EMPLOYMENT TRIBUNALS

Claimant: Mr D Cook

Respondent: Greenhey Industrial and Marine Engineering Limited

HELD AT: Liverpool **ON:** 14, 15 & 16 August 2023

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Mrs S Cook (claimant's wife)
Respondent: Mr P Clarke (consultant)

JUDGMENT

The judgment of the Tribunal is that:

(1) The complaint of unfair dismissal is not well founded which means it is unsuccessful.

(2) The complaint of wrongful dismissal was incorrectly included within the list of issues before the Tribunal at this final hearing and the claimant confirmed that this complaint could be dismissed upon withdrawal.

(3) Accordingly, the claimant's claim is dismissed.

REASONS

Introduction

1. These proceedings arose from the claimant's employment as a project manager from 24 July 2000 until his dismissal on 8 November 2021.

2. He presented a claim form to the Tribunal on 7 February 2022 following a period of early conciliation with ACAS from16 January 2022 to 26 January 2022. He indicated in section 8.1 of his claim form that he wished to bring a complaint of unfair dismissal.

3. The respondent presented a response to the Tribunal on 7 April 2022 resisting the claim and arguing that the claimant was fairly dismissed by reason of misconduct following his covert surveillance of the respondent's managing director following the discovery of a recording device being found under the desk in his office. They asserted that a fair investigation using an appropriate disciplinary process with a right of appeal being provided.

4. The case was the subject of case management before Judge Ord on 14 July 2022 when she listed the case for a final hearing, identified the list of issues and made case management orders in order that the case would be ready for the final hearing

Issues

<u>Unfair dismissal</u>

5. What was the reason for the claimant's dismissal?

6. If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:

    a) The respondent genuinely believed that the claimant had committed the misconduct.
    b) The belief was based on reasonable grounds.
    c) At the time the belief was formed, the respondent had carried out a reasonable investigation.
    d) The respondent followed a reasonably fair procedure.
    e) The dismissal was within the band of reasonable responses.

<u>Wrongful dismissal</u>

7. Although this was included within the List of Issues found in the Annex to Judge Ord's Note of Preliminary Hearing, the parties agreed that the complaint of wrongful dismissal/breach of contract was not indicated in section 8.1 of the claim form or within the grounds of complaint and did form part of the issues for me to consider during the final hearing. It was included in error and did not require a formal dismissal on withdrawal decision. However, for the purposes of clarity and finality, I have included this within the judgment above.

<u>Remedy</u>

8. It was agreed that there was only sufficient time to consider liability and the question of remedy, although forming part of the list of issues, would be considered at a separate remedy hearing if relevant.

Evidence used

9. The claimant relied upon the following witnesses:

    a) Mr D Cook (the claimant)
    b) Mr S O'Brien (former colleague of the claimant)
    c) Mr D Eden (former colleague whom the claimant line managed)

    Oral evidence was given by Mr Cook and Mr O'Brien. Mr Eden had produced a statement which was undated and unsigned within the papers provided to me, but Mrs Cook had a signed and dated copy available. I explained that while I could take note of this statement, I would give it limited evidential weight when deliberating as Mr Eden had not given oral evidence under oath and exposed himself to cross examination from the respondent. Mr O'Brien was only available to give evidence on day 2 of the hearing and as a result of delays in the respondent's evidence being heard, it was agreed that he could give his evidence out of order during the afternoon and before Mr Fernandes, who began his evidence on day 3.

10. The respondent relied upon the following witnesses:

    a) Mr T Sephton (Group Accountant and investigating officer).
    b) Mr S Knowles (Manager/Shareholder of sister company and dismissing officer).
    c) Mr E Fernandes (Managing Director and appeal hearing officer).

    Mr Fernandes did not begin his evidence until day 3 of the hearing, partly because of Mr O'Brien giving his evidence out of turn, but also because he only just returned from Portugal and was suffering from a lack of sleep. Although not an ideal situation given the evidence already taking longer than originally anticipated by Judge Ord, I accepted that it was in the interests of justice to conclude the hearing slightly early on day 2 so that Mr Fernandes begin his evidence on day 3.

11. The hearing bundle was agreed by both parties and ran to 347 pages. It enclosed the proceedings, contractual documents, grievance and disciplinary process documents as well as emails and other correspondence. There was a disputed document relating to transcripts of dashcam conversations which allegedly took place between the claimant and others while he was sat making phone calls in his car on 15 January 2022. Mr Clarke confirmed that he would cross examine concerning the transcripts and make final submissions on them, so they could remain in the bundle.

12. Although not evidence as such, there was also an agreed cast list and timeline provided by the respondent.

Findings of fact

13. Where I was required to consider matters in dispute between the parties, I made findings of fact based upon the evidential test of balance of probabilities

and what I believed was more likely than not to be the correct version of events. Naturally, some matters are not contentious and either not in dispute or unequivocal from the available evidence before me. In reaching my decision, I have taken account of the evidence introduced by the parties in their witness statements and during their oral evidence at the final hearing.

The parties

14. The respondent (Greenhey) is company based in Skelmersdale and it is an engineering company employing some 15 employees. There is also a sister company called Greenhey Industrial Insulation Limited. This company is relevant because Mr O'Brien and Mr Knowles were employed by it and not the respondent Greenhey and Mr Sephton was the accountant for both companies.

15. The claimant (Mr Cook) was employed as a Contract Manager at the time of his dismissal from Greenhey and had worked for the company since 24 July 2000. He accepted that he was subject to a statement of particulars (pp61 to 63) but had not signed the document because he had *'…probably put it in my drawer'.* He acknowledged that the Employee Handbook also applied to him and that it included reference to the in house disciplinary procedure providing details of the sorts of conduct which could amount to gross misconduct, (pp 76 to 77).

Background to the claim

16. This case arises from a belief by the Managing Director of Greenway, Mr Fernandes in January 2021 that someone was eavesdropping on conversations taking place in his office through covert surveillance. This suspicion arose from the discovery on 13 and 14 January 2021 of a microphone inserted through a hole in the office wall and its two wires being attached to a homemade device located by Mr Cook's desk next door and housed in a black box.

17. Mr Fernandes reached this conclusion following a meeting with Mr O'Brien regarding the alleged tampering by him of vehicle trackers in the morning of 13 January 2021. Reference was made by Mr O'Brien to the term *'green eyes'*, which Mr Fernandes had used at a meeting with Mr Ben Holroyd in December 2020. He says it was the only time he had heard it used and it related to him trying to persuade Mr Holroyd not to resign by suggesting jealousy on the part of other members of staff including Mr O'Brien.

18. That afternoon, Mr O'Brien then sent a text message to Mr Knowles mentioning that he had heard discussions suggesting he had '*issues at home'* and denying that was the case, (p86). Mr Fernandes believed that this reference to personal issues had been made that lunchtime following the earlier meeting with Mr O'Brien, in his office by Mr Knowles and repeated to Mr Holroyd. This text made so soon after the meetings with these managers and the earlier meeting with Mr O'Brien's reference to 'green eyes', led Mr Fernandes to believe that he was being subjected to covert surveillance.

19. That evening, Mr Sephton and Mr Fernandes located a tiny microphone attached to two wires which disappeared into a dividing wall between Mr Fernandes' office and the open plan office next door. The hole had originally been designed to carry the network cables for the office computer system, but with space for smaller wires to be inserted such as those connected to the microphone. Photographs were taken of the location and device by Mr Sephton (pp96 to 99) and Mr Fernandes (pp100 to 104) and which were understood to be contemporaneous with the discovery of the microphone. The following day on 14 January 2021, Mr Sephton located the two microphone cables emerging from the other side of the partition wall and connecting to a black plastic box situated next to Mr Cook's desk. The device within the box appeared to be home made and did not have its use described on the casing. However, the fact that a microphone was connected to it and Mr Cook's headphones were sat on top of it (and plugged into his PC base unit), led them to believe that he was carrying out covert surveillance of Mr Fernandes' office).

20. Both Mr Sephton and Mr Fernandes gave credible and reliable evidence of one speaking in the closed office and the other switching the device on, plugging the headphones into the box socket and hearing clearly what the other to be saying. Additional photocopy photographs were also included of the box with the two sockets, toggle switch and light clearly identified (pp105-7) and on balance of probabilities, I accept that these witnesses had located a device which could be used for covert audio surveillance of conversations taking place in Mr Fernandes' office and that the 'receiving' box was situated next to Mr Cook's desk and covered as described in evidence, by a sheet of paper so that it was not immediately obvious to the observer stood in this area.

<u>Decision to suspend and investigate.</u>

21. Mr Fernandes was of the view that given the proximity of the box to Mr Cook's desk, there were grounds for commencing a disciplinary investigation into this matter under Greenhey's disciplinary procedure. He discussed the matter with Mr Knowles and Mr Sephton and it was decided that they must suspend Mr Cook before he returned to work the next day on 15 January 2021. It was decided that Mr Sephton would be appointed as the investigating officer, Mr Knowles would be the disciplinary hearing officer and in the event of an appeal, Mr Fernandes would be available as appeal hearing officer.

22. Mr Sephton had not carried out an investigation into a disciplinary matter before. He acknowledged that while he had found the speaker on 13 January and the box purporting to be a recording device on 14 January 2021, Mr Fernandes was concerned that there were limited managers available who could deal with this case, Mr Knowles being the only other one. He acknowledged that Greenhey did use external HR advisors from time to time but did not consider using such a person to manage this disciplinary matter, which management appeared to recognise was complex and challenging.

23. Mr Knowles was of a similar view to Mr Sephton and on several occasions when giving his evidence was clear in his belief that Greenhey *'was a small*

company with limited resources, that these situations did not crop up very often and Mr Fernandes had to look at who was best to [manage the process] in order that he could put bums on seats. I accepted the situation [as disciplinary manager] because I thought I was the best person available to do the job'. He did concede that he had not chaired a disciplinary hearing before and that he briefly looked at the ACAS Code of Practice before becoming involved in the disciplinary hearing.

24. Mr Fernandes confirmed that he did take advice from Greenhey's HR provider with they had a service level agreement and that although the disciplinary procedure was lengthy, he was of the view that *'you can't put a timescale on something that serious',* (understood by me to mean the seriousness of the allegations under investigation). He explained that the only other possible personnel who could have conducted the disciplinary process were his co-director and wife Jane, who had suffered a stroke previously, was impaired and isolating due to Covid at that time. The other director Fred Knott was also felt to be unsuitable as he was hard of hearing, 80 years old and was isolating due to Covid, which was of course still a major issue in 2021.

25. Mr Sephton was the author of the suspension letter which was sent to Mr Cook on 19 January 2021 and which confirmed the verbal suspension which was given when he was prevented from coming into work on 15 January 2021, (pp112-3). The allegations under investigation were identified as follows:

    a) *'It is alleged that you have taken part in activities that if proved would cause the company to lose faith in your integrity and could irreversibly destroy the trust and confidence to maintain the employment relationship, namely it is alleged that you have placed an electronic listening device in the office of Managing Director Emil Fernandes and have eavesdropped on private conversations.*
    b) *It is further alleged that you have passed information gained through the above unauthorised access to private discussions of others.'*

26. He reminded Mr Cook that suspension with pay was not a disciplinary action and invited him to an investigation meeting on 20 January 2021.

27. Meetings took place with Mr Cook and on the same day, several other employees including Mr Fernandes, Mr Knowles and Mr Eden. A summary of the initial evidence was produced by Mr Sephton, (pp134-7). His initial conclusions were challenged by Mrs Cook during cross examination and it appeared to me that they had been reached without properly reflecting upon the evidence taken at this point.

28. Mr Sephton concluded that mid-morning on 13 January 2021, Mr Fernandes and Mr O'Brien had an ill tempered meeting concerning an allegation from Vince the company mechanic that he had been tampering with the trackers on vehicles. He was expressly asked why he had altered the name on Mr Hoyland's tracker, to which Mr O'Brien allegedly stated that he doesn't care what Mr Hoyland does and he hasn't got *'green eyes'.* Mr Fernandes felt that the use of the term 'green eyes' could only relate to a private conversation

between him, and Mr Hoyland in December 2020 and he felt Mr O'Brien must have been told about what had been said during that meeting to use the same term.

29. The second occurrence was in relation to a text message sent in the afternoon from Mr O'Brien to Mr Knowles when he stated, *'I've had a few phone calls regarding your meeting with you, Ben & Emil, someone told me you think I've got issues at home!'* (pp86-7). Mr Sephton believed this related to a private conversation which took place in Mr Fernandes office with Mr Hoyland and Mr Knowles after the meeting in the morning and the only way that he could have used those terms would have been because someone had eavesdropped on the conversation which had referred to Mr O'Brien having issues at home. He noted that the only other people in the office at that time were Mr Cook and Amanda Williams, (the latter person being the office administrator).

30. Mr Sephton made reference to Vince (whose surname could not be recalled by witnesses during the hearing, but it was accepted that he worked as the Company Mechanic), not informing anyone about passwords using trackers. However, he confirmed no formal interview with this employee had taken place. He made reference to Mr O'Brien knowing that tracker passwords had been given by Mr Fernandes to Mr Knowles and Mr Hoyland without having clear evidence that he knew who had been given them rather than him being annoyed he did not have access to the passwords himself.

31. He decided in his conclusions that Mr O'Brien was away and could not have eavesdropped. He noted that Mr Cook's desk was next door to Mr Fernandes' room, that he had the skill to build a recording device, he admitted using the headphones on the device despite being unaware of its purpose and that he was the only person other than Amanda in the office on 13 January 2021. His conclusion was also that during the interview Mr Cook had resorted to *'denial and threat'.* Denials are hardly surprising from a person being accused of something they believe they did not do, and the *'threat'* could equally be construed from the transcript of the interview as being a form of reassurance that if Mr Cook had really wanted to share information, he knew a lot more information about the company, which would be problematic if shared.

32. Mr Sephton's final sentence was that:

    'It seems evident that DC (Mr Cook) has on at least two occasions, passed private and sensitive information to SOB (Mr O'Brien)'.

    While he might have good reasons for reaching this conclusion, Mr Sephton's interim report is flawed in that it appears to jump to conclusions and suggests bias on his part a failure to consider issues which are less clearcut such as possibility of others sharing the information. He had played a part in the initial discovery of the device and the cable and while its location next to Mr Cook and its connection to a microphone suggested a case to investigate against Mr Cook, his initial role in the location of the device with Mr Fernandes meant that he entered the investigation process with biases he had not properly

addressed. I acknowledged that he did have a lack of experience of conducting disciplinary investigations during employment matters and while that was not in itself a problem, he was perhaps not the best person to investigate this complicated matter. However, I accept that there were limited personnel available within this small business, although the option was there for an external HR advisor to be instructed.

<u>Disciplinary hearing</u>

33. Mr Cook was invited to a disciplinary hearing on 22 Feb 2021 by letter dated 17 February 2021, (pp140-1). He was informed of the same two allegations as before and warned that if proven, they could result in a finding of gross misconduct with dismissal as a possible. An evidence pack was provided to Mr Cook including copies of the interview notes of the 5 people interviewed, and in the invitation letter he was also informed that Mr Knowles was the appointed hearing officer and that he could be accompanied. This information appeared to be consistent with the procedures identified in the Company Handbook, (p76).

34. Mr Cook raised a grievance on 22 February 2021. He then queried whether Mr O'Brien had been interviewed in his letter dated 26 February 2021 and made reference to ACAS and the need for all relevant evidence to be provided to him as an employee under investigation, (p162). Mr Fernandes confirmed further investigations would take place and *'…we will contact you again as soon as they are concluded',* (p163). Mr Cook was then chased by Mr Fernandes to provide a password for his work computer on 4 March 2021 having failed to respond to 2 previous requests, (p165). In the meantime, he then wrote to him on 9 March 2021 to confirm that he was still seeking to arrange an interview with Mr O'Brien, (pp166-7). This eventually took place on 19 March 2021 and the transcript was signed by Mr O'Brien, (pp169-176). Further evidence was then considered, and an invitation was sent to Mr Cook to attend a disciplinary hearing on 9 June 2021 by letter dated 2 June 2021, (pp253-255) with additional documents and interview records being provided.

35. Further correspondence was exchanged, and the hearing began on 9 June 2021 but was adjourned part heard because of matters arising relating to additional evidence and Mr Cook was reminded that he should disclose anything that he had. It resumed on 15 June 2021 with Mr Cook attending and being accompanied with his wife. Stephen Knowles chaired the hearing and Paul Gourdji was the note taker, (pp261-293). The hearing was adjourned part heard for further investigation, which unfortunately was delayed to Mr Sephton's father dying and this affected his availability at work. A reconvened hearing was listed for 24 September 2021 and an invitation letter was sent to Mr Cook on 20 September 2021, (p295-6).

36. The disciplinary hearing actually resumed a few days later on 4 October 2021 with reference being made to the 3 witnesses being available which were requested by Mr Cook. Mrs Cook was allowed to accompany her husband despite not being an employee or trade union representative once again, (pp300-314). Mr Cook was allowed to present his case in both hearings

which each lasted approximately 1 hour and cross examine those witnesses called by management.

37. The disciplinary hearing was made by Mr Knowles, and he sent a letter to Mr Cook on 8 November 2021 confirming his decision to dismiss, (pp317-9). It was 3 pages in length and included the 3 revised allegations. He confirmed that it was a summary of the consideration that had taken place, but he drafted the letter himself and in relation to the three allegations, he reached the following conclusions:

    a) Using the pictures and witness evidence provided, he noted that the *'listening device was discovered in the office of the managing director and that the wiring of the device led back to a box on your (Mr Cook's) desk.'* Given that Mr Cook did not deny the existence of the device, he took into account his working knowledge of such devices, that the device was on his desk, that he had admitted to using the headphones which were placed with it, that he had purchased a box of a similar design and shape to that used and said *'…I have formed a reasonable belief that the first allegation is substantiated.'*

    b) As he accepted that the listening device had been placed by Mr Cook in accordance with allegation one, he had to balance whether the information passed onto Mr O'Brien was obtained from 2 unidentified neighbours of Mr Holroyd or by Mr Cook using the covert device. He said *'I find it difficult to believe that two members of the public who as far as the evidence presented, could not be directly privy to the information passed, have both discussed this information with Mr O'Brien, in such detail. I have concluded that the most likely explanation is that you have passed on information gained from the planted listening device to Mr O'Brien, so I find the second allegation proved.'*

    c) The third allegation had been added during the investigation due to a belief that Mr Cook had been obstructive and had been included before the first part of the hearing took place in June 2021. Mr Knowles noted that Mr Cook failed to provide the password for his PC and went on to say that once pressed on the subject he submitted a retrospective fit note from his GP, while arguing that his medication had affected his memory. He noted that the sick note was only for 2 weeks duration and compared with his much longer absence during furlough where he remembered his password, it was surprising that he could not remember his password for the more recent time off work. He noted that there had been a refusal to provide access to medical records to support his memory loss and in the absence of *'…any further evidence to corroborate any medication or diagnosis that could lead to memory loss. I do believe this is deliberately obstructive.'* He also noted a refusal to provide the audio recording of the earlier interview on 20 January 2021, for which only a transcript had been provided and he also believed this amounted to obstruction.

38. Mr Knowles confirmed that he could not separate the allegations to give a view as to whether any of them were more serious than the others but argued that the given *'the seriousness of what was found to have happened, he had*

no reservations finding gross misconduct'. He added that he did not feel the need to stop short of dismissal and consider a lesser sanction because the findings which he made were so clear. He concluded his letter by saying to Mr Cook:

'Having carefully reviewed all the facts and circumstances I have decided your actions have irreversibly destroyed the trust and confidence required to maintain the employment relationship and that your actions constitute gross misconduct and therefore the summary dismissal is the appropriate sanction. You are therefore dismissed with immediate effect; you are not entitled to notice or payment in lieu of notice.

Mr Cook was also notified of his right to appeal to Mr Fernandes if he wished and he exercised this right by letter dated 14 November 2021 disputing that there had been a fair procedure, that there was an overly long suspension without proper contact and disputing the findings based upon the available evidence, (pp321-3).

<u>The appeal</u>

39. Fernandes acted as the appeal hearing officer and invited Mr Cook to a hearing on 8 December 2021 in his letter dated 24 November 2021, (p324). On the morning of the appeal hearing, Mr Cook sent his apologies and asked that his appeal be considered on the basis of his letter setting out his grounds, (p325). A decision was reached on this basis and a letter setting out this decision was sent to Mr Cook on 23 December 2021 with the appeal being not upheld, (pp328-331). In this lengthy letter, Mr Fernandes explained his consideration of each of the grounds of appeal raised. He explained that the suspension was carried out with full pay, delays arose from staffing shortages, that the relevant evidence was obtained and disclosed, and the credibility of Mr O'Brien's evidence was questioned, citing the obstructive way in which he had approached the provision of a statement.

40. In terms of witnesses who gave evidence during the hearing, I acknowledged that the respondent's witnesses had not previously been involved in disciplinary investigations or chairing hearings. Mr Sephton was guarded in the way which he gave his evidence and at times seemed reluctant to answer questions put to him by Mrs Cook and which I had to remind him, were correctly put and dealt with matters an investigating officer would be expected to answer. That is not to say that his evidence lacked credibility, but that he did not assist himself by the way in which he engaged with cross examination.

<u>Notes on the witness evidence</u>

41. Mr Knowles was credible and reliable. He was willing to concede where he could not remember dates or things which had taken place. Given that it was his first disciplinary hearing, he perhaps allowed greater latitude to Mr Cook to cross examine witnesses, which seemed to lengthen the disciplinary process and also caused unnecessary enquiries. However, this meant that Mr Cook was afforded significant opportunity to present his case and challenge some of the evidence which had been obtained and Mr Knowles behaved in a fair

and reasonable way in how he managed the process. I was satisfied that he did not enter the disciplinary process with his mind closed and his discretion tainted by his earlier involvement within initial finding of the microphone and device contained in the black box by Mr Cook's desk. He also made the fair point that as a small employer the Greenhey and its sister company had a limited management presence to use for the purposes of the investigation.

42. Mr O'Brien (unlike Mr Eden) was willing to attend and support Mr Cook by giving witness evidence, which was heard out of turn due to his limited availability. Although he passionately asserted that Mr Fernandes had failed to appreciate that Mr Holroyd was the source of disclosures arising from private meetings, his argument that he was telling his neighbours who were in turn telling relatives who in turn told Mr O'Brien's wife lacked credibility without the support of evidence from those involved in the chain of conversations. While he believed he had disclosed their personal details and provided evidence from them, in the absence of witness evidence during the hearing from the people concerned or their unequivocal signed and dated witness statements being available, on balance I felt that this alternative argument was not credible. Moreover, I noted that Mr O'Brien admitted to having a troubled relationship during the material time with Greenhey and recently been dismissed for gross misconduct. His evidence might have been considered more reliable had he provided corroborating evidence in support, but as it was, I was unable to accept the version of events advanced by him.

43. Although Mr Eden's statement was included within the evidence before me, having seen a signed and dated copy of his statement, I was unable to place any weight upon his evidence. The nature of his evidence which sought to attack the credibility of Greenhey's case as respondent, was not supported by any evidence other than in relation to his using of a plastic box like that found by Mr Cook's desk, for which an invoice with his name on ordering such a box was available (343). He also referred to a photocopy of a photograph showing a black box seemingly of the same type, which was attached to what appeared to be the down tube of an ebike. There was an argument advanced during the investigation into Mr Cook that the boxes were used to hold equipment which might assist the use of an ebike. However, I took judicial notice from the fact that the boxes were identified as accessories used by those working with electronic projects and who needed a means of safely housing the equipment and fitting the necessary switches, lights and sockets. Accordingly, they were usable and capable of being connected to other equipment. Just because one box is used for one project relating to an ebike, does not mean that another could not be used to house a device to support a microphone carrying out covert surveillance.

Law

44. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

45. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see *W Devis and Sons Ltd v Atkins* 1977 ICR 662.

46. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

47. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in *British Home Stores v Burchell* 1980 ICR 303. The Tribunal must consider a threefold test:

    a. The employer must show that he believed the employee was guilty of misconduct;
    b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
    c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

48. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

49. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. Mr Clarke reminded me in his submissions of the case of *Sainsburys Supermarkets v Hitt* [2003] IRLR 23, where the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

50. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: *Iceland Frozen Foods v Jones* [1982] IRLR 430.

51. In *Taylor v OCS Group Ltd* [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

52. Indeed, defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. It is not necessary for the appeal to be by way of a re-hearing rather than a review, but the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly it procedural fairness and thoroughness, and the open-mindedness of the decision maker; see *Taylor v OCS Group Ltd* [2006] IRLR 613 CA.

53. In respect of certain claims, such as unfair dismissal and breach of contract, Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer or employee has unreasonably failed to comply with the Code of Practice, it may, if it considers it just and equitable in all the circumstances to do so, increase or reduce compensation awards by up to 25% (this does not apply to any Basic Award for Unfair Dismissal).

54. The *Polkey* principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects, then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. The Tribunal must consider:

    (a) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?

    (b) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?

    (c) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

55. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

56. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

57. The Tribunal must award compensation that is just and equitable. Even if the loss arising from the dismissal is substantial, the Tribunal can still award no compensation if it would be unjust or in equitable for the employee to receive it. This might be the case where acts of misconduct discovered after the dismissal means that it would not be just and equitable to award compensation; see *W Devis & Sons Ltd v Atkins* [1977] IRLR 314.

Discussion

Claimant's submissions

58. Mrs Cook submitted that there was no evidence of a listening device being used by Mr Cook or of him being in the office when the meetings which were allegedly subject to covert surveillance took place. Moreover, she said that there was no evidence of him passing the information in question to anyone else.

59. She noted procedural failures, including a failure to question Ben Holroyd about the black box, Vince and Dave Carr about trackers, Mr Knowles being inexperienced as a disciplinary hearing officer and being too closely related to initial discovery of the black box in January 2021.

60. She disputed that there had been any obstruction from Mr Cook regarding the password and he had actually offered to sit with a manager and attempt to access the PC together. She noted that Mr O'Brien denied ever receiving the information in question from Mr Cook and had explained how it had been communicated to him by others.

61. She was also critical of the procedural fairness of Mr Fernandes having never carried out a suspension yet carrying out this action without having first taken advice. The duration of the suspension was criticised and an overall failure to review, explore alternatives to suspension such as temporary redeployment and a failure to keep in touch with Mr Cook during his suspension and sickness absence.

Respondent's submissions

62. Mr Clarke reminded me that the respondent was a small company of some 15 employees and that the grounds of resistance should be accepted. The dismissing officer Mr Knowles had clearly given the reason for the dismissal

as being Mr Cook's conduct. He had a genuine belief that Mr Cook had eavesdropped, and this was a very serious case. Mr Clarke said that Mr Knowles further believed that Mr Cook had passed information gained from the surveillance onto another and that it was within the reasonable band of available responses, to dismiss him for gross misconduct.

63. He noted that Greenhey had employed Mr Cook for more than 20 years at the time of the dismissal and there was clear regret in the decision having to be reached. However, he said that he wished to remind the Tribunal that the investigation only had to be *'sufficient'* and there was enough evidence available to demonstrate a case to answer, given the location of the device, the admittance by Mr Cook that the headphones found next to it were his and the *'geography'* of the office. In addition, he said that 10 people had been interviewed and Mr Cook had the knowledge and competency to design and construct the device in question.

64. He noted that a right of appeal was offered and that it considered all relevant matters raised even if Mr Cook failed to attend the appeal hearing himself. While he conceded (following questioning from myself), that the grievance had not been dealt with by Mr Knowles despite being promised to Mr Cook in the closing sentence of his dismissal letter dated 8 November 2021, he argued that it was effectively dealt with in the appeal decision letter produced by Mr Fernandes. He added that even if this was not the case, the way in which the appeal letter was produced, meant that it effectively made no difference to this case that the grievance was not formally resolved contrary to Mr Knowles' promise.

65. In the alternative, Mr Clarke submitted that Mr Cook *'100% contributed to his own dismissal'* and that any delay in the process was an opportunity for Mr Cook to further put forward his case, while conceding *'it was not meant to go on for that long'.* In any event, he argued that the outcome would not have changed had the process been shorter than was actually the case.

<u>The decision of the Tribunal</u>

66. Mr Cook had been employed by Greenhey for more than 21 years when he was dismissed, and he clearly had sufficient service to bring an unfair dismissal complaint with the Tribunal in accordance with section 108 ERA. He also presented his claim within the required period provided by section 111 ERA. There are no issues with jurisdiction in this matter.

67. Turning to the substantive questions of the complaint of unfair dismissal, it is correct that Mr Knowles dismissed Mr Cook summarily on 8 November 2021 and for the reason of 'gross misconduct', with conduct being a potentially fair reason to dismiss an employee under section 98 ERA and a decision which can be made summarily if found to be the case.

68. I am of course required to consider whether the dismissal was fair by reason of section 98(4) of the ERA and given that conduct was the reason given, the principles advanced in the well known case of <u>*Burchell*</u> while noting that I

must not *'step into the shoes'* of Mr Knowles as I am required to consider the reasonableness of *his* response to the disciplinary case before him.

69. I took into account the relatively small size of Greenhey and its sister company and the limited number of managers available. While I enquired with the respondent's witnesses concerning the possible exploration of using external HR professionals to manage the disciplinary and grievance processes, I find that it was not proportionate nor reasonable to expect every small employer to be expected to go to the cost of employing consultants for its disciplinary matters. Instead, the question that I asked myself was whether the respondent behaved reasonably in how it managed the disciplinary process, taking into account the limited resources available to it, in terms of management and HR resources.

70. The decision to dismiss was reached by Mr Knowles and he genuinely believed that the reason to dismiss was because of conduct on the part of Mr Cook. He considered 3 allegations which had been referred to during the disciplinary investigation. He determined that the listening device was placed by Mr Cook and explained that he held this belief because he purchased components which could be used in it, that the equipment was on his desk and that he accepted he used part of the equipment, namely the headphones. The second allegation was also that information obtained from the use of the device had been passed onto Mr O'Brien and it could not reasonably have been provided neighbours of Mr Holroyd who remained unidentified. Finally, he concluded that Mr Cook failed to provide his PC password and felt that it was not realistic that medication gave rise to memory loss so it could not be recalled. He provided a detailed explanation in his decision letter as described above.

71. He concluded that these actions had *'irreversibly destroyed the trust and confidence required to maintain the employment relationship'* and accordingly dismissed Mr Cook for the potentially fair reason of conduct under section 98 ERA. He clearly explained his reasons in his dismissal letter, and I accept that he genuinely believed that Mr Cook had behaved in a way which amounted to gross misconduct. Conduct is of course a fair reason where the employer is entitled to summarily dismiss an employee without notice.

72. I also accept that he had reasonable grounds to reach this conclusion and that there was enough evidence available to Mr Knowles. There was clear evidence of a listening device being installed, working and located next to Mr Cook's desk. Although the investigation was lengthy and delayed, partly due to staffing issues and Mr Cook's ill health, the disciplinary hearing only took place once detailed evidence had been obtained and it was even adjourned so that further evidence could be provided and so that Mr Cook could cross examine witnesses during the hearing.

73. The ACAS Code of Practice was referenced in the staff handbook and Mr Cook made clear reference to it during the investigation. Given the nature of the issues under investigation and their relationship to eavesdropping allegations and trust and confidence, it was appropriate to suspend. Mr Fernandes gave convincing evidence that the suspension was not disciplinary

in nature, he was not informed of the decision inside the workplace with other employees present even if perhaps the way of stopping him entering the workplace may have appeared somewhat melodramatic in the way which it was carried out. The suspension did take longer than would normally be expected to conclude the investigation, but there were problems arising from staff availability and ill health of Mr Cook. Mr Cook's challenges concerning evidence being available at the disciplinary hearing were accommodated by management and in these circumstances, it was reasonable to delay the conclusion of the process.

74. Mr Knowles confirmed that he briefly looked at the ACAS Code and applied the disciplinary procedure. He certainly was able to accept that a fair investigation had taken place, but also was willing to adjourn when Mr Cook requested additional evidence being required. He explained his decision in detail in his dismissal letter and the findings which he was entitled to make did amount to misconduct and of sufficient gravity for dismissal to be within the range of reasonable responses available to a dismissing manager.

75. There was a right of appeal and even though Mr Cook was unable to attend the appeal, Mr Fernandes at his request, clearly considered the grounds and explained why the appeal was not being allowed in his detailed decision letter.

76. Ultimately, taking into account the relatively small size of the respondent business, I accept that the process was fair and although longer than would normally be expected, there were reasons for this. Moreover, Mr Cook's concerns about the investigation were responded to and dealt with as far as was reasonable, before the disciplinary hearing took place. However, I do not believe that any problems arising from Mr Knowles' inexperience in dealing with disciplinary processes had a material impact upon the fairness of the process. He had sufficient evidence available before reaching his decision and considered the alternative argument raised by Mr O'Brien, but he had good reasons for rejecting that argument in terms of its lack of credibility.

77. Consequently, this was not a case where the consideration of the likelihood of a fair process producing the same outcome under *Polkey* principles is relevant. The process was on balance fair and Mr Knowles was entitled to reach the decision which he did. Additionally, this means that it is unnecessary to consider the question of contributory fault as Mr Knowles was able to fairly make his decision that there was misconduct and the decision to dismiss was within the band of reasonable responses. It may have seemed a harsh decision to Mr Cook, but the appearance of covert surveillance of management is something which would fundamentally undermine the employer and employee relationship.

78. Finally, I conclude that the ACAS Guide: Discipline and Grievances at Work principles under the Code of Practice had been broadly followed by the respondent. It was appropriate for them to consider formal action, they followed a proper investigation to establish the facts, notified Mr Cook of the meetings which he had to attend and allowed him to be accompanied, even though he relied upon his wife and not a trade union representative or colleague. He was properly suspended, and regular communications took

place with the action appearing as neutral act, a fair disciplinary hearing took place following a proper investigation, a full explanation for the decision to dismiss was given in writing and a genuine right of appeal was offered and carried out.

Conclusion

79. Accordingly, for the reasons given above, I must conclude that the correct decision in this case is that Mr Cook as claimant was fairly dismissed by reason of his conduct and accordingly his complaint of unfair dismissal must be dismissed by the Tribunal.

80. The complaint of breach of contract is of course dismissed upon confirmation of its withdrawal/non application in these proceedings.

81. I would like to thank both advocates for the way in which they approached the case and how they adopted a proportionate approach to issues which arose such as documents in the bundle, the agreement of the timeline and the management of the hearing including the reordering of witnesses to ensure that the most effective use of the Tribunal's time could take place

82. I would also like to thank Mrs Cook for the way in which she supported her husband Mr Cook as his advocate and how she diligently prepared and asked her questions and the polite way in which she cross examined the respondent witnesses. Advocacy is a difficult skill to develop for professionals let alone non legal representatives and I would congratulate Mrs Cook on the way which she presented the claimant's case, and which assisted with the smooth running of the hearing.

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Employment Judge Johnson

Date 4 October 2023

JUDGMENT SENT TO THE PARTIES ON
12 October 2023

FOR THE TRIBUNAL OFFICE