depot manager from 1 June 2004 until 6 June 2022. Early conciliation started on 12 August 2022 and ended on 23 September 2022. The claim form was presented on 18 October 2022.

3. The claims were unfair dismissal and direct associative disability discrimination.

4. The Respondent relied on misconduct as a potentially fair reason for dismissal and denies any disability discrimination.

5. The issues were summarised in a Record of a Preliminary Hearing dated 5/6/23.

6. We heard evidence from Mr Donovan (Director) and Mr Kerrison (Managing Director) and then from the Claimant, and we were referred to a bundle of 209 pages and to a chronology.

Findings of fact.

7. On 8/8/2018 Mr Donovan sent the Claimant a text message as follows: "*Gis a bell if ya can..I wont be here first thing tomorrow but Ian from links scaffolding is coming in early to collect the minifor..I told him 1200 I told him to come in at 7*"

8. During the period 20-25/9/2018 the Claimant (C) and an employee of Links Scaffolding (LS) entered into the following text message exchange: "*C. Can you call me mate? LS: Alright Bill money will be done this morning sorry mate I forgot to tell my son to do it…money done mate….cheers mate..C: You bringing that tr50 back today mate? You popping in this arfo* (date of text 22/9/2018 - a Saturday) *C…Meet me on river road in the morning mate LS: OK mate.*" C then gave his personal bank account number and sort code to LS.

9. Saturday was not a work day and "*river road*" was not the Claimant's work address.

10. On 27/9/2018 Links Scaffolding paid £400 into the Claimant's personal bank account.

11. The Respondent was affected by Covid lock-downs and furloughed its staff during 2020 and up to March 2021.

12. During the 2020 furlough another employee Charlie was able to enjoy a couple of weeks' furlough at home when his partner's baby was born.

13. In about March 2021 the Claimant told Mr Donovan that his wife had health problems as she was pregnant with twins who shared a single placenta. As a consequence of this the Claimant's wife had to attend numerous appointments at the hospital.

14. In about April 2021, after the Respondent's general furloughing of staff had ended, the Claimant asked if he could be placed on furlough again to facilitate his attending and supporting his wife. This was not agreed to by the Respondent as the general furlough scheme was over and it wanted employees to get back to work

15. On 6/4/21 Mr Donovan issued a direction to the Claimant and to four other salaried staff that "*in future all personal appointments (doctors/hospital etc) will need to be booked off as annual leave either full or half days as required unless discussed".*

16. The Claimant asked if he could be exempt from this rule - so as to be allowed to leave work early rather than take a day or half day off. Mr Donovan refused to agree to this. The reason for this was because salaried staff had accumulated large amounts of holiday entitlement during furlough and the Respondent wanted the salaried employees to use up holiday rather than leave work early. This was not targeted at the Claimant specifically. However, as a result the Claimant had to use up his holiday allowance in order to attend numerous health appointments with his wife.

17. The Claimant's wife gave birth to twin boys on 15/7/21. One of the twins (Chester) had health problems and had to remain in hospital for the first 9 months of his life. The Claimant told Mr Donovan about these health problems shortly after the birth.

18. The Claimant had a discussion with Mr Kerrison in which the latter said he would look into the feasibility of the Claimant being able to work from home when he was able to resume work but in September 2021 Mr Kerrison said that the Claimant would have to return to work at the depot. This was because he was needed there. Mr Kerrison told the Claimant that he could return to work when he wanted to - if necessary part-time on pro-rated full pay.

19. In August and September 2021 the Claimant was put on furlough (under a new scheme available at that point) and received 80% of his normal pay. In October 2021 the Claimant was given a month's fully paid compassionate leave. From the end of October 2021 onwards the Respondent paid the Claimant the equivalent of SSP. He was also left in possession of his company car, fuel card and company mobile phone. All this was in excess of the Claimant's contractual and statutory entitlements. In evidence the Claimant conceded that from the date of birth of his sons to the end of his employment he was well treated by the Respondent in terms of financial support and accommodation of his domestic situation arising from the health problems affecting his family.

20. At no time did the Claimant request formal paternity leave.

21. In the end the Claimant's compassionate leave was extended until his dismissal on 6/6/22.

22. In March 2022 Mr Donovan told Mr Kerrison that he had been told by another employee that a customer had told him that another local hire company had complained to the customer that the Claimant "*must be on the take*" because people were able to hire equipment from or via the Claimant at less than half the commercial going rate. Mr Donovan went on to tell Mr Kerrison (for the first time) that in 2018 he had been told by LS that it had made a BACs payment to the Claimant's personal account, and had been shown the text exchange (set out in paragraph 8 above); and that he had confronted the Claimant about this in about October 2018, who had confessed to theft from the Respondent (by secretly hiring out the Respondent's equipment and appropriating the hire-charges personally) and expressed remorse, whereupon Mr Donavan had given the Claimant an informal warning but had otherwise agreed to cover the matter up; - but that in the light of the rumours which were now circulating, he (Mr Donovan) had decided to disclose the whole situation to Mr Kerrison.

23. Mr Kerrison (who is based in San Francisco) without disclosing the situation to the Claimant, carried out some investigations into the matter. Documentary proof of the payment of £400 (referred to in paragraph 10 above) was obtained from LS. Mr Kerrison regarded the text exchange (set out in paragraph 8 above- which showed the Claimant shortly before the payment, pressing for a payment and then agreeing to meet a LS employee on a non-working day at a non-work location) as evidence showing theft by the Claimant as described by Mr Donovan.

24. In Mr Kerrison's oral evidence and only in response to direct questioning by the Tribunal (but not in his witness statement) Mr Kerrison said that he had also (in the period March to May 2022) by way of investigation, spoken to someone at LS directly about the 2018 payment. He also said that he had spoken to the (anonymised) employee who had made the report to Mr Donovan. However. no contemporary written records of these claimed discussions was produced and it is unclear to the Tribunal what these consisted of or when and how they were carried out.

25. Mr Kerrison told us he also spent much time searching through the Respondent's own telephone and computer records trying to find evidence of any other wrongdoing by the Claimant, from 2018 onwards, but that he had been able to find none.

26. Without discussing the matter with the Claimant at all, Mr Kerrison came to the conclusion that the Claimant had been guilty of theft from the company in 2018 and probably subsequently, at least up to the period when the Claimant went on furlough in 2020.

27. Mr Kerrison arranged matters so that the Claimant's return to work at the depot was delayed from 1/6/22 to 6/6/22, so that he (Mr Kerrison) could be present on that day. Mr Kerrison then approached the Claimant and handed him a letter dismissing him with immediate effect (albeit with pay until the end of June 2022). The letter referred briefly as follows to the reason for the dismissal : "*I regret to inform you that your employment with Concord Lifting Equipment Ltd is being terminated with immediate effect - today 6th June 2022 for gross misconduct for stealing from CLE (hiring equipment to customers and receiving payment to your personal bank account) which I became aware of in March 2022*."

28. The Claimant having read the letter evidently knew what was being referred to because he immediately told Mr Kerrison that the payment of £400 to him in 2018 was linked not to any dishonest hire of the Respondent's equipment, but was rather part of the price of £1200 for a hoist owned by a third party, the sale of which to Links Scaffolding Mr Donovan had arranged for his own benefit, and that the day after he (the Claimant) had received the £400, he had paid it over in cash to Mr Donovan. (This was also the explanation which the Claimant put forward in emails to the Respondent after his dismissal, and in his oral evidence at the Tribunal - although he had failed to do so at all his internal appeal, or in his ET1. He referred to the matter obliquely but not clearly in his witness statement).

29. The Claimant produced Mr Donovan's own text of 8/8/2018 (referred to in paragraph 7 above) and claimed that it supported and confirmed his (the Claimant's) explanation.

30. Mr Donavan stated in his witness statement for the Tribunal that on 7/6/22 (ie the day after the dismissal) he was asked by Mr Kerrison to explain the text message and that "*I don't know what the relevance of this message was/is but I can only assume it was me telling the Claimant that Links scaffolding were coming in the next day to hire a minifor. LS are a cash customer and therefore would be required to pay a security deposit by debit or credit card before hiring goods. This is standard procedure; the piece of equipment in question costs around £6K. For walk in cash account hires it is best practice not to raise a contract until the customer is actually with you ready to collect the goods and pay the deposit, we often have customers say they are coming in who fail to turn up".*

31. This alternative explanation of the text message did not feature in the statement dated 8/7/22 which Mr Donavan produced after the dismissal and for purposes of inclusion in an evidence pack for the Claimant's internal appeal.

32. The Claimant assisted by a TU rep (Ms M Bradley) lodged written grounds of appeal which listed the various procedural defects in the dismissal but which made no reference to the question whether or not the Claimant had stolen from the Respondent.

33. An evidence bundle containing a claimed statement from the whistleblowing employee, (redacted so as to anonymise the author and not showing any signature) and statements from Mr Donovan and Mr Kerrrison (all of which statements had been produced after the dismissal) was provided to the Claimant and Ms Bradley about 5 days before the appeal hearing. These statements set out the reasons for Mr Kerrison having concluded that the Claimant had stolen from the Respondent, but as already stated, omitted Mr Donovan's explanation for his text message.

34. On 13/7/22 the Claimant and Ms Bradley attended an appeal hearing held by the Finance Director Mr R Hatton. During the hearing the Claimant and Ms Bradley did not discuss the question as to whether or not the Claimant had stolen from the Respondent. Instead they made submissions about the procedural defects in the dismissal and raised a suggestion that the dismissal was motivated by the Claimant's long compassionate leave/requests for time-off for attending appointments. Mr Hatton said he would investigate these matters.

35. The transcript of the appeal hearing includes the following: "*RH I need to investigate the new facts which you have presented today; MB The opportunity for the management side to have investigated has been provided; there has been plenty of time and you have done that. Respectfully, I suggest you consider if a fair and correct procedure has been followed. If the management have not tabled the investigation and not provided evidence, we have not commented on it nor should it be to fulfil the gaps; RH The investigation will be specifically regarding your allegation that the decision taken was due to Billy being more trouble than his worth. This is something new which I cannot dismiss; MB You confirm that the investigation will be limited to that?; RH Yes, nothing else. This is new information today. I was not aware of this before. I cannot just accept what you say or dismiss it.; MB I am concerned that it will stray into other areas. You had time before. The appeal is about the decision; RH Yes it will only be the issued raised today*"

36. Thus, the Claimant and Ms Bradley not only did not refer to or challenge the evidence which by that stage had been presented by the Respondent which pointed to theft, and failed to present any evidence of their own about that, but they also expressly steered Mr Hatton away from investigating the theft issue at all. Mr Hatton adopted a passive and co-operative response to that approach and did not ask about the theft.

37. Mr Hatton upheld the grounds of appeal - by acknowledging that the Respondent had failed to follow a fair process - as it had not notified the Claimant about the allegations in advance, and had not provided the documentary evidence in advance of dismissal, had not given the Claimant a chance to explain, etc. However Mr Hatton concluded that although the process had been unfair, as the Claimant had not even at the appeal stage challenged the conclusion that he had stolen from the Respondent, the dismissal decision had to stand. Hence the appeal was dismissed in the sense that the summary dismissal was not overturned.

38. After that the Claimant sent emails to the Respondent and to Mr Kerrison's father in which he made various allegations against Mr Donovan, and in which he set out his explanation (sale of a third party hoist) for his receipt of the £400 in September 2018, which emails did not receive any substantive response.

The law

39. Where the conduct of the employee is established by the employer as a potentially fair reason for dismissal under Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows: "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.'*

40. A dismissal for misconduct will not be unfair if it is based on a genuine belief on the part of the employer that the Applicant had perpetrated the misconduct, which belief is based on reasonable grounds following a reasonable investigation BHS v Burchell [1978] IRLR 379.

41. An Employment Tribunal should not substitute itself for an employer or act as if it were conducting a rehearing of or an appeal against the merits of an employer's decision to dismiss. The employer not the Tribunal is the proper person to conduct the investigation into the alleged misconduct. The function of the Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the result of that investigation, is a reasonable response. HSBC v Madden [2000] ICR 1283.

42. The range of reasonable responses test (or to put another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable

in all the circumstances, as it does to the reasonableness of the decision to dismiss for the conduct reason. Sainsbury v Hitt 2002 EWCA CIV 1588

43. The ACAS Code of Practice No.1, Disciplinary & Grievance Procedures (2009) provides that that an employer wishing to discipline an employee should carry out an investigation to formally establish the facts; inform the employee in writing of the problem; after a proper interval, hold a meeting to discuss the problem; decide fairly on the appropriate action, and provide an opportunity to appeal. If these steps are not taken then, even if the employee has been guilty of misconduct, it is likely that the dismissal will be unfair.

44. In in considering whether an internal appeal can cure earlier procedural defects, what matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair. Taylor v OCS Group Ltd 2006 EWCA Civ 702 at para 46.

45. Section 13(1) of the Equality Act 2020 provides as follows: *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*".

46. Under English law an unborn child does not have a legal personality distinct from that of its mother. Hence an unborn baby, however unwell or disabled, cannot be a disabled person for purposes of the Equality Act 2010.

Conclusions

47. Mr Kerrison had a genuine belief that the Claimant was guilty of theft both in 2018 and continuing until the Claimant went off on furlough in 2020.

48. English law and the ACAS code requires that an employer who contemplates dismissing an employee for misconduct must give the employee an opportunity to answer the charges and defend themselves, before the decision is made. The fact that the matter is serious does not allow the procedure to be dispensed with - in such a case the need for a fair hearing is greater.

49. In his evidence for the Tribunal Mr Kerrison offered the following explanation for his having acted as he did in dispensing with any fair procedure before dismissing the Claimant: "*To prevent Bill destroying physical or digital evidence (and) to prevent Bill from trying to pressurise or intimidate staff or customers".*

50. However, employers are able to deal with these potential problems without breaching their obligation to act fairly, by suspending the employee on full pay (at the same time he is told he is under investigation), barring him from the work place and if necessary suspending his access to the employer's email and computer systems while the investigation and disciplinary hearing/s take place. Mr Kerrison could have taken these steps to safeguard the Respondent while at the same time complying with the Respondent's duty to act fairly.

51. Mr Kerrison leapt to his conclusion without warning the Claimant in advance, telling him what the charges were, asking him about the matter, listening to his explanation or investigating what he had to say. As a result, before being dismissed

the Claimant was not given a chance to try to explain his receipt of the £400 in 2018 or to comment on the claim that rumours about him were circulating in 2022.

52. As part of his investigation prior to deciding on dismissal, Mr Kerrison should have obtained the Claimant's answers about these matters, and then should have carried out any investigations which were reasonable, proportionate and relevant in the light of such answers.

53. In his oral evidence (but not in his witness statement) Mr Kerrison said he had asked someone at LS about the £400 but no statement from that person was produced, and the first the Claimant heard about this was at the Tribunal hearing.

54. At the Tribunal hearing Mr Kerrison was asked what was the meaning of the text message referred to in paragraph 7 above. His answer was "*I do not know".* Hence even at the Tribunal Mr Kerrison was unable to say whether or not he accepted Mr Donovan's explanation about it, or if he did to give any reasoned account as to why it was to be preferred over the Claimant's version.

55. On his own version of events, Mr Donovan, who was a Director of the Respondent in 2018 and onwards, had been guilty of dishonesty and a grave dereliction of his fiduciary duty to the Respondent by covering up theft by the Claimant. That being the case, it was incumbent on Mr Kerrison to be especially cautious about relying on what he was told by Mr Donovan.

56. The Claimant should have been told about Mr Donovan's explanation of his text in August 2018 and which local hire company it was alleged had been complaining in 2022 that the Claimant had been undercutting it with low hire charges, so the Claimant could respond.

57. We turn to the question whether these defects were remedied by the appeal. By then the Claimant and Ms Bradley had been provided with most of the evidence relied on by the Respondent, but they failed to refer to it and, on the contrary, steered Mr Hatton away from investigating whether the evidence supported a finding of theft. They could have taken another line by engaging with the theft issue, and if they had taken the initiative to do so, then no doubt Mr Hatton would have followed suit.

58. However, on the facts of this case we find that the onus remained on the Respondent to take the lead to ensure that this essential matter was investigated properly and fairly.

59. If the Respondent wished to try to remedy the previous defect by way of appeal, it was necessary for the appeal officer to ascertain and assess the Claimant's defence. Despite the Claimant's and Ms Bradley's strange approach, (the reasons for which also Mr Hatton did not ask about) Mr Hatton should have ensured that the theft issue was properly considered and ventilated at the appeal. In dismissing an employee for gross misconduct the law requires the employer to act fairly and to do so on adequate grounds. In a situation where there has been a wholesale failure to make proper enquiries at the dismissal stage, the appeal officer who wishes to make amends must ensure that the main points at least which should have been covered at the investigatory and dismissal stages, are covered at the

appeal, if that has not already been done. It is not good enough for the appeal officer in such a case to sit and listen to whatever the dismissed employee or his TU rep has to say, when what they say does not cover the substantive reason for dismissal which previously had not been discussed.

60. As was apparent from what the Claimant had said to Mr Kerrison immediately after being dismissed, this was not a case in which the Claimant admitted the misconduct, - on the contrary he had a story to tell.

61. There may be many reasons why an employee or a TU rep may fail to say all that should be said at the appeal - for example they may be overawed or inexperienced, or incompetent or ill or depressed or mistaken in their expectation as to what the appeal officer will do, or simply deploying a stratagem.

62. We did not know what the motivation of Ms Bradley was in acting as she did at the appeal - perhaps she was overly-optimistic that if her procedural arguments were upheld, then the whole matter would be sent back for a rehearing at a new disciplinary hearing. However Mr Hatton did not say what he might do one way or the other.

63. If Mr Hatton had asked Ms Bradley and the Claimant to tell his story, to comment on the Respondent's evidence and to provide any counter-evidence on the theft issue, and told them that even if their procedural arguments were upheld, they would not have another opportunity to put forward this material, and then, notwithstanding such a warning/invitation, they had refused to do so, the case might be different, but that did not happen.

64. We have assessed the whole process (including the appeal) in the round and find that the procedural problems were not remedied at the appeal stage. The whole process was unfair, principally because it did not include any consideration of, investigation into or reasoned conclusion about the Claimants explanation for his receipt of the £400 in 2018.

65. Hence the dismissal was procedurally unfair. It was carried out in flagrant breach of the ACAS code and also of the Respondent's own disciplinary procedure. Nor did the Respondent have reasonable grounds for dismissal because even when confirming the dismissal on appeal it had not considered the merits of the Claimant's defence.

66. We are unable to make any finding of contributory fault because in order to do so we would have to make a finding on a balance of probabilities that the Claimant had been guilty of a relevant action or conduct as referred to in sections 122(2) and 123(6) ERA 1996. On the evidence before us we do not feel able to make a finding of theft. We agree that the bank transfer of £400 in September 2018 and the Claimant's text exchanges leading up to it (set out in paragraph 8 above) are suspicious but the matter is stale, clouded and ambiguous, particularly in the light of the text from Mr Donovan (paragraph 7 above) and because the 2018 allegation emerged more than three years later, and via Mr Donovan; who on the Claimant's version was implicated and who on his own version has acted dishonestly and who therefore was a tainted source. The 2022 matter consisted at its highest in rumours and triple hearsay coming from outside the Respondent, again via Mr

Donovan, which rumours we regard as a wholly inadequate basis for making a serious finding that the Claimant was a thief.

67. We also decline to make a Polkey deduction because to try to reconstruct what might have happened following a fair procedure would require us "to embark of a sea of speculation". There was a wholesale failure in the procedure and it is impossible for us to conclude that it was inevitable or even that that there was any quantifiable chance that the Claimant would have been dismissed anyway, had matters been handled properly.

Remedy for unfair dismissal

68. The Claimant had failed to deal with remedy issues in his witness statement and had not produced any mitigation documents or any evidence of the receipts of his own company which he formed in October 2022. It would have been necessary to adjourn and order the Claimant to produce further evidence if he wished to pursue damages beyond the end of October 2022. He was offered that opportunity but declined and agreed that it was fair and that he would prefer to limit his claim for compensatory damages to the period starting at the end of June 2022 (he was paid in full by the Respondent until the end of that month) until the end of October 2022, but not beyond. After a short adjournment the Respondent also agreed to dispose of the matter in that way and did not challenge the quantum of the consequent award which is calculated as follows:

| | |
|---|---|
| Basic award | £8850.50 |
| Loss of statutory rights | £500 |
| Loss of pension for 4 months | £653.33 |
| Loss of net salary for 4 months | £11997.08 |
| Total | £22000.91 |

69. The Claimant told us on oath that he had not received state benefits which would trigger any recoupment and hence the matter has been disposed of on the assumption that this is true. If it the Respondent obtains evidence to the contrary it should apply for the Tribunal accordingly.

Disability Discrimination claim

70. It was conceded that the Claimant's son Chester was disabled.

71. The Respondent had knowledge of that because shortly after the birth the Claimant told Mr Donovan that Chester was unwell with developmental impairment (or words to that effect).

72. Before Chester was born he was not, in the eyes of the law, a disabled person with whom the Claimant could be associated. Hence and without more any matters

complained of as direct associative disability discrimination in this matter which occurred prior to the date of Chester's birth, (15/7/21) would be dismissed anyway.

73. As a matter of substance the matters complained of as direct discrimination were as follows:

74. Firstly: the instruction from Mr Donovan in April 2021 that the salaried staff should book half or full days holiday for purposes of attending medical appointments, instead of leaving work early. The reason for that was because the Respondent did not want to lose the paid services of salaried staff and it wanted to run down the large accumulated holiday allowances of staff after furlough. It was not targeted at the Claimant in particular.

75. The second matter was the refusal of the Claimant's request that he be put on furlough in about April 2021. That was refused because the Respondent had finished its furlough scheme in March 2021 and it wanted employees back in the work place. The Claimant's comparison of his situation with Charlie is misconceived because the latter was in a different situation - the birth of Charlie's child co-incided with a furlough scheme which was in operation in any event, whereas the Claimants request did not.

76. The third matter was Mr Kerrison's telling the Claimant in about September 2021 that when he came back to work he would have to do so at the works depot and not at home. The reason for that was that the Respondent wanted/required employees back in the work place.

77. The fourth matter was the dismissal of the Claimant. That was because Mr Kerrison believed that the Claimant was a thief.

78. None of these four matters were because the Claimant was the father of a disabled child.

79. Hence the disability discrimination claim fails and is dismissed.

**Employment Judge J S Burns**
**Dated: 14 August 2023**