**Case No: 1304008/2023**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Bonehill

**Respondent:** DPD Group UK Ltd

**Heard at:** Midlands West (by Cloud Video Platform)

**On:** 16 and 17 August 2023

**Before:** Employment Judge Faulkner (sitting alone)

**Representation:** **Claimant** - in person
**Respondent** - Mr A Johnston (Counsel)

# JUDGMENT

1. The Claimant's application to amend his Claim to include a complaint of breach of contract related to alleged non-payment of bonuses was refused.

2. The Claimant confirmed that he did not pursue a complaint of breach of contract related to his not being paid for his notice period on being dismissed.

3. The Respondent accepted that accordingly the decision of Employment Judge Harding to reject its contract claim, sent to the parties on 8 August 2023, was correct. Its application dated 9 August 2023 for reconsideration of that decision was withdrawn.

4. The Claimant was not unfairly dismissed. His complaint of unfair dismissal was accordingly not well-founded.

# REASONS

1. Oral judgment in this case was given, with reasons, at the conclusion of the Final Hearing on 17 August 2023 and the written Judgment was sent to the parties on 18 August 2023. On the same date, the Respondent requested written Reasons. That request was forwarded to me on 30 August 2023. These Reasons are provided in response to it.

## Complaint/issues

2. The Claimant confirmed at the outset of the Hearing that he was not pursuing a complaint of breach of contract based on his not being paid for a notice period on termination of his employment. He confirmed that he was however complaining of breach of contract in relation to the alleged non-payment of quarterly bonus payments from July 2019 to March 2023. His application to amend his Claim to include that complaint was refused for the reasons set out below. On my giving that decision, Mr Johnston confirmed that the Respondent did not seek to challenge the correctness of Employment Judge Harding's decision to reject its contract claim. Its application dated 9 August 2023 for reconsideration of that decision was withdrawn.

3. On that basis, the only complaint to be determined was the Claimant's complaint of unfair dismissal. It was agreed that the issues to be determined in relation to liability were:

3.1. Has the Respondent shown the reason for dismissal? It relied on the conduct of the Claimant referred to below.

3.2. If so, was it a fair reason for dismissal within the meaning of section 98(2) of the Employment Rights Act 1996 ("ERA")? Obviously, the reason for dismissal was said to be related to the Claimant's conduct.

3.3. If so, was dismissal for that reason fair within the meaning of section 98(4) ERA? That would ordinarily require the Respondent to have had a reasonable suspicion of misconduct, to have reached a reasonable conclusion that the Claimant had committed misconduct, to have carried out a reasonable investigation at the point of reaching that conclusion, to have followed a reasonable procedure in effecting dismissal (including compliance with the ACAS Code of Practice on Disciplinary and Grievance matters – "the Code"), and that dismissal be within the range of reasonable responses.

3.4. Any questions of whether, if there was unfairness, the Claimant would still have been dismissed and of whether his conduct contributed to his dismissal was to be left to considerations of remedy if relevant.

## Hearing

4. I read witness statements prepared by the Claimant, Mrs S James (the Respondent's Regional Customer Relationship Manager) and Mr G Philips (the Respondent's Head of Credit Management Claims), all of whom also gave oral evidence.

5. The parties prepared a bundle of documents comprising 295 pages. Naturally, there was insufficient time for me to read all of those documents, nor indeed did I consider it necessary to do so. As discussed with the parties, before hearing evidence I read the pleadings, the employment contract, two pages of the Respondent's policy on commission and bonuses highlighted by the Claimant, an investigation report and associated witness statements, the relevant payslips, the invitation to a disciplinary hearing, the dismissal letter and its attachment, the Claimant's appeal against dismissal, the appeal decision, and the second appeal decision. I made clear that it was for the parties to take me to anything else in the evidence that they wished me to consider in reaching my decision, including anything within the transcript of the disciplinary hearing or the notes of the appeal hearings. I did thereby read further documents or extracts from documents during the course of the oral evidence, as referred to below. References in these Reasons to pages are references to the bundle, whilst alpha-numeric references are references to the statements, for example SJ14 is paragraph 14 of Mrs James' statement.

6. One page in the bundle was provided to the Claimant later than the deadline in the relevant Case Management Order. This was the email to Mr Philips at page 224. It was plainly relevant to the question of inconsistency of treatment which the Claimant raised as part of his case that his dismissal was unfair. It was a single page, the Claimant had received it well in advance of the Hearing, there was no prejudice to him in including it, and as Mr Johnston pointed out, though omitted from the Respondent's initial disclosure, there is an ongoing duty to disclose. I made clear that the Claimant was free to ask Mr Philips why the document was disclosed late. He did not do so.

## Amendment application

7. As indicated above, the Claimant's amendment application related to a complaint of breach of contract, specifically what he had stated in box 9.2 of his Claim Form (page 11). He referred in that box to a settlement proposal he had put to the Respondent and went on to say, "If not [that is if the Respondent was not prepared to settle early], I could also potentially claim for breach of contract regarding unpaid bonus payments during 15 quarterly periods between July 2019 and March 2023" going on to set out a calculation of that claim. He confirmed that he wished to pursue this as a breach of contract complaint, which seemed sensible given the potential issues he might have encountered if it was pursued as an unauthorised deduction from wages claim, not least the two-year retrospective limit on such complaints, though the label attached to the complaint made no difference to my decision on whether it should be allowed to proceed.

8. The first question was whether the Claimant required permission to amend his Claim or whether this was a complaint already within the Claim Form, noting authorities such as **Chandhok v Tirkey [2015] ICR 527** which make clear that the Claim Form is not just a starting point for a Claim; it is important that it set out the case being made. The Claimant had at section 8.1 of the Form ticked only the unfair dismissal box (page 9), though that was not determinative because the Claim Form should be read as a whole and should be given a fair reading, especially bearing in mind the Claimant is a litigant-in-person.

9. I nevertheless determined that permission to amend was required, as Mr Johnston submitted. The Claimant's words were clear, "I could also potentially claim for breach of contract" [emphasis added], words written in the context of

whether the Respondent was willing to settle for what he was proposing or not. In the face of that explicit wording, and the absence of any reference to a claim for unpaid bonuses in the detailed and well formulated particulars of claim attached to the Claim Form (pages 16 to 18), which focused solely on the unfairness of his dismissal as the Claimant saw it, as well as the Claimant's comment to me that the bonus complaint was "a footnote" if things progressed, I was in no doubt that the complaint was not within the boundaries of the Claim as set out in the Claim Form and that permission to amend was therefore required.

10. The second question therefore was whether that permission should be granted. In answering that question, I kept in mind the relevant case law, in particular **Selkent Bus Co Ltd v Moore [1996] ICR 836** and **Vaughan v Modality Partnership [2021] ICR 535**, as well as the relevant Presidential Guidance. There is no list of factors that tribunals must consider, though the relative injustice and hardship between the parties, or what might be said to be the balance of prejudice, is crucial.

11. I noted again that the Claimant was not legally represented or professionally advised, and that he told me he did not know he needed to address the point sooner than this Hearing. I accepted that as his explanation for why the matter was only being raised at this late stage, and it was not entirely without merit. There were however three other matters that had to be taken into account.

12. The first was the merits of the complaint. The Employment Appeal Tribunal ("EAT") has confirmed that tribunals can take into account the merits of a potential complaint – **Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132** – but care is required in doing so, to ensure that it is possible to make a proper assessment of the case when taking an amendment decision, which even when being addressed at a Final Hearing will usually be before the tribunal has considered all of the relevant evidence.

13. Part of the Claimant's statement of terms of employment (page 37) signed on 7 January 2015, stated that, in addition to salary "you may be eligible for a bonus payment of such amount, at such intervals and subject to such conditions as the Company may in its absolute discretion determine from time to time. The Company reserves the right to change or withdraw the bonus payment at any time by giving 1 month's prior notification". These terms were provided by the Claimant's initial employer, before he transferred to the Respondent. The letter to the Claimant at pages 95 to 96 sent by the Respondent ahead of that transfer and dated 17 July 2019, made no mention of bonuses at all. Whilst there was no jurisdictional issue in relation to the complaint, as Mr Johnston accepted, he submitted that the Claimant could not hope to succeed in the light of the above wording, which made clear that the payment of bonuses was discretionary, and in the light of the fact that no bonus was ever paid to the Claimant, whether before or after the transfer except, the Respondent says, by mistake.

14. Whilst proving the complaint may not have been straightforward for the Claimant given the contractual wording, I noted that the written terms provided that the bonus arrangement could be withdrawn on one month's notice, which might suggest that a bonus arrangement was in place. That, and the Claimant's case that the monies he was paid which the Respondent says were in error matched information given to him by his manager regarding sales performance in the relevant quarters, meant that I could not say – certainly not before hearing all of the relevant evidence – that the position was so clear-cut as to mean the

complaint was so lacking in merit that an amendment should be disallowed on that basis.

15. Secondly however, it was necessary to consider time limits. A problem with time limits is not of itself determinative against allowing an amendment, but the complaint would have been deemed as presented on the date of my decision, 16 August 2023 (see **Galilee v Commissioner of Police of the Metropolis [2018] ICR 634** to the effect that an amended complaint does not date back to the date of the Claim Form) and the Claimant had not to my mind presented a prima facie case (see **Reuters Ltd v Cole [2018] UKEAT/0258/17**) that it was not reasonably practicable for him to present it in time or that it was presented within a reasonable period after the usual time limit expired. His explanation was that he did not understand he had to make his position clear, but it is well-established that mere ignorance of time limits will not suffice to excuse failure to comply with a time limit, though it might if it is of itself reasonable. On that point, given his obvious intelligence (shown by his careful particulars of claim and witness statement and the way in which he had presented to me in our initial discussions) and the absence of any indication that he had sought advice or assistance, that was not a reasonable explanation which evidenced that it was not reasonably feasible for him to deal with matters within the prescribed timescales. He could plainly have sought some advice, whether from professional advisers or online, or even from ACAS, if he had wished to pursue the complaint. Time limit issues therefore militated against granting the amendment.

16. Thirdly and most importantly, there was the question of the balance of hardship and injustice, or relative prejudice. As to that:

16.1. The Claimant said that there was no prejudice for him if the amendment were refused, though of course I took into account that he would be prevented in this jurisdiction at least from pursuing payment of the bonuses.

16.2. It was not for me to advise or determine whether he could pursue them elsewhere, but certainly Mr Johnston's view was that he could, something he submitted mitigated against any prejudice to the Claimant.

16.3. The Respondent also faced prejudice, as Mr Johnston agreed, if the amendment was refused, in that it would then be unable to pursue its own contract claim before the Tribunal. It was prepared to live with that prejudice.

16.4. What it did not wish to live with was the evidential prejudice it said it would encounter in defending the bonus complaint if the amendment were allowed. The claim for bonus payments was not addressed in its witness statements, nor in fact in the Claimant's. He did refer to it in his schedule of loss at page 277, though again that was as part of what he would be looking for by way of "Non-Early Settlement", and was only sent to the Respondent on 12 June 2023.

16.5. Mr Johnston said that the Respondent had not prepared to deal with the complaint, certainly not as to the amount of any bonuses. That was certainly the case as far as its witness evidence was concerned and it seemed clear to me also that the Respondent had not prepared at this stage to deal with liability either, meaning that it would have to make further enquiry as to why the bonuses were not paid and why the Respondent's discretion was exercised as it was, as it was far from clear that either witness before me could deal with those questions.

16.6. To enable the Respondent to have sufficient time to put itself in a position of being able to deal with the matter would have threatened completion of a hearing on liability (let alone remedy) in this window.

17. Balancing all of the above factors, the Claimant's amendment application was refused. In summary, this was because of a combination of there being no prima facie case meriting an extension of time and, particularly, the prejudice to the Respondent in conducting its defence to the bonus complaint if it was allowed to proceed without any adjournment, and the fact that if the Respondent was given the time it would need to prepare to defend it, the risk of the overall case not being concluded in this Hearing. The Claimant's view that there was no prejudice to him, and the possibility – I put it no higher than that – of his being able to pursue it elsewhere, confirmed that conclusion.

## Facts

18. Having regard to the evidence I was taken to, as summarised above, my findings of fact were as follows.

### Background

19. The Respondent is a parcel delivery business. The Claimant was initially employed by Bristol Distribution Ltd from 5 January 2015 and transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 on 19 July 2019. He was employed until 31 January 2023 (he says 23 March 2023, but nothing turned on that difference) as a Commercial Development Executive based in Bristol.

20. I have already referred to part of the Claimant's written terms. He only received a copy of them after he had been suspended and interviewed under the Respondent's disciplinary procedure (see below), though he had been asking for a copy for some time. Initially when employed by Bristol Distribution Ltd, he had a combination of salary and monthly bonus that would have enabled total earnings of £50,000 but these were consolidated into salary before the transfer to the Respondent, in connection with which he was given the option of transferring on that salary or accepting a lower salary with the opportunity for bonuses. He chose the former. The colleagues he joined at the Respondent were thus on much lower salaries than him; they subsequently received pay rises and he did not.

21. Some of the Respondent's employees received payments additional to salary, whether commission or bonuses, the former being for new business, the latter for achieving an annual price increase. There was also a commission bonus payment for retaining existing business. The Respondent says that both types of payment were made quarterly, whilst the Claimant says that commission was paid monthly. It was not necessary for me to decide the point, though I was inclined to prefer the Respondent's case, given that another employee, Ms A Cheshire, who I will refer to in more detail below, seems to have received commission payments on something other than a monthly basis (see page 225).

22. The Respondent's disciplinary procedure (pages 42 to 81, see in particular page 63) lists "theft", "conduct … which in the reasonable opinion of the Company … reflects on the employee's suitability to perform the type of work for which they are employed" and "breakdown of mutual trust and confidence" as

examples of gross misconduct. Clause 4(d) of the Claimant's written terms of employment stated that he was under a duty to report his own wrongdoing to the Respondent immediately on becoming aware of it, and to use his best endeavours to promote, protect, develop and extend the business of the Respondent. He was also under a duty to comply with applicable rules, policies and procedures.

23. On 17 November 2022, the Claimant met with his line manager, Ms J Wilson, online regarding a number of issues. During that conversation, she raised with the Claimant what she described as a bonus payment which she said had been made to him by the Respondent in error in August. The Respondent does not know how this sum was paid to the Claimant or how the payment was discovered. The Claimant told Ms Wilson that there may have been other such payments. His case is that he was not aware that he was entitled to them until he received a copy of the written terms referred to above, something I will return to below. Ms Wilson offered a repayment plan. She was not a witness before me, but her account of this meeting is in her statement given during the Respondent's investigation – see below. It is agreed that after the meeting the Claimant informed her of two further, similar payments.

**Suspension – 21 November 2022**

24. The Claimant met with Ms Wilson again on 21 November 2022, he thought to finalise the repayment arrangements. In fact, the repayment option was revoked and the Claimant was suspended, pending an investigation into an allegation that he had deliberately and dishonestly failed to inform the Respondent of his receipt of repeated commission payments he was not entitled to, that is in February, May and August 2022. The Claimant's case is that the reference to commission was strange, given that Ms Wilson had previously said and later mentioned in her statement (see below) that the issue was overpayment of bonuses. The relevant payslips are at pages 280 to 285.

25. It is agreed that at this juncture the Claimant was not advised he could be dismissed. This was contrary to the Respondent's disciplinary policy at page 64 which says in underlined text that a suspended individual must be made aware that suspension may result in disciplinary action up to and including dismissal. The Claimant also says Ms Wilson mentioned that the Claimant had received one other payment (that is, four in total), which turned out to be incorrect. Again, Ms Wilson dealt with this in her statement for the investigation – see below.

26. The suspension letter (pages 98 to 99) was prepared by Ms Wilson. As the Claimant says, it referred to commission payments, not bonus payments. It also rather clumsily referred to "the incident on 17 November 2022", but there is no complaint from the Claimant about that. It did not warn the Claimant he might be dismissed, though it did say it was alleged that he had failed to "advise management of repeat overpayments within monthly salary through erroneous payment of commission payments which you are not entitled to. This potentially amounts to an act of dishonesty and infidelity which goes to the heart of the terms of trust and confidence in the employment relationship, which we now consider to have been broken if the case is proven following investigation". The Claimant told me this wording made him realise it was serious, but he did not know the possible outcomes of the process. He was not able to say he was thereby occasioned any unfairness; his point was that the Respondent did not comply with its policy.

27. After his suspension, the Claimant filed a grievance in relation to what had happened regarding pay rises. I need say nothing further about the grievance process or outcome, as neither party drew my attention to it during the evidence. The question of pay rises is addressed further below.

**Investigation**

28. The Claimant attended an investigation meeting with Mr T Fenn, the Respondent's Commercial Development Manager, on 28 November 2022. The notes of that meeting are at pages 107 to 111; I did not read them. Mr Fenn stated at the outset of the meeting that the Claimant would be going to a disciplinary hearing. The Claimant says that this contravenes the Respondent's disciplinary policy at section 7.6 (page 55) which says, "The investigating officer will be responsible for compiling and reviewing all evidence obtained as part of his/her investigation, utilising the disciplinary investigation template. This includes a conclusion and a recommendation of further actions, i.e., whether there is sufficient evidence to warrant a disciplinary hearing".

29. The statement the Claimant gave to Mr Fenn on 28 November 2022, which he signed, is at pages 107 to 111. It dealt with the following:

29.1. The Claimant detailed his discussions with Ms Wilson, to the effect that initially one overpayment was raised with him, which led to discussion of a repayment plan and his then advising her of further overpayments, making a total of £6,049.83.

29.2. He had mentioned to Ms Wilson other employees being overpaid with no action being taken, and also that he had been underpaid salary. The latter was a reference to his view that he should have received a pay rise.

29.3. At his suspension meeting, Ms Wilson mentioned one further overpayment which in fact had not been made.

29.4. The Claimant said he was confused about why a repayment plan option had been withdrawn. He said if he had been dishonest, he would not have said there were other overpayments.

29.5. He had noticed the overpayments in May 2022 but did not mention them due to ongoing issues (that is over his salary) and because he was incredibly stressed. He stated, "I was fully aware that this would come out at some point in the future", that he planned on raising it once the pay issues were resolved and his mental health better, that "in hindsight, [he] should have mentioned these overpayments previously", and that "it was an error of judgment".

29.6. He went on to detail the discussions between him and the Respondent about pay increases and stated that he was aware that he was not entitled to bonus or commission payments as this "had been ironed out on many occasions", something he confirmed in evidence before me.

29.7. He referred to having experienced some issues in his personal life. I do not need to set out the details.

30. Ms Wilson also met with Mr Fenn. Her statement (pages 104 to 106), said that:

30.1. A colleague had highlighted to her on 14 November 2022 that the Respondent had paid the Claimant "a bonus payment" in error for August.

30.2. The Claimant would have known it was a mistake.

30.3. The Claimant told her on 17 November that he had spent the monies and she had told him she was disappointed by his lack of honesty.

30.4. She advised him at that meeting that payroll had said it needed repaying and asked him about any other overpayments. He told her he could not recall and said, "fuck them, it's only what they owe me". The Claimant accepts this is what he said.

30.5. The Claimant had told her that he felt "owed" the monies, because he felt he was due annual salary increases (although he had no contractual right to any) and therefore kept payments he knew he was not entitled to.

30.6. He called Ms Wilson after their initial meeting to advise of two other payments. She accepts she incorrectly told him when suspending him that she had been advised of four (not three) overpayments by payroll.

30.7. The Claimant's colleague, Ms Cheshire, was entitled to commission under her contract.

31. Mr Fenn concluded that the Claimant had received three payments in February, May and August 2022 respectively, labelled as "sales commission" totalling £6,049.83 gross. His investigatory report, recommending that the matter be considered at a disciplinary hearing, is at pages 100 to 103. In summary, it said:

31.1. The overpayments were clearly listed as commission on the payslips.

31.2. The Claimant admitted to being aware of them and it was his decision not to disclose them due to the ongoing debate over salary reviews.

31.3. This mitigation offered by the Claimant did not justify or account for "his poor ethical behaviour".

31.4. The Claimant had offered to repay the monies.

31.5. He admitted the payments were not due to him. He had knowingly kept them and failed to disclose them to the Respondent.

32. The Claimant told me that he could not identify any investigatory step Mr Fenn failed to take. The Respondent invited the Claimant to a disciplinary hearing by a letter from Mrs James of 23 November 2022 (pages 112 to 113). It outlined the allegations, namely that the Claimant had failed to advise the Respondent of repeat overpayments through erroneous payment of commission he was not entitled to. It warned the Claimant of the possibility of summary dismissal, saying that the alleged conduct potentially amounted to dishonesty going to the heart of trust and confidence. The hearing was scheduled for 8 December 2022 but rearranged to 27 January 2023 due to sickness on the Claimant's part. The two statements, Mr Fenn's report and the relevant payslips were enclosed with Mrs James' letter.

**Disciplinary hearing – 27 January 2023**

33. The disciplinary hearing was chaired by Mrs James, who is at the same level as Mr Fenn. In preparation she read the latter's report, the two statements and the payslips.

34. The hearing was recorded, as the Respondent's disciplinary policy permits – page 62. It lasted over two hours. There is a dispute about whether Mrs James mentioned that it would be recorded at the start. There is no need for me to resolve that dispute. What is clear from the transcript is that part way through, the question of recording came up, Mrs James asked the Claimant if he was content to proceed on that basis, and he was – see page 154. The transcript is at pages 115 to 186; the Claimant did not suggest to me that it was in any way inaccurate. As already indicated, I made clear I could not possibly read it all in the time available and that it was for the parties to take me to any parts of the transcript they wished to draw to my attention. I was referred to a small number of extracts during the oral evidence. Nothing I was taken to called into question Mrs James' account of the hearing in her statement, from which I highlight the following:

34.1. She outlined the allegations against the Claimant (SJ13).

34.2. The Claimant confirmed that he had received additional payments out of the ordinary, and to his view that he had been underpaid as promised pay rises had not materialised (SJ14). The transcript records at page 127 that the Claimant said he did not disclose the payments because of the dispute over his pay rises, which he said was an error of judgment.

34.3. The Claimant referred to his written terms of employment, which he had obtained since being suspended and which as noted above said he "may be eligible" for a bonus. Mrs James pointed out that he had been wrongly paid commission, but the Claimant said he believed they were bonus payments. See SJ15.

34.4. Mrs James considered the Claimant's case presented to her to be inconsistent with what he had said to Mr Fenn (SJ17). In any event (SJ18), he confirmed to her that he did not declare the payments because of his ongoing dispute with the Respondent. He said that he was surprised to receive them.

34.5. Mrs James found the Claimant's account unconvincing and thought it had been formulated to fit with what he had read in the contract (SJ19). They discussed the pay rise conversations (SJ20) and Mrs James ascertained that whilst a rise had been mentioned to the Claimant in October 2021, he was told the next month that this was an error. She did not believe he could have taken the commission payments as a pay rise in 2022 as he had been clearly told that no rise would be forthcoming (SJ22). Page 152 of the transcript shows that part of the Claimant's mitigation was that he said the Respondent had been in breach of trust towards him, that is in particular regarding the pay rises.

34.6. The Claimant categorically accepted he knew he was not entitled to commission when he received it (SJ24). The Claimant confirmed to me that this is what he said. The transcript shows at page 141 that the Claimant accepted he knew he had received the payments and at pages 126, 142 and 143 that at the time of receipt he knew he was not entitled to them.

35. The Claimant referred Mrs James to the position of Ms Cheshire, whose statement is at page 225, though it is not clear to me whether the statement was available to Mrs James or only to Mr Philips on appeal. In any event, Ms Cheshire stated that she had received three overpayments on 18 March, 17 June and 18 November 2022, the last when she had ceased to be employed by the Respondent. She was contacted by her former manager and agreed to pay them back in full immediately.

36. The Claimant says that Mrs James did not consider his evidence as to what he had been accused of (retaining commission, when in fact he had received bonuses), the procedural issues around his suspension (namely that he was not told he might be dismissed), Mr Fenn's comment at the investigation meeting, and consistency with how Ms Cheshire was treated. It seems clear that what the Claimant means by this is that Mrs James did not decide in his favour based on that evidence, rather than that he did not have opportunity to present it

37. Mrs James adjourned the hearing and did not make a decision on the day. During the adjournment she enquired with Human Resources about Ms Cheshire and was assured her circumstances were different. She was told that Ms Cheshire was employed on a contract that included commission and had been wrongly paid it whilst on sabbatical, which was a situation the Respondent had not encountered before. Mrs James did not check Ms Cheshire's contract herself.

38. Mrs James concluded as follows – see her decision document at pages 187 to 189:

38.1. The Claimant had agreed he decided not to raise the overpayments due to outstanding issues about pay rises, which he wanted resolved first. As he said to her, he was very unhappy about what had happened in October and November 2021 in this respect. She recorded that the Claimant had also said he believed from reviewing his contract that he was entitled to the payments (she called them "commission payments") which, Mrs James told me, confirmed that he did not believe he was entitled to them when they were paid.

38.2. The Claimant had not received a pay rise since transferring to the Respondent and was told in November 2021 that he would not receive one, prior to receiving the overpayments.

38.3. There was therefore no connection between the pay rise issue and the commission payments. It was clear to the Claimant that the overpayments were not a pay rise.

38.4. The Claimant's contract did not provide an entitlement to commission and as to bonus it said that the Claimant "may" be entitled to one. Mrs James did not refer to Ms Wilson describing the payments as a bonus, because the payslips referred to commission.

38.5. The Claimant was clear in his statement to Mr Fenn, prior to reviewing his contract, that he was not entitled to commission and therefore knew that at the time he got the payments.

38.6. He had not received bonus or commission payments before the first error in February 2022.

38.7. She was advised by HR that Ms Cheshire's case was different – there was no suspicion she had retained monies she knew she was not entitled to. The decision document did not make this clear; she simply told the Claimant she had no knowledge of this other case. She told me that what she meant was that she did not have the details of it; she also wanted to refrain from disclosing another person's personal information.

38.8. The procedural matters to which the Claimant had drawn attention, including Mr Fenn's comment, had no impact on the overall outcome as that was her decision to make. She told me she accepted Mr Fenn made the comment but that it had no bearing on the disciplinary hearing. As to the suspension letter, she was satisfied that the Claimant was told of the possible outcome of the disciplinary process before the disciplinary hearing took place.

38.9. Repayment had been offered initially, but when more payments came to light, it became clear it was a more serious issue.

38.10. She was confident the Claimant knew he should not have received the payments and that he had chosen not to declare them because of his views about his pay. Even if it turned out he was entitled to the payments, the question was his dishonesty in concealing their receipt at a time when he considered he was not.

38.11. She considered the Claimant's service and clean record, but concluded that his actions amounted to a breach of contract and gross misconduct, causing a breakdown in trust and confidence, and going against the Respondent's core value of honesty. She said in evidence that the Claimant's actions created a fundamental trust issue.

38.12. She did not consider a lesser sanction than dismissal appropriate. In evidence she said she considered a final written warning, but the Claimant's actions raised serious questions about whether the Respondent could trust him and his honesty. The Claimant had shared at the end of the hearing some serious family issues he had been dealing with but did not say to Mrs James that this was why he had acted as he had.

39. The Claimant was not given minutes or the transcript of the hearing to sign. He was, sometime after the hearing, sent a copy of the recording.

**First stage appeal**

40. The Claimant appealed against his dismissal (page 194). The grounds were:

40.1. What he had been dismissed for. He said there was misinterpretation of evidence (he told me he was referring to the decision that Ms Cheshire's position was not the same as his) and a failure to fully consider it. He said he had been dismissed for receiving commission payments, but this was not correct; he had received bonuses. He relied on the Respondent's "CDE Policy" (relating to bonuses and commission) at pages 85, 89 and 90 and on the written terms of his employment.

40.2. What he viewed as an unfair suspension, investigation and dismissal.

40.3. Inconsistency with how other cases were handled, namely that of Ms Cheshire, who he said also received overpayments on the same number of occasions.

40.4. Procedural issues.

41. The appeal hearing took place on 17 February 2023, before Mr Philips, who was senior to Mr Fenn and Mrs James. Beforehand, Mr Philps read the investigation report, the two statements, the payslips and the invitation to the disciplinary hearing. He also listened to the recording of that hearing. He viewed the hearing before him as a rehearing, reaching his own decision on the evidence, rather than just a review of Mrs James' decision. The notes/transcript of the hearing are at pages 196 to 218. Again, I did not have time to read them in full – see above – and as with the disciplinary hearing, there was no challenge to the Respondent's account of the hearing set out in Mr Philips' statement.

42. The Claimant says he was able to demonstrate that what he had been dismissed for were bonus payments to which he was entitled, not commission, because of the wording of his written terms to the effect that he "may be entitled to bonus payments". He told Mr Philips that new information had come to light to suggest he might be entitled to a bonus (GP7) and so (GP8) he disputed use of the word "commission" in the dismissal letter.

43. As Mr Philips says (GP9), the Claimant said to him, "I believed I wasn't entitled to commission and bonus at that time if I'm being perfectly honest" – see page 200. Relying on the CDE policy, Mr Philips understood the Claimant to be saying that the payments were bonuses as they correlated with sales figures and with formulas in that policy. The Claimant pointed out to him that Ms Wilson had referred to "bonus" payments in her statement. Mr Philips put to the Claimant (GP11) that he was retrospectively trying to adapt the facts to suit his case.

44. As to procedural matters, the Claimant acknowledged that the invitation to the disciplinary hearing told him of the possible outcome. He raised inaccuracies in the notes of the disciplinary hearing, though neither party specified for me what the Claimant was referring to. Mr Philips was satisfied that there could be no question over what was said given that the hearing had been recorded. The question of inconsistency compared with Ms Cheshire was also discussed.

45. After the hearing, the Claimant sent Mr Philips the statement prepared by Ms Cheshire, the CDE Policy and his written terms of employment. He also set out in an email to Mr Philips what he said Ms Wilson had sent him by way of bonus calculations. See pages 219 to 223.

46. Mr Philips made enquiries of Ms Wilson in relation to Ms Cheshire, who replied (page 224) to say that Ms Cheshire was entitled to commission under her contract and believed she was entitled to the payments. She had gone on sabbatical, a unique situation for the Respondent, and the payments of commission usually made to her had continued by mistake. There had been a further payment after her employment ended in October 2022, again in error. She had agreed to repay these amounts in discussion with her manager. Mr Philips saw this as completely different to the Claimant's situation. He did not check Ms Cheshire's contract for himself, as he was happy with the explanation he had been given, which he felt tallied with Ms Cheshire's own statement.

47. Mr Philips concluded as follows:

47.1. The bonus point was a red herring. There had been no such payment since 2015 and the figures the Claimant provided (pages 222 to 223) did not match the overpayments. In fact, it seems clear that they essentially did – compare page 222 with page 283 and page 223 with page 285. In any event, Mr Philips noted that at the start of his email at page 221, the Claimant indicated he knew he was not entitled to the payments at the time they were received. Mr Philips also told me that what the Claimant said Ms Wilson had sent him did not prove she thought he was entitled to bonuses, though he did not check that with Ms Wilson in reaching his decision.

47.2. Dismissal was an appropriate sanction. He considered a final written warning but told me that trust in the Claimant had gone. The Claimant had raised personal issues with him too, but not as an explanation for why he had acted as he did.

47.3. The Claimant did not appreciate his serious dishonesty (GP22) and that the Respondent could no longer trust him. He knew he should not have had the payments at the time they were made.

48. Mr Philips' decision was dated 27 February 2023 and can be seen at pages 226 to 229. In summary:

48.1. He acknowledged that the Claimant had not been given minutes of the hearing with Mrs James, but pointed out that he had received the recording. Mr Philips had offered him the opportunity to adjourn the appeal hearing to listen to it, but the Claimant declined the offer, as he had listened to it already. The Claimant's point was that he had received it thirteen days after the hearing and should have received it sooner.

48.2. The letter then rehearsed the discussion about the Claimant's contract and the email from Ms Wilson, summarising the Claimant's argument that he was thus entitled to the payments. Mr Philips concluded that they had been labelled as commission payments throughout and that the Claimant had acknowledged in his statement and to Mrs James that he knew he had been paid them in error and intentionally failed to declare them. This was supported by the Claimant confirming he had not received any such payments previously. In his evidence to me, Mr Philips said that accordingly, whilst there was confusion over whether the payments were commission or bonuses, the heart of the matter was that the Claimant knew he was not entitled to them and did not say so at the time, which Mr Philips thought dishonest. In other words, how the payments were described did not matter.

48.3. Mr Philps acknowledged there had been procedural flaws, saying, "after listening to these points and looking into our internal disciplinary and grievance policy, I do believe that these were procedural flaws within your disciplinary process. As a result, I uphold this area of your appeal". He listed in his letter that the Claimant had raised the omission from the suspension letter, Mr Fenn's comment, the recording of the disciplinary hearing and the fact that there were no signed minutes, but did not stipulate which criticisms he accepted. In evidence, he said he accepted the issues with Mr Fenn's comment and the suspension letter not referring to the possibility of dismissal, saying that Mr Fenn should not have made the comment he did, as the point of an investigation is to establish

whether a case should proceed to a hearing. He told me that the procedural flaws did not merit overturning the decision to dismiss however, because they did not change the fundamental picture presented by the evidence.

48.4. As to inconsistency, the letter stated that he had looked into Ms Cheshire's situation and it was different, though he did not make clear why.

49. Like Mrs James, Mr Philips also took into account what the Claimant had said about personal difficulties but told me that the Claimant's intention to "effectively steal" £6,000 was serious enough to merit dismissal. He did not mention stealing or theft in his decision, though he did refer to dishonesty.

**Second stage appeal**

50. The Claimant appealed again as he was entitled to do under the Respondent's disciplinary policy. He said:

50.1. Mr Philips had upheld certain aspects of his first appeal but had not made any amendment to the sanction.

50.2. The Respondent had admitted errors and serious misdemeanours but not taken action on them. When asked what he was referring to, the Claimant told me he got lots of apologies about errors by the Respondent during the process. I was not told what they were or taken to evidence of them, other than those specifically highlighted in these Reasons.

50.3. He referred to the Respondent being dishonest and to victimisation and discrimination – this was the point about treating Ms Cheshire differently.

51. The second appeal was heard by Sharon Hughes, People and Talent Director, on 17 March 2023. The minutes/transcript are at pages 238 to 267. I took the same approach to reading them as to the other hearing records. Neither party took me to any part of this particular transcript. The Claimant said in evidence that he had a full opportunity at each hearing to put his case, except this one, clarifying that this was in relation to his grievance appeal which Ms Hughes heard at the same time. He accepted that the Respondent went through his disciplinary and appeal case in detail.

52. The outcome letter was dated 23 March 2023, and is at pages 273 to 276. In summary, Ms Hughes found:

52.1. The Claimant had said he had only received bonuses not commission and now believed he was eligible for them under his contract.

52.2. He confirmed he had received three payments he knew he was not entitled to, but believed he was entitled to keep them because he had not received a pay increase.

52.3. He recognised now that this was an error of judgment.

52.4. He also raised Mr Fenn's comment and the situation of Ms Cheshire. Ms Hughes said she had looked into Ms Cheshire's situation and whilst she could not disclose the details, was completely confident that she did not attempt to

conceal receipt of the payments to her and that the two cases were fundamentally different.

52.5. The Claimant knowingly kept money he knew he was not entitled to. He did not raise it and had no intention of doing so until the error was identified. The contract was therefore a moot point as the Claimant had consciously decided to conceal the payments long before he saw it.

52.6. She had considered action short of dismissal but there had been a fundamental breakdown of trust and confidence and gross misconduct by what she described as deceitful actions.

53. As indicated, Ms Hughes also dealt with the Claimant's appeal against a grievance outcome, his having complained about a data protection breach and the issues regarding his annual pay awards. I do not see any need to detail her decision on those matters.

54. The Claimant says in his witness statement: "Whilst I was initially under the impression that I was not entitled to any 'bonus' or 'commission' payments this all changed on receipt of my contract from DPD Group UK Limited. I did admit to knowing about the potential overpayments and to not coming forward about these potential overpayments due to an ongoing underpayment issue regarding a promised pay increase by DPD Group UK Limited that never materialised but again things changed on receipt of my contract".

**Law**

55. Section 98 ERA says:

"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (2) [which includes a reason related to the conduct of the employee] …*

*(4) [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)—*

*(a) depends on 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*

*(b) shall be determined in accordance with equity and the substantial merits of the case*".

56. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or

as it may be of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers.

57. If the Respondent shows the reason and establishes that it was one falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including its size and administrative resources, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of the reasonableness of the decision to dismiss. In all respects, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

58. In assessing these requirements in connection with a conduct dismissal, the Tribunal will of course have regard to the guidelines in **British Home Stores v Burchell [1980] ICR 303** as to whether the Respondent believed the Claimant to be guilty of misconduct (on the basis of a reasonable suspicion), had reasonable grounds to sustain that belief, and when forming that belief had carried out a reasonable investigation in the circumstances. The reasonableness of the Respondent's actions is to be assessed based on what it knew, or reasonably should have known, at the time it took its decision to dismiss. The question to be answered is not what the Tribunal would have done in the same circumstances; rather the focus is on the Respondent's actions – has it acted reasonably? The Court of Appeal in **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23** held that the range of reasonable responses test also applies to the investigation carried out by the Respondent.

59. In respect of both the investigation and the Respondent's decision to dismiss, reasonableness would require the Respondent to be willing to listen to and take into account evidence in support of the Claimant's protestations of innocence as well as evidence that supported the Respondent's suspicion of guilt. In **A v B 2003 IRLR 405**, the EAT stated that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. In that case, the fact that the employee, if dismissed, would never again be able to work in his chosen field was by no means as irrelevant as the tribunal appeared to think. Serious allegations must always be carefully investigated, and the investigator should put as much focus on evidence that may point towards innocence as on that pointing towards guilt. Having said this, the EAT accepted that the standard of reasonableness will always be high where dismissal is a likely consequence, so the serious effect on future employment may not in practice alter that standard. Such factors merely reinforce the need for a careful and conscientious inquiry.

60. The question of consistency can arise in relation to decisions to dismiss,

namely whether an employer has treated another employee more leniently. **Post Office v Fennel 1981 IRLR 221** decided that this is part of ensuring tribunals decide cases in accordance with equity (and the substantial merits of the case). The Court of Appeal made clear in that case that it is for the Tribunal to determine if there is sufficient evidence before it to decide whether the cases are genuinely comparable. In **Hadjioannous v Coral Casinos [1981] IRLR 352** it was said that the question is whether the employer had a rational basis for the different treatment. That underlines the importance of the Tribunal not substituting its view for that of the employer.

61. Generally, "gross misconduct" must have an element of wilfulness about it. Failure to list particular conduct as "gross misconduct" in an employer's policy may be relevant to fairness, but tribunals must also consider whether the employee should have known the conduct was viewed in this way in any event. Furthermore, as made clear in the cases of **West v Percy Community Centre [2016] UKEAT/0101/15** and **Hope v British Medical Association [2021] IRLR 206**, the focus should be on section 98 when looking at whether dismissal was within the range of reasonable responses, not on the label "gross misconduct", though whether the employee's conduct is gross misconduct as set out in an employer's policy is a factor in this assessment.

62. **West Midlands Co-Operative Society Ltd v Tipton [1986] ICR 192** is well-known authority for the principle that unfairness in connection with an appeal against dismissal can of itself render that dismissal unfair. In that case the appeal was provided for contractually, but there is no reason to doubt that the same principle applies where appeal arrangements do not have contractual force as such. Appeals can also correct unfairness at the dismissal stage – **Whitbread & Co plc v Mills [1988] ICR 776**. In **Taylor v OCS Group Ltd 2006 ICR 1602**, referred to by Mr Johnston, it was held that an appeal does not have to be in the nature of a re-hearing to do so. That case also confirms that fairness must be assessed from the start of the disciplinary process to its finish, whether as to the employer's investigation, its conclusions, or its decision. A Tribunal must look at the substance of what happened throughout. If the disciplinary hearing had been defective the appeal would have to be comprehensive if the whole process and the dismissal was to be found to be fair. The Court of Appeal also added that where misconduct was serious and there are procedural imperfections, section 98(4) might still be satisfied; where it was less serious, a procedural deficiency might mean dismissal is not fair. **Polkey v AE Dayton Services Ltd [1988] ICR 142** is however clear authority to the effect that a tribunal cannot say a dismissal is fair because the unfairness would have made no difference to the outcome – except where taking a particular step would have been utterly futile.

63. In summary, what is important is to answer the question posed by section 98(4), as summarised above, and in doing so to make an overall assessment of the facts as I have found them to be. Also of course, in any case such as this, the Tribunal must have regard as far as relevant to the ACAS Code of Practice on Disciplinary and Grievance Procedures.

## Analysis

64. I reached my conclusions below based on the evidence I read and heard, as I have summarised it in these Reasons. I did not deal with all of the points raised by the parties, focusing instead on those material to the issues identified above.

**The reason for dismissal**

65. I can deal with this very briefly. The reason for the Claimant's dismissal was not disputed. In short, the reason was the conclusions the Respondent reached about the Claimant receiving payments which it decided he knew he was not entitled to, then retaining them and not declaring them. There was nothing in the evidence to suggest that another reason was in the minds of Mrs James, Mr Philips or indeed Ms Hughes. To the contrary, all the documents and witness evidence make clear that it was precisely their conclusions about the Claimant's conduct which led to their respective decisions.

66. This was plainly a reason for dismissal which related to the Claimant's conduct and was thus a fair reason under the ERA. That was not the end of the matter of course as it was necessary to then go on to consider the question of fairness under section 98(4), the effect of which is summarised above. The focus of my attention in this respect was not on what I would have done, but on the conduct of the Respondent and whether in all respects it was within the range of reasonable responses to the circumstances. There is no burden of proof on either party at this stage. I take each of the issues identified above in turn.

**Reasonable suspicion?**

67. The Respondent undoubtedly had a reasonable suspicion of misconduct. It discovered three payments, totalling more than £6,000, which it genuinely believed had been paid in error and which it genuinely believed the Claimant had retained and not declared. This was certainly something it was entitled – one might say bound – to investigate. How the Claimant came to be paid these sums or how the payments were discovered is nothing to the point.

**Reasonable conclusion?**

68. The Respondent's conclusions as to the Claimant's conduct essentially came from his own evidence:

68.1. In his statement to Mr Fenn, he said he had noticed the first two payments in May 2022.

68.2. They were clearly identified in his payslips as sales commission.

68.3. He believed and knew at the time he received the payments that he was not entitled to any bonus or commission.

68.4. This was something the Respondent had made clear to him repeatedly, before the payments were received.

68.5. The Claimant said he did not mention them, at least in part because of the dispute about pay. That is what he told Ms Wilson, in colourful terms.

68.6. The Respondent had made its position on that crystal clear, well before the first payment in February 2022.

69. I noted the Claimant's point that there was a degree of honesty on his part in alerting Ms Wilson to two further payments after she raised one payment with him on 17 November 2022. The Respondent could reasonably conclude

however that even if it was the Claimant's honesty which at that point had led to disclosure of additional payments (I understand Mr Johnston's point that the Claimant would have known they would be investigated, but this was not put to him in cross-examination), that did not alter the nature of his prior conduct in noticing, retaining and not declaring them in the first place.

70. I noted too the point the Claimant raised with all three hearing officers regarding what was said in his written terms of employment about bonuses. I will say more about this below, but at this point note that each hearing officer could perfectly properly conclude that this was a change in what the Claimant had said to Mr Fenn, and more importantly did not change the nature of his behaviour on receipt of the payments. In fact, as Mrs James points out, the Claimant seeking to rely on the contract term at a later stage could reasonably be said to underline the fact that he knew at the time of the payments that they should not have been paid to him.

71. The Respondent thus reasonably concluded on the basis of the evidence available to its hearing officers that the Claimant had knowingly retained monies that he was not entitled to.

**Reasonable investigation?**

72. What is crucial in answering the question of whether the Respondent had carried out a reasonable investigation at the time of reaching the conclusions just discussed, is the substance of the investigation, that is what Mr Fenn actually did, and whether the Respondent was willing to hear evidence that might vindicate the Claimant as well as evidence suggesting misconduct. It is important to assess Mr Fenn's comment at the start of his interview with the Claimant in that overall context.

73. The Respondent itself accepts that the comment was ill-advised. I agree, as it does suggest, on its face, a pre-formed view on Mr Fenn's part but I also noted the following:

73.1. It was not suggested to me that Mr Fenn – nor the hearing officers when other matters came to their attention later – failed to investigate any relevant point. The Claimant was able to give in his statement a full account of his position and agreed that nothing seems to have been unreasonably left out of the investigation process.

73.2. Mr Fenn took the investigatory steps he could reasonably have been expected to take – interviewing the Claimant and Ms Wilson and reviewing the pay slips. He did not review the Claimant's terms of employment, but no copy was available at that point, and this omission was corrected at all three internal hearings.

73.3. The conclusions Mr Fenn set out in his report cannot be faulted based on what he was told. I also noted that he did not omit to include the Claimant's offer to repay the sums in question, which is indicative of his having taken all of what was said to him into account, this being a point in the Claimant's favour.

73.4. The Respondent was plainly open during the rest of the disciplinary process to considering exculpatory evidence, because it considered the position of Ms Cheshire. Mr Philips also looked at the payment details the Claimant sent to him

after the appeal hearing as part of his case that he was in fact entitled to the payments.

74. Taking matters in the round, I therefore concluded that, regrettable as Mr Fenn's comment was, the Respondent conducted an investigation within the range of reasonable responses to the circumstances before it. The comment was inappropriate, but I am satisfied no unfairness was occasioned by it.

**Reasonable procedure?**

75. The question of whether the Respondent followed a reasonable procedure in dismissing the Claimant includes of course the question of compliance with the Code. Equally obviously, I could only assess those procedural issues specifically raised with me and evidenced. As I have said, the Claimant referred to having received numerous apologies for procedural failings but did not specify or evidence anything other than the matters set out in these Reasons. I deal with each material procedural issue in turn.

***The suspension letter***

76. Not advising the Claimant in the suspension letter that he could be dismissed was contrary to the Respondent's policy and a regrettable omission. I entirely accepted however the Respondent's submission that it occasioned no unfairness to the Claimant, for four reasons:

76.1. The alleged conduct was by its nature very serious; the Claimant knew that was the case.

76.2. The letter made clear the seriousness of the issue with its reference to the conduct potentially going to the heart of the employment contract. Even though he had not been in this position before, the Claimant could not reasonably have been mistaken that this was a serious matter, as he agreed in evidence. I would go further than his admission and conclude that the wording made clear his employment was at risk. The letter used the words "dishonesty" and "infidelity". Those are plainly fundamentally serious issues.

76.3. Most importantly, the Claimant knew that he was at risk of dismissal ahead of the disciplinary hearing and of course throughout the procedure thereafter.

76.4. Finally, he was unable to identify any unfairness in this respect; his point was simply that the Respondent did not follow its own procedure. I understand his point, but it did not make the dismissal unfair.

***Change of terminology***

77. There was, as the Claimant says, a change in the description of the payments in question from "bonus" to "commission" early on in the disciplinary process. This too was not ideal, but the three hearing officers were plainly entitled to conclude that this was nothing to the point. The essential point was that the Claimant agreed he had knowingly retained payments he knew he was not entitled to receive, regardless of how they were labelled. I have dealt with the significance of the written terms of employment above.

***Disciplinary hearing minutes***

78. There is no need for me to say anything about the actual recording of the disciplinary hearing before Mrs James, given that the Claimant agreed to carry on with the hearing on that basis and has not suggested there was anything he would not have said had he known he was being recorded. That is obvious, of course, because anything incriminating would have been noted down even if there was no recording taking place.

79. As to the provision of minutes to the Claimant, the Respondent's policy could be clearer as to when this is required, as could the process it will follow in relation to the record of hearings generally. It seems to me it is best to get a written record of a hearing, whether minutes or a transcript, signed by the employee and to make doubly sure s/he consents to a recording before a hearing starts.

80. That said, I could see no unfairness to the Claimant in the minutes not being signed. He was sent the recording, had a chance to listen to it before his appeal hearing and has not drawn my attention to any inaccuracy in the transcript.

***Ms Cheshire***

81. I will return below to the consistency point, but there were also procedural matters to consider in relation to Ms Cheshire's evidence. Mrs James said in the dismissal letter that she did not have details of Ms Cheshire's circumstances, when it is clear she did. To some extent that error was cured on appeal, because Mr Philips and Ms Hughes said that they had checked the position and that Ms Cheshire was categorically not in the same circumstances as the Claimant. The point nevertheless remains that all three hearing officers could have been clearer as to why they reached this conclusion (given Ms Cheshire was the Claimant's witness, I am not sure I understand their circumspection), but there was no unfairness to the Claimant in terms of his ability to put together any appeal point related to Ms Cheshire because by his own admission he knew what her circumstances were, and of course could have spoken to her about them if he needed to clarify anything.

82. I also accepted the Respondent's submission that none of the hearing officers had any reason (certainly none I was made aware of in evidence) to doubt what they were told by HR about Ms Cheshire, so that they could reasonably take it on face value. Some hearing officers would have checked for themselves, but HR is there to support people conducting internal hearings and so it cannot be said to be outside the range of reasonable responses not to have done so.

***Mr Philips' reference to "theft"***

83. In fairness to the Claimant, this was not a point he laboured overmuch. I need only record therefore that whilst employers need to be careful not to reach disciplinary or appeal decisions on grounds not put to an employee, as Mr Johnston submitted, this was no more than an issue about the label to attach to the conduct in question. The Respondent fairly and squarely put to the Claimant at all stages in the internal process the facts on which it relied. In that context, even if Mr Philips concluded that the Claimant's conduct amounted to theft but did not say so in his decision, there was no unfairness suffered by the Claimant as a result.

***The ACAS Code***

84. Much of what the Code requires is already dealt with above. I therefore add only two further points:

84.1. The Respondent did not have a specific rule saying that employees should not keep money that was not owed to them, but of course that was hardly necessary. It is, or certainly ought to be – particularly to someone in the Claimant's position – evident that it would be a breach of trust and confidence to do so, something which is listed in the non-exhaustive examples of gross misconduct in the Respondent's disciplinary policy.

84.2. Otherwise, the Code encourages prompt action, consistency, investigations, an opportunity for an employee to put their case at a hearing and be accompanied and an opportunity to appeal. I will return to the consistency point below, but subject to that, all of this was done.

**Appeals**

85. Case law makes clear that a fair appeal process is crucial to the fairness of a dismissal. As to that in this case:

85.1. The Claimant did not at any point suggest to me that either appeal process was unfair.

85.2. He agreed that he had the chance to put his case on both occasions.

85.3. It is evident that at both appeal stages his case remained essentially as it had been before Mrs James.

85.4. After the first appeal hearing, Mr Philips made further enquiries and got more detailed info about Ms Cheshire. It is evident from her decision letter that Ms Hughes did something similar.

85.5. Mr Philips also considered the Claimant's other additional evidence sent to him after the hearing in support of the Claimant's case that what he had received were bonus payments. Ms Hughes' decision letter makes clear she also considered the Claimant's case on this point.

86. It is true that Mr Philips upheld the Claimant's appeal in relation to procedural irregularities, and I can understand why the Claimant would question why that would not lead to a different outcome. Mr Philips also seems to have been mistaken that the information the Claimant sent him after the first appeal hearing did not match the Claimant's payslips. None of that meant however that the dismissal decision should reasonably have been reversed. I was entirely satisfied with Mr Philips' explanation of why he did not take that step. Like Mrs James, he maintained a reasonable focus on the Claimant's conduct – effectively re-hearing the case. Mr Fenn should not have made his comment, but Mrs James had been the decision-maker and at the appeal stage it was clear that this is how Mr Philips saw his own role. The suspension letter was defective, but the Claimant knew well before the disciplinary hearing that he might be dismissed.

**Range of reasonable responses**

87. Whether dismissal was within the range of reasonable responses to the circumstances was a crucial question, which I considered for all stages of the Respondent's disciplinary and appeals process.

88. The Respondent was evidently entitled, on the Claimant's own evidence, to conclude that what he had done was wilful, which properly placed it in the category of gross misconduct.

89. I understand the Claimant's argument that his written terms of employment indicated he might be entitled to a bonus, but what he does not seem to appreciate is that he was in effect saying that he concealed receipt of payments he knew he should not have had, but then obtained a document which gave him an opportunity to argue that actually he could have kept them. The Respondent was reasonably entitled to conclude that his actions were dishonest and reasonably entitled to conclude that they were not retrospectively made honest by something the Claimant was not aware of at the time.

90. There was another reason why it was also within the range of reasonable responses to reject his argument that these were bonus payments he was entitled to, namely that he accepted the Respondent had repeatedly made clear before he received them that he was not entitled to any such payments. The Claimant accepts the overall amount of money he retained was substantial. Further, as Mr Johnston submitted, there were several months between receipt of the first two payments and his first discussion with Ms Wilson, and he had not raised this with the Respondent in any way or to any purpose.

91. The Claimant submitted that the Respondent itself was in fundamental breach of contract because of a breach of data protection legislation, its dishonest denial (as he sees it) of any such breach, its miscommunication over his pay rise, and the fact that he had been asking for his contract for some time and only got it during the disciplinary process. I am not required to determine whether or not the Respondent was thereby in fundamental breach of contract, but even if it had been, the fact was that he remained in its employment and his obligations to the Respondent were not waived. In those circumstances, whatever the Respondent's conduct in relation to such matters, it cannot in my judgment be the case that the Claimant's dismissal was thereby rendered unfair.

92. The Respondent was fully entitled to conclude that what the Claimant had done was more than an error of judgment. As I have said, it could reasonably conclude that it was wilful, and as the Claimant himself said in evidence it is difficult to argue against the Respondent's conclusion that he was in breach of trust and confidence. Any such breach is fundamental – **Morrow v Safeway Stores Plc [2002] IRLR 9**.

93. The Respondent initially offering and then revoking the repayment option was not material to my analysis. The Claimant implicitly argued that by offering it, the Respondent (through Ms Wilson) was indicating that it was not a disciplinary matter. Some employers would have thought otherwise, and certainly Mrs James' view, expressed in evidence, was that a single retention of a payment one knows one is not entitled to is gross misconduct, but it is clear that a reasonable employer could view the situation in a different light once it

discovered that the initially identified payment was not alone and was part of a pattern.

94. All three hearing officers considered alternative sanctions, and certainly Mrs James and Mr Philips considered the Claimant's service and clean record. As Mr Johnston submitted, some employers may not have dismissed in these circumstances, but that is not the question and it is certainly irrelevant whether I would have done so. As he also submitted the question is whether dismissal was in the range of reasonable responses based on what the Respondent had reasonably concluded after a reasonable investigation. It plainly was. Some employers may have given the Claimant another chance, but even with his previously unblemished record, it cannot be said that a reasonable employer could not dismiss in these circumstances. Honesty is at the heart of contracts of employment, as it happened explicitly so in the Claimant's case. Put another way, as the Respondent says, being able to trust an employee, perhaps particularly a relatively senior and well-paid one, is essential to an employment relationship. Where there were proper grounds, as the Claimant himself admitted, for no longer being able to trust him, dismissal for the conduct that created that situation is fair. The Claimant raised personal issues during at least two of the internal hearings, but evidently did not seek to argue that this is what had led him to behave as he did.

**Inconsistency**

95. I turn finally to the question of whether the Claimant was treated inconsistently with Ms Cheshire, a crucial question in determining whether dismissal was within the range of reasonable responses in the circumstances of the case. The fundamental question is whether someone else was not dismissed who was in circumstances genuinely comparable to those of the Claimant.

96. I concluded as follows:

96.1. The November payment to Ms Cheshire was irrelevant to answering this question, as even if she had been dishonest about that, she had left the Respondent's employment and so could not be dismissed or disciplined for it.

96.2. As to the earlier payments, the Claimant said in evidence that he knew Ms Cheshire was on sabbatical when she received them and that she was on a contract entitling her to commission. At the end of his submissions however, he said that it had been agreed prior to Ms Cheshire going on sabbatical that she was not entitled to commission. Whilst I accept that the Claimant was not legally represented, I had to note that this was not something he raised in his statement, his Claim Form, the Respondent's internal hearings (as far as I was taken to evidence of them), nor in his oral evidence. Given the inconsistency in his position and the late change in his case in this regard, set against the consistency of the Respondent's position on the point and the need to conduct this Hearing fairly for both parties, I concluded on the balance of probabilities that there was no such agreement.

96.3. I could not conclude therefore, based on what was presented to me, that there was evidence to show Ms Cheshire was in truly parallel circumstances to the Claimant. Unlike him, she had a contract that entitled her to commission, and unlike him, she was in changed circumstances, because she was on sabbatical, and could legitimately have concluded the payments would be ongoing.

96.4. Accordingly, the Respondent did not act unfairly in treating her differently. It had a rational basis – when the matter was reviewed at each stage – for doing so.

## Conclusion

97. Determined in accordance with equity and the substantial merits of the case, the Respondent's decision to dismiss the Claimant was fair. His complaint of unfair dismissal was therefore not well-founded and was dismissed.

*Note: This was a remote hearing. There was no objection to the case being heard remotely. The form of remote hearing was V - video.*

Employment Judge Faulkner
Date: 31 August 2023