

RM



EMPLOYMENT TRIBUNALS

Claimant: Mr Szabolcs Fekete
Respondent: Citibank N.A.
Heard at: East London Hearing Centre (by CVP)
On: 7th September 2023
Before: Employment Judge Illing

Representation

Claimant: Mr G Baker (Counsel)
Respondent: Mr S Nicholls (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. The complaint of unfair dismissal is not well founded and is dismissed.
2. The complaint of wrongful dismissal is not well founded and is dismissed.

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was Video (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. The case was issued on 26 April 2023 and listed for a 1-day final hearing without a preliminary hearing for case management.

2. The Respondent required a witness (David Smith) to give evidence from overseas as he was based in the U.S. Appropriate permissions were sought and granted on 27 July 2023.
3. Due to the time constraints, the Parties representatives had discussed and agreed to limit cross examination to key points only. The Tribunal remained open to consider any other points on the papers before it.

The hearing

4. Bundle of 720 pages.
5. We heard evidence from:
 - 5.1. For the Claimant:
 - 5.1.1. Mr Szbolcs Fekete
 - 5.2. For the Respondent:
 - 5.2.1. Mr David Smith
 - 5.2.2. Mr David Flowerday

Conduct of the Hearing

6. At the outset of the claim, the Parties representatives were confident that the cross examination of the witnesses would be limited and that the hearing could be concluded in one day. The hearing would be limited to liability, Polkey and Acas submissions and if Judgment was given, remedy would then be considered.
7. The examination of witnesses slightly overran and therefore liability, Acas and Polkey submissions were made and the Judgment was reserved and would be sent to the Parties in writing.

Findings of fact

8. The respondent is global financial institution employing over 150,000 employees. The respondent operates a number of policies including an Expenses Policy, a Disciplinary Policy and a Code of Conduct. The key sections are:
 - 8.1. Code of Conduct:
 - 8.1.1. Page 6 Titled Our responsibilities and subtitled Everyone's Responsibilities:
 - Conduct business in a manner that is fair, transparent, prudent, and dependable. This includes a commitment to honesty in our dealings and communications with our clients, suppliers, competitors, and each other.
 - Fully cooperate with any investigation into alleged violations of laws, regulations, rules, or breaches of policy, standard, procedure, or this Code and be truthful and forthcoming during such investigations."

8.1.2. Page 13 Titled Upholding our Values and subtitled Investigations:

- Not make false statements to internal or external auditors, investigators, legal counsel, Citi representatives, regulators, or other governmental entities

8.2. Expense Policy:

8.2.1. Section 3.1.1.10 Spousal travel and meals are not reimbursable [8]

8.2.2. Section 3.1.5.1 (b)(i) All attendees whose meals are submitted for reimbursement must be listed on the reimbursement request.

8.3. Disciplinary Policy s.5.4 – Disciplinary procedure

8.3.1. Within the list of examples that could lead to disciplinary action and potential gross misconduct s. 5.4.8:

- Falsification and irregular practice involving cash, vouchers, records, the use of business credit, corporate or debit cards for non-business related expenses, returns or accounts, including false claims for expense reimbursement, and additional allowances such as overtime and shift premiums.
- Serious Breach of Citi's Code of Conduct

8.3.2. S. 5.4.3 Titled Investigation:

- An investigation will be carried out as required.

9. The claimant commenced employment on 15 July 2015 and at the time of his dismissal he had been promoted internally and held the position of EMEA Regulatory Exam Management and Oversight – Senior Analyst. The claimant describes his role within paragraph 1 of his witness statement as “my work and role involved developing internal strategies, policies, and risk management frameworks to ensure compliance with laws and regulations.” From his evidence the claimant confirmed that he was a financial crime professional.
10. The claimant's grandmother had passed away prior to the alleged misconduct and that her passing was a significant loss to the claimant.
11. On 3 July 2022 the claimant travelled to Amsterdam on a business trip. Prior to travelling he had informed his colleague, Samantha Donaldson that he was taking his partner and he returned from his business trip on 5 July 2022. The claimant then was absent from work from 6 July for 6-weeks on medical leave. He was due to return to work on 17 August 2022.
12. The claimant submitted his expenses claim on 8 July 2022 and on 18 July 2022 he was informed that further approvers were required for his expense claim. The further approver was Mr Adam Gigante, a Director and more senior colleague.
13. On 28 July 2022 Mr Gigante emailed Ms Cory to advise her that he was going to reject the claim as he believed that the meals were for two people and they needed to be named in the system. Ms Cory advised the claimant of this.

14. The claimant replied to Ms Cory that "I checked the receipt and did not see anything out of order :) Please advise Adam that I was on the business trip by myself and that I had 2 coffees as they were very small."
15. Ms Cory questioned the claimant's reply asking "The receipt appears to have two sandwiches, two coffees, and another drink. Unfortunately I no longer have access so cannot attach. Are you advising that this was all consumed by you?"
16. The claimant replied stating "yes- that is correct. Kindly advise Adam that on that day I skipped breakfast and only had 1 coffee in the morning. For lunch I had 1 sandwich with a drink and 1 coffee in the restaurant, and took another coffee back to the office with me and had the second sandwich in the afternoon... which also served as my dinner." The claimant added that the amounts were "well within my €100 limit."
17. Ms Cory replied to Mr Gigante giving the claimant's explanation. Mr Gigante replied to this email to advise Ms Cory that "That accounts for 5 July." He then raises a concern regarding additional food and drink on both the 3 and 4 July that seemed to include two meals. Mr Gigante confirmed that he would send the expenses report back to the claimant.
18. Mr Gigante emailed the claimant on 28 July 2022 and asked "Hi, Szabi, please could you add the attendees for the meals?"
19. The claimant replied to Mr Gigante asking why his expense report had been returned and Mr Gigante emailed the claimant on 28 July 2022 to raise his concerns directly with the claimant. This email stated, "in the expense claims for the meals you need to add all attendees, but just now it only includes you."
20. The claimant replied by return asking Mr Gigante if he had a specific query in relation to a specific receipt and Mr Gigante responded detailing all the expenses claimed per day in a return email.
21. The claimant responded stating "All my expenses are within the €100 daily allowance. Could you please outline what your concern is as I don't think I have to justify my eating habits to this extent... As previously confirmed these are all my expenses and I have no one to add to them."
22. Mr Gigante replied stating that he could not approve the expense claim as is. He stated, "my concern is not related to the daily USD limit. I have concerns related to sections 3.1.1 and 3.1.5 of the Citi Expense Management Policy."
23. The claimant responded to Mr Gigante asking if he could "please outline the exact points". The claimant did not receive a response to this question.
24. On 2 August the claimant emailed Ms Cory to tell her that he had recalled the expense report from Mr Gigante as Mr Gigante was not able to approve the report as it was more than his approval limit. Ms Cory replied to him advising him to speak to "Mags" (Ms O'Connor, the claimant's manager) as she could not approve the expense. The claimant asked Ms Cory what was required from him to move this forward as he believed that the claim was within policy guidelines. This is on the same email thread as the original question from Ms Cory where she expressly asked, "Are you advising me that this was all consumed by you?" and the claimant responded, "Yes – that is correct."

25. On 2 August 2022 Mr Gigante raised his concerns regarding the expense claim to the Ethics Office and Andrea Lelo was appointed to investigate the matter. Ms Lelo is an investigator within the CSIS (Citi Security and Investigations Services) team based in London.
26. Ms Lelo informed the claimant and Ms O'Connor, that the expense claim was being investigated and the claim had been put on hold. The claimant informed Ms Lelo that he was absent on medical leave until 17 August 2022 and Ms Lelo confirmed that the investigation would be followed up with him on his return, if needed.
27. On 18 August 2022 Ms Lelo emailed the claimant to arrange a meeting by Zoom and this meeting took place on 19 August 2022. The meeting notes were taken from a recording of the meeting and the claimant accepted in evidence that to the best of his recollection that the main things are there. I find that the notes are an accurate reflection of the meeting.
28. The following are relevant findings from the meeting:
 - 28.1. Within the interview, Ms Lelo asked the claimant "Did anybody travel with you from London?" The claimant admitted that no work colleagues travelled with him. When asked about non-work colleagues, he admitted that his partner had travelled with him. Ms Lelo asked if the claimant and his partner had a meal together and the claimant answered "no, that is not correct."
 - 28.2. Ms Lelo asked the claimant if he had claimed for the full amount of the meals from the respondent. In reply the claimant admitted that he knew that there was an option to split receipts within the expense report, in that he could add his partner or a colleague to the claim.
 - 28.3. The claimant admitted that he had paid for a coffee with a work colleague and Ms Lelo asked the claimant whether this was the only time that there was another person and that was only for a coffee. The claimant said, "That is the coffee, yeah."
 - 28.4. The claimant was questioned about all the receipts and continued to reply that the meals had been consumed by him.
 - 28.5. Ms Lelo told the claimant that most of the receipts for the second trip specifically seem to relate to two people having food rather than one. The claimant responded that the food was consumed by him.
 - 28.6. The claimant was expressly asked by Ms Lelo whether he had shared a meal (pasta pesto and a bolognaise) with his partner and confirmed that she would understand that a mistake could have been made and the claimant replied, "No."
 - 28.7. The claimant was told that he needed to look into whether he had shared a meal in the evening with his partner as a misrepresentation, particularly with CSIS, is very different from being up front.
29. During the course of the interview, Ms Lelo confirmed to the claimant that this was not about the amount of money being claimed but whether the items were

consistent for a claim from him for his expenses. The outcome of the meeting was that Ms Lelo told the claimant to take some time to think about his expenses report and the receipts from the trip to Amsterdam and to reply to her by Tuesday.

30. I find that during the course of the interview, the claimant did not answer direct questions about the inconsistency between the receipts and his claim. He was told by Ms Lelo that the concern was whether some of the expenses of non-employees were being put through as an employee expense and whether the claim was being misrepresented. Again, I find that the claimant did not answer the question.
31. During the course of evidence, the claimant suggested that Ms Lelo was aggressive. It is notable that the claimant did not answer her questions directly and that this was how he answered questions put to him in cross-examination too. I find that the interview notes do not indicate that Ms Lelo was aggressive but frustrated at the lack of a direct response to her questions.
32. On 22 August 22 Ms Lelo emailed the claimant with the Citibank Expense Management Policy (CEMP) and directed the claimant to page 15 that states that spousal travel and meals are not reimbursable. She asked the claimant to review his receipts as they seemed to have items more consistent with two meals rather than one and she asked for his explanation for this. In responding, the claimant explained that there had been an overlap between his personal card and the company card. Ms Lelo asked the claimant to provide the details and the claimant confirmed that some of the items claimed had been consumed by his partner. He also provided a breakdown of his partner's meals. Ms Lelo advised the claimant that he could speak to Ms Cory to assist in completing the expense report but that the matter remained a confidential investigation and he could not discuss the investigation with her.
33. The claimant stated during cross examination that there was a draft report prepared by Ms Lelo prior to the publication of the final report. I find that this was the case and that she and Employee Relations would prepare a report and share this with the Ethics Office. I find that the respondent's concerns around the claimant's conduct was ongoing.
34. On 14 September 2022 Ms Lelo submitted a draft report to Renata Lauber. The respondent did not provide any evidence from Ms Lelo or any evidence in relation to who Renata Lauber is. The investigation report does identify Renata Lauber as the CEMP representative. I find that Ms Lelo submitted the report to Renata Lauber for an opinion for a Potential CEMP breach and asked for advice as to the severity of the breach.
35. It is the claimant's position that some unknown third party amended this draft report prior to the finalisation of it. It is the respondent's position that there was no draft report. I find that there was a draft report and that Ms Lelo submitted this report to Renata Lauber for advice and an opinion as to the severity of the concerns raised.
36. On 4 October 2022, Ms Lelo provided her investigation report by email. It is the claimant's position that this report was shared with 19 people. From the email I find that the report was shared with 14 people. The email addresses identify the

employees as members of Legal, HR, CSIS and also includes Renata Lauder, Ms Cory, Mr Gigante and Ms O'Connor.

37. The investigation outcome was that in claiming for reimbursement for meals not consumed by him, the claimant had breached the Citi Expense Management Policy. Additionally, by maintaining his explanation that the meals had all been consumed by him to the CSIS investigation, that his actions may be deemed Gross Misconduct.
38. On 21 October 2022 Ms Lelo emailed Loren Burton HR. Within this email she stated that the breach of CEMP was a severity 5. The severity level 1 was provided by Employee Relations on the basis of lying during an investigation.
39. The respondent appointed a disciplinary committee to hear the allegations against the claimant. The disciplinary chair was Mr David Smith, who was Ms O'Connor's manager. On 21 October 22 the disciplinary committee received the documents relevant to the investigation including receipts, correspondence, the investigation report and policies, but did not have a copy of the investigation meeting transcript.
40. By letter dated 4 November 2022, the claimant was invited to a disciplinary meeting on the 15 November 2022. The letter detailed who would sit on the committee and gave the following allegations:
 - 40.1. You submitted business expenses for meals in CTE indicating that you were the only attendee. However, it was evidenced from your receipts showing a second meal and/or drink(s) that there was another person in attendance (unrelated to Citi) but you still submitted the claim for reimbursement in its entirety. **(The Expenses Claim)**
 - 40.2. You misrepresented to Citi when you repeatedly insisted when asked by the expense approvers and during an investigation with CSIS that the food and drink you submitted in CTE were all consumed by you. You subsequently admitted to CSIS that your partner (unrelated to Citi) was with you on the trip and that some of the food and drinks you submitted in CTE for reimbursement during from 3 – 5 July 2022 were purchased for and consumed by them. These items of food and drinks were previously raised to you by the expense approvers and during the investigation meeting with CSIS, however you repeatedly denied there was a second diner and that all the purchases of food and drink were for you. **(The Misrepresentation)**
41. The letter asserted that the above allegations of misconduct may amount to gross misconduct in that it may have constituted:
 - 41.1. Falsification and irregular practice in respect of cash, vouchers, records, the use of business credit, corporate or debit cards for non-business-related expenses, returns or accounts including false claims for expense reimbursement, overtime and shift premiums.
 - 41.2. Serious non-compliance with the Code of Conduct, specifically in relation to participating in investigations by providing accurate and comprehensive information and not making false statements.

42. The letter warned the claimant that an outcome of the hearing it may result in disciplinary action up to and including dismissal. He was also given the opportunity to be accompanied. The letter enclosed documents relevant to the allegations.
43. By letter of 9 November 2022 the hearing was adjourned until 21 November 2022.
44. The disciplinary committee interviewed the claimant on 21 November 2022. The claimant was not accompanied. The claimant also confirmed that he had received the CSIS report and supporting documentation and had had time to review them.
45. During the hearing the claimant was asked about the email exchange with Ms Cory and Mr Gigante and why did he respond to each email stating that the food and drink was consumed by himself. The claimant replied and explained to the committee that it was his understanding of the policy that he could claim up to €100 per day and that he was having personal difficulties, specifically following the death of his grandmother and with his mental health.
46. It was the claimant's position that he had not exceeded the daily limit and that the email exchange had occurred whilst he was absent from work on medical leave and that he was on medication.
47. Mr Smith asked the claimant why it took until 22 August 2022 for him to advise that some of the food and drink claimed was for his partner. This was the first time the claimant's conduct during the investigation meeting had been put to him. The claimant replied by answering that he had been on medical leave and under medication. He also stated that it hadn't been clear how he should submit his expenses. The claimant also said that he needed time to understand what Ms Lelo wanted and that is when he went through his receipts again. He again referred to the daily limit and stated that he corrected the record when he had an opportunity to do so.
48. Mr David Smith accepted that the email exchange took place whilst the claimant was on medical leave.
49. During cross examination, I find that the claimant did not answer questions in a direct manner.
50. It is the respondent's position that the disciplinary committee gave the claimant every opportunity to explain why he had acted in the alleged manner and to raise any other relevant point with them including the agreement the claimant had reached with Ms Lelo regarding the splitting of the expenses. This agreement was made following the claimant's confession on 22 August 22 that some of the receipts had included food and drink for his partner. I find that the claimant had every opportunity to raise further relevant points had he chosen to do so.
51. It is the claimant's position that he was stressed and anxious and did not put any further point forward because of this. He accepted that he had had the opportunity to raise further points during the disciplinary hearing. I find that the claimant was stressed and anxious however, the he had had the opportunity to prepare and could have put forward any point that he wished to raise.

52. During the disciplinary hearing and in cross examination the claimant was asked questions as to the expenses policy, specifically in relation to claiming for third parties.
53. It is the claimant's position that his understanding of the 140-page policy was that he had a daily limit and that his claims were well within that. It is the respondent's position that the policy is very clear at 3.1.1.10 that spousal expenses are not recoverable and to be sure, the claimant could and should have checked before making a claim. It is also their position that it is a matter of common sense that a company would not pay for a non-colleague's expenses.
54. It is the claimant's position during cross examination that his responses to Ms Cory, Mr Gigante and Ms Lelo were a mistake and that the respondent was not out of pocket and that the claim made had been well within the daily limit. The claimant accepted that he knew that the expense process provided for an option to name another attendee.
55. I find that the claimant would have been aware that he should not have claimed for food and drink for his partner.
56. On 23 November 2022, the claimant received confirmation that his application to transfer to the position of Financial Crime Risk Manager would take effect from 1 January 2023. This would be a promotion for the claimant.
57. The claimant was sent the minutes of the disciplinary meetings on 23 November 2022 and responded back to the respondent on 24 November 2022 with his comments. These were sent to the disciplinary committee.
58. The disciplinary committee approved the disciplinary outcome letter on 30 November 2022 and it was sent to the claimant on 1 December 2022. The outcome was that both the allegations regarding the Expenses Claim and the Misrepresentation were upheld and that he was summarily dismissed.
59. The disciplinary committee did not interview anyone else.
60. During cross examination Mr Smith confirmed that he has experience in assigning severity levels to misconduct matters and I accept that he had this experience.
61. The committee had concluded that the claimant's actions amounted to gross misconduct and was a fundamental breach of the respondent's trust and confidence in him and a serious breach of the claimant's employment obligations, duties or responsibilities and that your conduct has been sufficiently inappropriate to warrant summary dismissal in accordance with the respondent's Disciplinary Policy.
62. During the disciplinary meeting the claimant put forward mitigation for his actions, including his recent surgery, the loss of his grandmother and the medication he was taking. He also explained that he did not get on with Ms Cory or Mr Gigante and did not want to disclose that his partner had travelled with him. However, the outcome letter refers to mitigating factors but does not detail them.
63. The claimant was afforded the right to appeal and did so by email dated 8 December 2022. Mr David Flowerday, Compliance Product Senior Director was

appointed as the Business Reviewer and an appeal meeting was scheduled for 13 January 2023. The claimant was invited to this meeting by letter of 22 December 2022 and it confirmed that the claimant had the right to be accompanied.

64. The appeal meeting was rescheduled to 24 January 2023 on request by the claimant and Mr Flowerday had the relevant receipts, policies and investigation reports and correspondence prior to this meeting.
65. The appeal meeting took place on 24 January 2023. Again, the claimant chose not to be accompanied. At the outset of the hearing, Mr Flowerday provided a summary as to the points of the claimant's appeal. The claimant accepted Mr Flowerday's summarisation. The points of appeal were:
 - 65.1. You feel the chair of the disciplinary committee, David Smith, was not impartial because he worked closely with your line manager.
 - 65.2. Number two, the allegations were incorrect.
 - 65.3. Three, the investigation was biased, and the outcome of the disciplinary hearing was predetermined.
 - 65.4. Number four, the conduct did not constitute gross misconduct and therefore the sanction of dismissal was too harsh.
 - 65.5. And finally, number five, that the disciplinary committee did not take into account your mitigating circumstances.
66. Mr Flowerday discussed all of the above grounds of appeal with the claimant. It is the respondent's position that the claimant did not answer questions directly and side stepped questions regarding whether the company paying for a spousal meal was permitted. From the minutes of the meeting and the cross examination of both the claimant and Mr Flowerday, I find that the claimant did not answer the questions asked of him in a direct manner.
67. It was put to Mr Flowerday that the investigation report had been edited. Mr Flowerday accepted that a report could be edited. It was put to Mr Flowerday that the report had been edited to remove mitigation and to increase the severity of the allegations. In response, Mr Flowerday confirmed that he could not comment on the rating of 5 for the Expense Claim, but lying during an investigation would be a severity rating of 1. My finding is the investigation report is unchanged.
68. During the course of the appeal meeting, the claimant suggested to Mr Flowerday that he had not seen all of the information from the investigation and that the final report was missing details. When asked if there was anything else the claimant wanted to say the claimant confirmed that he had said everything that he wanted to say and asked if he could consider this and reply by email within the hour. Mr Flowerday agreed to this. The claimant did not put forward anything further for Mr Flowerday to consider.
69. Following the appeal meeting Mr Flowerday requested that the investigation meeting recording was transcribed and provided to him to review. In evidence Mr Flowerday confirmed that he had found that the meeting notes did not provide

any new evidence. Mr Flowerday sent the claimant his outcome by letter / email dated 15 March 2023.

70. I find that the investigation transcript did not provide any new evidence.
71. Mr Flowerday explained the reason for the length of time for the outcome for two reasons. Firstly, the adjournment of the original hearing date at the claimant's request. Secondly, the claimant had raised new concerns within the appeal meeting in relation to his belief that the investigation meeting notes would contain relevant evidence and that this had been omitted from the CSIS report. The delay being the time taken to obtain a transcript of the original hearing.
72. The outcome of the appeal was that Mr Flowerday was satisfied that there was no new evidence and that the decision to dismiss with immediate effect for gross misconduct was reasonable, including taking mitigation into account.
73. The outcome letter addressed each point of appeal in turn and specifically addressed the points the claimant had raised in mitigation. Mr Flowerday was satisfied that whilst the claimant may have been having a difficult time, he did not accept that any of the circumstances given in mitigation would cause the claimant to put, on multiple occasions, that he consumed all of the food items himself, when he did not. Mr Flowerday was also satisfied that the disciplinary committee had taken the claimant's mitigating factors into account.

The law

Unfair Dismissal

74. An employee has the right not to be unfairly dismissed, s. 94(1) of the Employment Rights Act 1996 (ERA). The relevant test is at s.s.98(1), (2) and (4) are relevant to this case. This states:
 98. General.
 - (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) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
 - (2) A reason falls within this subsection if it— ...
 - (b) relates 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."
75. The question of fairness in a conduct dismissal is **British Home Stores Ltd v Burchell** [1980] ICR 303 (EAT) which held that a dismissal on the grounds of

conduct will be fair where, at the time of dismissal, a) that the employer must have a genuine belief in the misconduct; b) reasonable grounds for that belief; and c) the employer carried out as much investigation as was reasonable in the circumstances. I remind myself that I can only take account of those facts or beliefs that were known to those who took the actual decision to dismiss at the time of dismissal.

76. As submitted by both representatives, the test as to whether the dismissal fell within the band of a reasonable response are summarised within the judgment of Brown-Wilkinson J in **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17, which states:

(1) the starting point should always be the words of [S.98(4)] themselves;

(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the... tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the... tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

77. In considering the "band of reasonable responses" I also direct myself to consider the question as to whether the respondent has acted reasonably or unreasonably in deciding to dismiss in accordance with equity and the substantial merits of the case, s.98(4) ERA. **Newbound v Thames Water Utilities Limited** [2015] I.R.I.R. 734.

Wrongful dismissal

78. Wrongful dismissal is a claim of breach of contract by the employee against the employer for the unpaid notice pay. In addition to considering whether the claimant was guilty of gross misconduct, I have been asked to consider whether the contract of employment has been affirmed by the respondent per Lord Hope in **Société Générale, London Branch v Geys** [2012] UKSC 63 where it is stated:

"97...I consider, on the contrary, that we should keep the contract of employment firmly within the harbour which the common law has solidly constructed for the entire fleet of contracts in order to protect the innocent party, as far as practicable, from the consequences of the other's breach."

79. Furthermore Chitty on Contracts provides guidance as to affirmation which states:

27-056: "Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as terminated. Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract. Equally a party cannot affirm the contract for a limited period of time and then abrogate it on the expiry of that period of time. Mere inactivity

after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach. The mere fact that the innocent party has called on the party in breach to change his mind, accept his obligations and perform the contract will not generally, of itself, amount to an affirmation: "... the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligation." But if the innocent party unreservedly continues to press for performance or accepts performance by the other party after becoming aware of the breach and of his right to elect, he will be held to have affirmed the contract. Reliance upon a term of the contract (such as a term giving a party the right to claim a refund) will not be held to amount to an affirmation, at least in the case where the party who is alleged to have affirmed the contract has made it clear that it was treating the contract as discharged."

"27-057...Once the innocent party has elected to affirm the contract, and this has been communicated to the other party, then the choice becomes irrevocable. There is no need to establish reliance or detriment by the party in default. Thus the innocent party, having affirmed, cannot subsequently change his mind and rely on the breach to justify treating himself as discharged"

Submissions

80. Both representatives provided helpful skeleton arguments, which the Tribunal has taken into consideration.

Conclusions

Unfair dismissal

81. It is accepted by both parties that the claimant was dismissed by the respondent.
82. The first question to be addressed is the reason for the dismissal. The respondent submits that the reason was the claimant's conduct. No ulterior reason has been submitted and I conclude that the reason for the claimant's dismissal was his conduct.
83. Conduct is a potentially fair reason for dismissal s.98(2)(b) ERA.
84. Did the respondent genuinely believe the claimant had committed misconduct?
85. There are two allegations against the claimant, the Expense Claim and the Misrepresentation.
86. The claimant admitted that he had submitted the Expense Claim, in mitigation it was his position that:
 - 86.1. That he thought he was able to recover €100 a day and that he had misunderstood the expenses policy and that the amount claimed was small.
 - 86.2. That he was on medical leave and that he was on strong medication when he replied to the emails.
 - 86.3. That he did not want to tell these managers that he was on the trip with his partner for privacy reasons.
 - 86.4. That he was stressed by the investigation
 - 86.5. That he was still grieving for his grandmother

- 86.6. That he had work concerns and a lack of support
87. It is the claimant's position that the emails in relation to the Expense Claim to and from Ms Cory and Mr Gigante were written during his medical leave and that his state of mind was that he was stressed and anxious for the mitigation reasons given above.
88. Mr Smith questioned the claimant in relation to the emails and I have found that the claimant did not answer these questions.
89. I find that the questions asked of him were clear and unequivocal and the claimant did not answer the questions asked of him. I find that the claimant was evasive in his answers. I find that he did believe that he was entitled to a daily limit and that this was reasonable, but I do not find that it was reasonable for him to believe that he could claim for spousal expenses from the respondent.
90. I conclude that Mr Smith and the committee genuinely believed that the claimant had submitted his expense claim, which included expenses that he was not entitled to recover.
91. The Misrepresentation allegation includes the failure to answer the questions asked by Ms Cory and Mr Gigante and the further misrepresentations and emails to the investigator, Ms Lelo.
92. Again, the committee questioned the claimant in relation to the emails and I have found that the claimant did not answer these questions either. The committee also asked the claimant why he had not disclosed that some of the items claimed were consumed by his partner until his email of 22 August and the claimant put forward his position as detailed above in mitigation of his conduct.
93. With regards to the allegation that the claimant had misrepresented himself and the claim to Ms Lelo during the investigation meeting, the disciplinary meeting with Mr Smith was the first opportunity the claimant would have had to answer this allegation. I conclude that the disciplinary committee was also investigating this allegation.
94. The claimant received a copy of the investigation report and was asked express questions by the disciplinary committee as to why he had failed to answer the questions put to him during the investigation. He again gave the reasons above.
95. It is the respondent's position that this is not about the amount of money, but about the honesty of the claimant in answering the questions as he did, not just once but on multiple occasions and that he failed to accept responsibility for his actions.
96. I have found that Mr Smith found the claimant's answers to be evasive and that he did not answer the questions he was asked. The claimant admitted in his email of 22 August that his partner had consumed some items claimed.
97. I find that the claimant continued with his position that the expenses were only for him and conclude that he was misleading Ms Cory, Mr Gigante and subsequently, Ms Lelo. I find that the claimant did believe that he was entitled to a daily limit of €100 but did not answer the question as to who had the food. He understood that the expense report required the attendees to be named, but not only failed

to answer this question or the questions put to him, he continued with his representation. He also presented an incorrect position to his manager Ms O'Connor and additionally, he did not own up at the first opportunity.

98. Given the findings and the claimant's admission I conclude that Mr Smith and the committee genuinely believed that the claimant had acted in the manner alleged.
99. Did the respondent act reasonably in all the circumstances in treating the claimant's conduct as a sufficient reason to dismiss him?
100. The circumstances of this case are as follows:
 - 100.1. The respondent is a global financial institution with over 150,000 employees and it engages a professional HR and Legal team.
 - 100.2. The respondent operates in a highly regulated financial sector and requires its employees to act with utmost integrity at all times. The Code of Conduct expressly states that it's employees' responsibilities includes a commitment to honesty.
 - 100.3. The claimant was employed as EMEA Regulatory Exam Management and Oversight – Senior Analyst and, at his own admission, is employed in financial crime.
 - 100.4. The facts of the case are not complex and is evidenced by emails to and from the claimant.
 - 100.5. The email evidence shows that the claimant asserted that he was the only attendee for the meals when expressly asked questions regarding meals.
 - 100.6. The claimant has admitted that he did not tell the expense approvers that he travelled with his partner or that his partner had consumed some of the food. He admitted that he told Ms Lelo that he was travelling with his partner during the investigation meeting but did not admit that the expense claim included food that had been consumed by his partner.
 - 100.7. The claimant has admitted that he did not admit to the expense claim containing some food items that had been consumed by his partner until 22 August 2022, after the investigation meeting. This admission is also evidenced by an email from the claimant to Ms Lelo.
 - 100.8. The report prepared by Ms Lelo is consistent with the claimant's subsequent admission.
 - 100.9. That the claimant had mitigating factors including:
 - 100.9.1. That he thought he was able to recover €100 a day, that there was an overlap with other expenses, that he had misunderstood the expenses policy and that the amount claimed was small.
 - 100.9.2. That he was on medical leave and that he was on strong medication when he replied to the emails.

- 100.9.3. That he did not want to tell these managers that he was on the trip with his partner for privacy reasons.
 - 100.9.4. That he was stressed by the investigation
 - 100.9.5. That he was still grieving for his grandmother
 - 100.9.6. That he had work concerns and a lack of support
 - 100.9.7. That he had 7-years of service with no disciplinary issues
101. This is a case that is not factually complex and the key evidence is recorded in emails to and from the claimant. Combined with the acceptance by the claimant to the disciplinary committee that he did not tell Ms Lelo about his partner's food on the expense claim until after the investigation meeting, I conclude that following the claimant's interview with the disciplinary committee, it was reasonable for the disciplinary committee to believe that the claimant had acted as alleged.
102. The disciplinary committee did not interview Ms Lelo nor did they have sight of the investigation meeting minutes. I have found that there was a draft report and that this was sent to a third party with a respondent's email address. I have found that it is not an unreasonable course of action for an employee to seek advice, which is my understanding of the emails referred to. Taking the claimant's submissions at its highest against the respondent, if the investigation report is disregarded, I am satisfied that the disciplinary committee would make the same decision that the claimant had acted in the manner alleged on the content of the emails to and from the claimant, including those to Ms Lelo, and his own conduct and admissions during the disciplinary meeting.
103. The decision of the disciplinary committee was reviewed by Mr Flowerday on appeal. Additionally, Mr Flowerday obtained a transcript of the investigation meeting. Mr Flowerday was a credible witness and confirmed that he found that the investigation meeting notes showed no new evidence. I conclude that if the disciplinary committee acted unreasonably in taking the investigation report at face value, the actions of Mr Flowerday in obtaining the transcript and reviewing it against the report would remedy this.
104. I conclude that there were reasonable grounds for the genuine belief held by the disciplinary committee and Mr Flowerday that the claimant had acted as alleged.
105. At the time that this belief was formed, had the respondent carried out a reasonable investigation?
106. In the circumstances above, the respondent appointed an independent investigator to investigate the claimant's conduct in the filing of the Expense Claim and his representations thereafter. The claimant had further opportunity to explain his actions in relation both allegations to the disciplinary committee and I conclude that this investigation was reasonable.
107. In the circumstances above, the Misrepresentation allegation against the claimant in relation to his conduct during the investigation meeting was first put to him in the disciplinary letter of 4 November 2022. He was first able to respond to that allegation to the disciplinary committee during the disciplinary meeting. I

have found that for this allegation, the committee has acted as both the investigator and the disciplinary committee.

108. I have found that the facts of the case are not complex and that the claimant has admitted that he did not tell Ms Lelo that the expense claim contained items consumed by his partner until after the investigation meeting had concluded. It was the claimant's position that he needed to review the receipts and it is the respondent's position that the claimant was evasive in his answering and that he did not admit to his actions at the first opportunity.
109. It is the claimant's position that the severity level has been determined by some unknown person who then unduly influenced the disciplinary and appeal. The respondent has not provided any witness evidence in relation to the investigation. I find that the severity level for the investigation outcome in relation to the lying during an investigation was influenced by Employee Relations. I find that it was not unreasonable for Ms Lelo to seek and take internal advice.
110. It is common for a respondent to hold a separate investigation and disciplinary meeting, however, there is no requirement to do so. The respondent's disciplinary procedure does not require a separate investigation and disciplinary meeting. It states that "an investigation will be carried out as required."
111. During cross examination, Mr Smith confirmed that the disciplinary committee did not interview Ms Lelo. He also responded to a question that they had interviewed someone who had been part of the investigation but could not name them. I find that the disciplinary committee did not interview anyone involved in the investigation and took the report at face value.
112. In these circumstances where the facts are not complex, there is email evidence of the misconduct and there is an admission by the claimant that he was not full and frank with Ms Lelo, I conclude that the investigation was reasonable.
113. Mr Flowerday reviewed the disciplinary committee's process and decisions on appeal and carried out further investigations at the claimant's request. I conclude that if the disciplinary committee acted unreasonably in taking the investigation report at face value, the actions of Mr Flowerday in obtaining the transcript and reviewing it against the report would remedy this and, in these circumstances, the investigation was reasonable.
114. Did the respondent act in a manner that was procedurally fair?
115. It is an agreed fact that the claimant was not suspended or had any limitation on his duties at any time. There is no obligation on the respondent to suspend and I find that the failure to suspend does not detract from the seriousness of the allegations faced by the claimant.
116. With regards to the investigation meeting with Ms Lelo, the claimant contends that he did not have time to prepare. There is no obligation on the respondent to provide this time. The conclusions of the investigation report in relation to the claimant's submission of the Expense Claim and his responses to Ms Cory and Mr Gigante are evidenced by email and the claimant was afforded the opportunity to address these allegations during the investigation meeting.

117. I have found that the disciplinary committee acted to investigate the allegations of Misrepresentation to the investigation manager, Ms Lelo.
118. Mr Smith confirmed that the circumstances for the claimant was that there were two separate issues, one in relation to the filing of the incorrect expense claim (the Expense Claim) and one for lying during the course of the investigation (the Misrepresentation), each issue having its own severity rating. It is the claimant's position that the severity rating had been bumped up by a person unknown from 5 to 1.
119. I find that I accept the respondent's position in that each allegation of misconduct had its own severity rating. I also accept that Mr Smith and the disciplinary committee had an unfettered discretion to determine the disciplinary sanction according to their assessment of the severity of the misconduct following the disciplinary hearing.
120. It is the claimant's position that the respondent failed to take his mitigating factors into account. It is the respondent's position that they did.
121. I find that the respondent took into account all of the claimant's representations including his state of mind and mitigation factors in conjunction with how he answered the questions and the reasons put forward by him as to why he acted as he did.
122. I have considered the requirements of the Acas Code and I am satisfied that in all of these circumstances, the respondent acted in a procedurally fair manner.
123. On appeal, I have found that Mr Flowerday has reviewed the disciplinary committee's outcome and has carried out further investigations at the claimant's request. I am satisfied that in these circumstances, the respondent has established the facts of the case, provided the claimant with the relevant documents and afforded the claimant every opportunity to put his case and any mitigation factors, including his state of mind, to the respondent before a decision was made. If the disciplinary committee had erred in their procedure, I conclude that the further actions by Mr Flowerday would remedy any defect.
124. The procedure followed by the respondent was not perfect, however I am satisfied that in these circumstances that imperfection did not amount to an unfair procedure.
125. Was the dismissal within the range of a reasonable response?
126. My starting point to consider this question is s.98(4) and I remind myself that this question is in relation to the reasonableness of the respondent's conduct and not what I consider to be fair. Additionally, I may not substitute the employer's decision with my decision as to what was the right course of action to adopt.
127. I have outlined the circumstances of the case above and I must determine whether in the particular circumstances of this case whether, in accordance with equity and the substantial merits of the case, the decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

128. The claimant was employed in a position of trust in a global financial institution. I am satisfied that even if the expense claim had been filed under a misunderstanding, there was an obligation upon the claimant to own up and rectify the position at the first opportunity. I accept that the respondent requires a commitment to honesty from its employees.
129. The email evidence and the admission by the claimant that he did not disclose that some of the expense items had been consumed by his partner is unequivocal. I have found that the claimant was asked direct questions as to the content of his expenses claim and that he did not answer the questions. This was not a one-off occurrence, but repeated conduct and to more than one person of increasing seniority.
130. I accept that this was the claimant's first disciplinary issue and that this may have started from a genuine misunderstanding when the claimant filed the expense report. However, on 28 July 2022, some 3-weeks after the claim had been submitted, when the claimant was expressly asked "Are you advising this was all consumed by you?" the response "Yes – that is correct" was untrue. This remained the claimant's position until his email of 22 August 2022 after the investigation meeting.
131. I have considered the claimant's state of mind but, on balance, find that the importance of honesty is paramount and I am satisfied that the claimant did not make a full and frank disclosure at the first opportunity and compounded the severity of his conduct by maintaining his position.
132. Equity refers to fairness and justice and the question is whether the sanction by the respondent was fair and just in all of the circumstances. As detailed above, the conduct of the claimant was evidenced in emails, including his admission that some of the expenses claimed had been consumed by his partner. I have found that respondent reasonably and genuinely believed that the claimant was not open and honest during this process and conclude that it was fair to impose a sanction against the claimant. The question remains whether the sanction of dismissal falls within the reasonable band of response of a reasonable employer.
133. In considering the substantial merits of this case, I have found that this case is not about the sums of money involved. This case is about the filing of the expense claim and the conduct of the claimant thereafter. It is significant that the claimant did not make a full and frank disclosure at the first opportunity and that he did not answer questions directly.
134. I find that in all of the circumstances of the case as detailed above, I conclude that the dismissal does fall within the band of a reasonable response by a reasonable employer and conclude that the dismissal was substantively and procedurally fair.
135. I have accepted that the expense report may have been submitted in error. However, I am satisfied that a dismissal in relation to the Misrepresentation allegation alone would fall within the band of a reasonable response by a reasonable employer.
136. When asked to consider whether the claimant has contributed to his dismissal, I conclude that he was solely responsible for his actions and any compensation would be reduced by 100%.

137. When asked to consider any procedural defects, I conclude that if there were any procedural defects rendering the dismissal unfair, I find that on balance of probability it is 100% likely that the claimant would have been dismissed in any event.

Wrongful dismissal

138. It is accepted by both parties that the claimant was dismissed without the payment of notice.
139. Did the claimant do something so serious that the respondent was entitled to dismiss without notice?
140. I have reviewed the email evidence within the bundle and the evidence within the witness statements and cross examination and I am satisfied that the claimant acted as alleged in that he submitted an expense claim with items that were not reimbursable and that the claimant's state of mind and mitigating factors impacted on this decision. I accept that this original submission may have been in error, however I am satisfied that the claimant was not full and frank about this error when the issue was first raised with him.
141. I find that the claimant was aware of the obligation to name attendees for whom expenses were being claimed. I also find that the respondent has a Code of Conduct that requires a commitment to honesty from its employees and that the claimant was aware of this.
142. The claimant was afforded a number of opportunities to rectify any mistake, but he did not do so. I am satisfied that the questions being asked of him were clear and unequivocal and I find that the claimant repeated his representation, which was on more than one occasion and to more than one, increasingly senior, manager. I therefore conclude that this conduct was sufficiently serious to entitle the respondent to dismiss the claimant without notice.
143. It is the claimant's position that the transfer offered to him on 23 November 2022 showed that the respondent was continuing with his employment. It is the respondent's position that the ongoing investigation and disciplinary matter was confidential and that it was fair and appropriate to allow the claimant to seek internal transfers or promotions without interferences until any final decision was made.
144. As to affirmation of the contract, after the claimant had agreed to split the expense claim to remove his partner's expenses, the claimant was advised by Ms Lelo in her email of 22 Aug 22 that this matter remains a confidential investigation. There is no evidence that the claimant was told that this matter was concluded. Additionally, the claimant was invited to a disciplinary meeting by letter dated 4 November 2022 and attended the disciplinary meeting on 21 November 2022. On the 23 November when the claimant received notice of the new role, the outcome for the disciplinary was still pending and the claimant submitted his comments to the disciplinary meeting notes on 24 November 2022 and submitted his appeal on 8 December 2022.
145. I find that there was no unequivocal act that inferred that the respondent intended to continue with the contract of employment regardless of the breach. The disciplinary invitation was clear in that the outcome of the hearing could be

dismissal, i.e. the termination of the contract. The claimant was waiting for the outcome from the disciplinary hearing when the transfer was offered. In these circumstances, I am satisfied that the claimant was aware that the disciplinary matter was continuing and conclude that the contract of employment was not affirmed.

146. It is the Judgment of the Tribunal that:

146.1. The complaint of unfair dismissal is not well founded and is dismissed.

146.2. The complaint of wrongful dismissal is not well founded and is dismissed.

Employment Judge Illing

19 September 2023