Case Number: 1403820/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Marie Anne Stout	**v**	**Coram UK Holdings LTD**

Heard at: Southampton by CVP

On: 21 and 22 February 2024

Before: **Employment Judge Rayner**

Appearances
For the Claimant: In Person
For the Respondent: Ms J Duane, Counsel

JUDGMENT

1. The complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed.

2. There was 100% likelihood that Claimant would have been fairly dismissed following a fair procedure, on 30 January 2023, and therefore no compensation is payable to the Claimant.

3. The Respondent will pay the Claimant a basic award of £5995.50.

REASONS

4. Oral reasons having been given to the parties at hearing, and judgment dated 22 February 2024 having been sent to the parties, written reasons were requested by the respondent on the 14 March 2024 and are provided as follows.

5. The claimant was employed by the respondent from 11 January 2016 as a sales manager. She was dismissed by them in January 2023 following a disciplinary hearing. She was dismissed for gross misconduct.

6. The claimant appealed and the appeal was heard by Mark Dain. He upheld the a decision to dismiss and confirmed this by letter to the claimant on the 1 February 2023.

7. The respondent says that it had a fair reason for dismissing the claimant, which was gross misconduct and that this was based on their genuine belief that she had submitted a false invoice in respect of a business trip which she had taken on the 20 December 2022. The respondent also asserts that she had breached their policy in respect of overnight accommodation and travel by not obtaining permission in advance from her line manager to incur the expenses for a stay away from home.

8. The claimant accepts that she did not have permission for the overnight stay, but says that there were reasons why she was not able to gain permission for this overnight stay before the 20th of December. She further asserts that she did not submit a false invoice but that she submitted an invoice which was typed up for her by the hotel receptionist and which reflected the money that she had spent, both on the room which she had stayed in, which was a bed and breakfast, but also on a drinks she had bought in the bar for customers, as well as cash which she had spent.

9. I heard evidence from the claimant on her own behalf and from Miss Borowski and Mr Dain on behalf of the respondents.

10. I was provided with a bundle of some 133 documents which was added to during the course of this hearing. Firstly, a selection of whats app messages were added, which in the end were not raised during the course of evidence.

11. Secondly the respondents produced an e-mail which they said they had received from the White Swan Hotel in Lincoln where the claimant said she had stayed overnight. The invoice she had submitted, and which the respondents disputed genuine, was in respect of that nights' accommodation; subsistence and entertainment of clients.

12. I make the following findings of fact.

13. The respondent has had a policy regarding the claiming of expenses by its sales managers in place for a number of years.

14. Sales managers such as the claimant often had to travel significant distances and often needed to stay away from home overnight and were entitled to claim for accommodation and reasonable subsistence.

15. The claimant was fully aware of the respondent's policy.

16. When Miss Borowski, who is the national sales manager, was appointed as an Interim National Sales Manager on the 1 August 2022, she introduced a new procedure for booking overnight accommodation and journey and customer visit planning. There is no dispute that this was communicated to all parties, including the claimant.

17. I accept the evidence of Miss Borowski that the company was seeking to reduce expenditure where possible and was therefore asking team to justify and quantify the reasons for staying away over night.

18. I accept that the allowance for each overnight stay was for a meal of up to £25.00 and one alcoholic drink, as per company guidelines.

19. Miss Borowski told the Business Development Managers, including the claimant, about the new hotel booking procedure on the 19 August 2022. The

new procedure required Managers to e-mail in lists of customers that they intended to visit and the reasons for visit, prior to booking overnight hotel accommodation.

20. The claimant knew that there was this procedure in place and also knew that the respondent and Miss Borowski would be checking it periodically.

21. The reason I find that she knew is that on 4 October 2022 Miss Borowski queried the claimant's expenses claim for September, because she had an issue about the mileage and locations.

22. I find that in the following months over October and November 2022 there were a series of emails from Miss Borowski reminding her Business Development Managers to ensure that their calendars had journey plans listed for the months of November and December. I also find that there were emails from the claimant on a number of occasions in which she requested permission or authorization for an overnight stay in advance as required by the policy.

23. I find therefore that the claimant was well aware of the requirements of the policy in respect of overnight stays and in particular that she knew that she needed to get advance authorization.

24. I also find that the claimant, in common with all other Business Development Managers was well aware of the need to justify any claim she made for expenses by providing the relevant documentation, showing that she had incurred such expenses. The requirement to do so is standard in any business where a sales manager or other person is likely to incur expenses. I accept the respondent's evidence that the claimant was in a position of trust, in that she was provided both with a company car for which she could claim her mileage and that she was provided with a company credit card which she could use to buy petrol and pay for her expenses and that she was trusted to visit clients, stay away overnight and to incur expenses in respect of potential sales.

25. There is no dispute that the claimant was on holiday for a period of time prior to the 20 December 2022. It is also not in dispute that during that period of time the claimant's laptop was not working. The respondent says and I find as fact that nonetheless the claimant had other mechanisms of contacting them in advance to inform them of her intention to make an overnight stay, for example she could have used her company mobile phone to text or message or she had a tablet which she could have used.

26. The claimant decided to make a business trip which required her to travel on the 20 December 2022. She decided that she would go to Lincoln, and on her first day back at work, which was the 20 December 2022, she sent an e-mail request to Miss Borowski, asking for authority to incur costs of overnight accommodation in Lincoln on the night of the 20 December 2022. It is not denied that the claimant sent that e-mail and it is not denied that Miss Borowski received the e-mail.

27. Miss Borowski did not respond to the e-mail however and said that she was unable to do so because she was busy with other matters that day and that she did not have time to get through all the emails in her e-mail box.

28. The respondent asserts and I find as fact that one of the reasons for the policy requiring advance notice of business trips was so that authority could be given in sufficient time and was precisely to avoid this sort of situation.

29. The claimant accepts that her request was made late in the day, but points to the specific situation she found herself in. Miss Borowski suggests that the claimant could have made her arrangements prior to her holidays and could have asked at an earlier stage for authority to incur expenses.

30. I find that the claimant did travel for a legitimate business reason to see various clients that day and that she did stay overnight at the White Hart hotel in Lincoln. I also find that the respondents accepted but this was the case.

31. Miss Borowski did not provide a response to the claimant's request for authority at any stage. She said once she saw the e-mail, the date had passed and therefore she did not see the need to authorise it, and the claimant had not chased the matter.

32. The claimant says that she would have expected the authority to be given even after the event and I agree. It was perfectly possible for Miss Borowski to authorise the expenditure after the event and if she had an issue with the lateness of it, to take that matter up with the claimant. She did not do so.

33. I find it was reasonable therefore for the claimant to submit an expenses claim in respect of the 20 December 2022.

34. When Miss Borowski received the expenses claim, she was troubled by a number of things about it. Firstly, she considered that the invoice she had been provided with was unusual and she had a concern that it might not be genuine.

35. She also had a concern that the claimant may not have visited the clients which the claimant had listed as having visited.

36. Instead of contacting the claimant to ask her about who she had visited; where she stayed and raising any queries about the invoice, Miss Borowski decided to contact a number of clients to see whether the claimant had visited them and also decided to ring up the White Hart Hotel and ask about the claimant’s invoice.

37. I find that Miss Borowski did make the phone calls to clients and did indeed contact the White Hart hotel. No notes have been provided either to the

claimant in the course of a disciplinary proceedings or indeed to the tribunal at this hearing. I find that what she did not do was make any record of any discussions that she had with anyone.

38. Further I find that she did not seek any statement or e-mail from any of the individuals to confirm that they had *not* seen the claimant on the days in question.

39. In respect of her contact with the White Hart hotel, I find that Miss Borowski did contact the hotel and did provide them with a copy of the invoice that the claimant had submitted and which the claimant said was provided by the White Hart hotel.

40. I find that Miss Borowski understood the hotel to tell her that the invoice was not one that they had issued, and that they also noted that the room number on the invoice was one which they did not have in their hotel.

41. I also find that on the 9 January 2023 the Hotel did send Miss Borowski a copy of an invoice in respect of a stay by Miss Stout on the 20 December 2022, for bed and breakfast, for the amount of £90. This was different to the amount on the invoice provided by Miss Stout.

42. Miss Borowski contacted human resources, and in an e-mail dated the 9 January 2023 she states *hi Claire as per our discussion it looks like Marie has made-up her own invoice and added £35 to it. I never gave the agreement for her to stay as she sent me her request on the day that she was intending to stay or not before which I thought was extremely bad planning. Also why go all that way before Christmas. if you can let me know how we should handle it I would be very grateful.*

43. I asked Miss Borowski when she gave her evidence whether or not she had formed a view at that point about what had happened. She confirmed that she had by then formed the view that the claimant had made-up the invoice.

44. On the basis of the investigations she had carried out up until that point, this was not an unreasonable assumption to make. There was clearly a discrepancy between what the hotel was saying to her and the invoice that the claimant had submitted.

45. Miss Borowski did not contact the claimant to find out what she had to say about the discrepancy between the invoices, but instead, on advice from human resources, she wrote to the claimant and invited her to a disciplinary meeting.

46. I find that the reason Miss Borowski did not contact the claimant was that she did not want to talk to her, because she had found the claimant difficult in the past. I find that Miss Stout had, in the past, become antagonistic when Miss Borowski had raised issues over her expenses. I find that Miss Borowski made a deliberate decision not to give the claimant an opportunity to explain the discrepancies, before calling a disciplinary meeting.

47. Miss Borowski sent the claimant a letter which was attached to an e-mail.

48. The e-mail said *I would like to speak with you in person regarding your expenditure and diary movements in December 2022. You will find the finer points in the letter attached.*

49. Attached to that e-mail, sent on the 11 January 2023 was a copy of the respondents disciplinary policy and procedure; a copy of the November 2022 expenses policy; a copy of the claimant's invoice in respect of the 20 December 2022 and a copy of an invite to a disciplinary letter.

50. Miss Borowski did not provide the claimant with a copy of the invoice she had received from the White Hart Hotel and accepted in evidence that she ought to have done so at this point.

51. Nor did she set out the fact that she had spoken to the Hotel about the invoice, or that she had spoken to clients that the claimant said she had visited.

52. The letter sent to the claimant and attached to the email stated that the claimant was being invited to a formal disciplinary meeting to discuss the expenses she had submitted for December 2022 and to discuss two matters of concern which were said to be

a. an anomaly in the receipt for overnight stay on 20 December 2022 as detailed in clause 1.1 and 4.1 of the company expenses policy and
b. failure to seek pre approval from line manager for overnight stay as detailed in clause 5.1 of the company expenses policy.

53. The letter did not tell the clamant what the anomaly was. It warned the claimant that if found to be substantiated, the claimant might be issued with a warning or a final written warning and then the letter said *if found to be gross misconduct gross misconduct will result in the initiation or escalation of the disciplinary procedure and may result in immediate dismissal without notice or pay in lieu of notice.*

54. The letter then stated that during the meeting, they would review her expense claim for December 2022 and in particular identified the following four matters

a. discrepancies in expenses relating to an overnight stay on 20 December 2022 at the White Hart, Lincoln, copy of receipt attached.
b. failure to follow procedure when requesting a hotel accommodation.
c. inconsistencies in diary entries for customer visits pertaining to dates 20th and 21st December 2022

d. inconsistencies in expenditure in January 2023 Barclaycard statement pertaining to purchased made in December 2022

55. The claimant attended at the disciplinary hearing which was chaired by Miss Borowski. Miss Borowski confirmed to the employment tribunal that the decision about the outcome of that hearing and the subsequent decision to dismiss were her decision.

56. I have been referred to the disciplinary policy, and the flow charts summarising the policy are in the bundle. The flow chart refers to gross misconduct and summarises that an independent investigation should have taken place.

57. The disciplinary procedure states at para 6, (p 54 of bundle) that an investigation will normally be used *when you are suspected of committing an act of serious misconduct or an act of breach of any of the companies policies*.

58. I find that this was what the claimant was suspected of and therefore find there should have been an investigation which complied with the requirements of the companies own policy.

59. The policy says that the purpose of the investigation is to establish all the facts of the case independently before a decision is taken as to whether there are proper grounds to involve disciplinary procedure.

60. Paragraph 7, of the November 2022 procedure, the one which had presumably been considered and agreed shortly before the events in this case took place , provides that the person who undertakes the investigation , will not be the same person who carries out the disciplinary procedure.

61. The procedure goes on to say, that if gross misconduct is suspected, the line manager will contact HR as soon as possible after learning of alleged gross misconduct, so that a manager can be assigned to conduct the investigation. (if

appropriate). It states that all managers assigned to carry out investigations, will have received training to do so. It also provides that the company reserves the right to nominate any other person to conduct the investigation where it considered it appropriate.

62. There is a time table for an investigation process and at paragraph 9, a procedure for the investigation is set out, which includes conducting an investigatory meeting with the person suspected of gross misconduct to make sure that they know the purpose of the interview and which is to establish the facts . The interview is not part of the disciplinary process.

63. The policy further provides that there will then be a written statement summarizing the information given by the person, on formal recorded note.

64. The person subject to an investigatory meeting would have the right to be accompanied.

65. A decision will only be taken whether to continue to a full disciplinary after the investigatory meeting. The accused person will then be sent a letter setting out in full the allegations made, or the case against him or her.

66. I find that none of these stages, with the exception of the letter setting out the allegations, took place.

67. Miss Borowski was not appointed to undertake an investigation, but rather did so as part of her daily work. She formed a view that the claimant had committed fraud. She spoke to HR.

68. At that point a person should have been appointed to investigate, and I accept that the person could have been Miss Borowski.

69. She would have been required under the policy to interview Miss Stout, having explained in full what the concerns were. She would , in any fair process have been required to tell the claimant that she had spoken with the hotel, and gained a different invoice, and would have been required to give the claimant the opportunity to respond.

70. None of this happened.

71. I find that at the start of the disciplinary meeting, Miss Borowski had carried out investigations which led her to believe the claimant had committed fraud. She had also had decided not to speak to the claimant at all, and had been appointed to chair a disciplinary hearing, based on evidence and information which she herself had gathered direct from potential witnesses.

72. She was acting, in effect as both prosecutor and judge.

73. I also find that the letter did not set out in any sufficient detail the actual allegations against Miss Stout. She needed to know that she was being accused of not only having forged an invoice, but also of not having incurred the expenses set out. She was accused of having inflated her claim by about £35.00.

74. During the course of the discipinary meeting Miss Borowski provided the claimant with sight of the invoice that she had received from the White Hart in Lincoln. She asked the claimant if she could explain the discrepancies between the two invoices and the claimant said that she could not.

75. Miss Borowski pointed out a number of differences between the two invoices but did not specifically suggest to the claimant, that the claimant had created or made-up the invoice which she had submitted.

76. Nowhere in the notes of the meeting that we have seen was it ever suggested to the claimant that she had committed fraud, either by submitting a fraudulent claim or by constructing a fraudulent or false invoice.

77. The claimant did say that it was the invoice that she had received from the hotel. She told us, although it is not clear from the notes, that she was clear in the meeting, that she had paid for the bed and breakfast on her own credit card, but had bought drinks in the bar for herself and for colleagues she was entertaining to the value of £18, being two lots of £9.

78. She has been able to produce her bank details for this hearing, which show a payment of £90 and two payments of £9 to the White Hart on the night of the 20 December 2022.

79. The claimant also said that she had made some cash payments that night and that the hotel receptionist had typed up a receipt for her, to cover all the costs.

80. I find that she has proved that she made payments of £108.00 to the White Hart that night. This is different to her receipt, but it is also different to the receipt that the White Hart provided. I accept that the figure is still not the whole £125.50 that was claimed.

81. However, I also observe that the claimant was entitled to a meal and a drink when she was away from home.

82. I also find that during the course of that meeting, the claimant was taken by surprise. She did not know what precisely was to be raised with her and therefore she did not have the documents with her. She did not have her bank statements or any other receipts.

83. The claimant has made a number of criticisms about the notes of that meeting, but I find that broadly speaking they are reflective of the discussion that took place between the claimant and the respondent on that day.

84. I find that the claimant was given an opportunity to explain the differences between the invoice she had submitted and the invoice which she was told Miss Borowski had obtained from the hotel, but I also find that she was not in terms told why Miss Borowski was concerned about the differences between them.

85. I also find that it was only during this meeting that the claimant was given notice of the discrepancies and she was not therefore in a position to provide any information about the claims which she had made by reference to other documentation such as her bank account which she says demonstrates that she had incurred other expenses on that night both in respect of her own sustenance and in respect of some clients who she said she had entertained.

86. I find that the claimant was not provided with a copy of the minutes until they were provided to her via ACAS, after she had commenced proceedings and was therefore not in a position to correct them or make any further comments on them at the time.

87. In that meeting, Miss Borowski asked the claimant about a number of other matters including a query about a trip the claimant had taken in November 2022 of 126 miles. The note from Miss Borowski was that the claimant had travelled 126 miles on a day she had been in hospital. I find that this was not one of the matters set out in the disciplinary meeting invite letter and should not therefore have been discussed. No investigation had taken place into this allegation.

88. The claimant was also asked the reason why she had not gained approval for her visit in advance and the claimant told Miss Borowski, as she has told the employment tribunal that she was unable to do so because she had been on holiday; because her laptop had been out of action but also because she

considered she was simply re booking a trip which she had not been able to make on a previous date because of bad weather.

89. Miss Borowski accepted in evidence that these were understandable explanations, although technically in breach of the policy and that had she spoken to the claimant in advance and received this explanation, that she would not have included this as part of the disciplinary action.

90. Miss Borowski said that during the course of the meeting the claimant said the invoice she had submitted was the actual invoice she had received from the hotel. She said she hadn't paid for the stay on her company credit card but that she had spent £9 on the credit card on a drink at the hotel. Miss Borowski said the claimant was not able to show any proof of payment of the £125.50 invoice.

91. Miss Borowski paused the meeting for 15 minutes and then considered what she had heard. She said, and I find as fact that her main concern was about the hotel invoice and I accept that she would not have dismissed the claimant , had it not been for that matter.

92. She says that she firmly believed that the claimant had falsified the hotel invoice and that the real invoice was for £90.00 only and that the claimant had falsified it adding an extra £35.50 onto it. She considered the claimant was in a position of trust, being a lone worker with a company car and a company credit card and did not consider that the claimant had offered any explanation for the difference. She thought that the claimant had actively set out to decieve the company by creating a receipt for her own benefit.

93. I find that whilst this was the genuine belief of Miss Borowski, she did not at any time tell the claimant that this was what she believed and therefore the claimant had no opportunity to counter or respond to that specific allegation

94. Miss Borowski decided that she could no longer trust the claimant and decided that in those circumstances dismissal for gross misconduct was appropriate.

95. In the dismissal letter Miss Borowski states as follows

It was concluded that the receipt you provided for the overnight stay on 20 December 2022 was not a genuine receipt from the establishment claimed and the expense claims submitted was for an increased amount than that of the actual stay. In accordance with Corum UK Holding Disciplinary Policy and procedure under Clause 22, Gross Misconduct, it was found that offence of "Falsification of any company records including reports, accounts, expenses claims or self certification forms" was upheld. Furthermore, it was found that you failed to seek pre approval from your line manager for an overnight stay on the 20th of December 2022. In accordance with Coram UK Holding disciplinary policy and procedure under clause 22 gross misconduct, it was found that offence of "insubordination e.g. refusal to carry out duties or of a reasonable instructions except where employee safety may reason to be in jeopardy" was upheld.

96. The letter went on to say that *I am therefore writing to you to confirm the decision that you were dismissed with immediate effect without notice or payment in lieu of notice.*

97. The claimant appealed the decision.

98. Mr Dain, who heard the appeal, gave evidence to us. I asked Mr Dain whether or not he considered the need for an independent investigation, and he said No, because Caroline (Miss Borowski) was approving the expenses, she was doing due diligence, so he did not see that it needed an independent person.

99. This is not what the disciplinary procedure says, and I would have expected any fair appeal process to consider whether there had been a fair disciplinary process, whether or not specifically raised by the claimant.

100. The claimant's appeal focused on her concern around Miss Borowski's failure to authorise her expenses.

101. She raised a concern that Miss Borowski had set her up to fail; that she had had sufficient time to spend answering stupid and offensive what's App messages but not taking time to answer the claimant's e-mail.

102. I find that whilst there some evidence that Miss Borowski did indeed take some time during the day to take part in a WhatsApp chat, and that the content of that chat may have offended some people, Miss Borowski had been working very hard on other matters that day and that she simply had not had time to deal with all her emails, including the e-mail from the claimant. All employees are entitled to take a break and it is important that they do so. I find that Miss Borowski did not deliberately ignore the claimants e-mail and that it was the claimant who was at fault, all be it for understandable reasons, for having made her request at a late stage in the day and contrary to the policy, of which she was well aware.

103. The claimant suggests that, had she received a response either then or at another time, that would have impacted upon her submitting her invoices. I do not understand how that makes any difference to the fact that she did submit the invoice she submitted, and I find that it does not.

104. In any event, she was aware by the time of her appeal, of the concern over the invoices. She knew that she had been dismissed because of the finding that she had not submitted a false claim for expenses. In her appeal, she did not focus at all on the invoices or put forward any

argument that she could prove that she had validly incurred the expenses and/ or that she had not forged or created the invoice herself.

105. Mr Dain conducted a reasonable and fair appeal, but I find that the appeal was short and not in the nature of a rehearing and that it did not therefore cure any procedural errors in the initial hearing.

Parties submissions

106. The respondent submits that they have satisfied the test set out in *Birchill v British Home Stores* in that they have proved that the reason for dismissal was gross misconduct, which is a potentially fair reason for dismissal.

107. Ms Duane ,Counsel for the respondent asserts that the respondent carried out a full investigation and that the view reached by Miss Borowski was in essence a reasonable one on the basis of the information which she had. She points to the discrepancies in the invoice which remain unexplained by the claimant even as at today's hearing.

108. She points to the discrepancies and differences between the two invoices and the information which Miss Borowski had obtained from the hotel, which she believed to be true.

109. Counsel also submits that in a small company it may be permissible for the same person to carry out an investigation and chair the disciplinary procedure. She also asserts forcefully that even if there were procedural failings in this case, a fair process would have made no difference to the outcome. She says that the evidence was clear and in the absence of an explanation which fully explained the discrepancy there was 100% likelihood that the claimant would have been found guilty of gross misconduct and would have been dismissed summarily.

110. She says this is because the finding of gross misconduct was inextricably wrapped up with the company's inability to continue to trust the claimant. The nature of the claimant's job required the Company to be able to trust her implicitly in the incurring of expenses and in the claiming of them. This would be irretrievably damaged by a finding of gross misconduct for having fraudulently claimed expenses . In those circumstances she says no other outcome would be possible

111. She also asserts that in the claimant contributed to her dismissal by her own conduct, by the way that she made the expenses claim, by failing to explain the claim adequately but also by her failure to adequately explain differences between the two invoices either during the disciplinary hearing, in her appeal or before this hearing.

112. The claimant submits and asserts that she was not given the information she required in advance of the disciplinary hearing and relies on the alleged procedural failings of the respondent. She continues to maintain that she was provided with the invoice she submitted by the hotel receptionist, and that she had incurred all the expenses she claimed. She maintains that she had visited the clients that she had listed. She suggests that Miss Borowski has made a number of errors and that she had misunderstood what the claimant had been saying both about the visits the claimant had made and the individuals she had spoken to.

113. The claimant also referred to her clean employment record and the fact that, in six years, she had no disciplinary warnings against her at all. She considered that the process amounted to a kangaroo court; that the sanction was too harsh and that some lesser sanction could have been imposed.

The Relevant legal principles

114. It is for the employer to show a potentially fair reason for dismissal. Here the respondent relies upon gross misconduct, which is a potentially fair reason.

115. Once an employer has shown a potentially fair reason for dismissal, the tribunal must go on to decide whether the dismissal for that reason was fair or unfair. This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given in accordance with S.98(4) of the Employment Rights Act 1996 (ERA).

116. That provision states that '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'.

117. It is the employer who must show that misconduct was the reason for dismissal. According to the EAT in *British Home Stores Ltd v Burchell 1980 ICR 303, EAT*, a three-fold test applies. The employer must show that:

i. it believed the employee guilty of misconduct;
ii. in mind reasonable grounds upon which to sustain that belief, and
iii. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

118. This means that the employer need not have conclusive direct proof of the employee's misconduct, and a genuine and reasonable belief, reasonably tested, will be enough.

119. I also remind myself that , in a case where a claimant had not been caught in the act, and where inference was involved, an investigation and inquiry should be fuller and fairer. (*see for example ILEA V Gravette 1988 IRLR 497)*

120. I remind myself that the onus on the employer to show reasonableness was removed by S.6 of the Employment Act 1980 and refer to His Honour Judge McMullen QC, giving the judgment of the EAT in Singh, which indicated that it is only the first of the three aspects of the Burchell test identified above that the employer must prove. The burden of proof in respect of the other two elements of the test is neutral.

121. I reminded myself that therefore it is not enough that the employer has a reason that is capable of justifying dismissal, as S.98(4) makes clear. The tribunal must be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason. I remind myself that for this part of the test, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide . (see for example *Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT*.)

122. I remind myself of the need to be careful to assess the question of reasonableness under S.98(4) in the context of the particular reason for dismissal it found established by the employer.

123. I remind myself that whether an employer has acted reasonably is not a question of law. S.98(4) has the effect of giving tribunals a wide discretion to base our decisions on the facts of the case before us, and in the light of good industrial relations practice. As Lord Justice Donaldson put it in *Union of Construction, Allied Trades and Technicians v Brain 1981 ICR 542, CA*:

124. *'Whether someone acted reasonably is always a pure question of fact. Where Parliament has directed a tribunal to have regard to equity…and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question*

in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane.'

125. The appellate courts have, nevertheless, developed certain general principles, some of which have crystallised into principles of law. Thus, the broad, non-technical approach has led to the development of the 'band (or range) of reasonable responses' test as a tool for assessing the reasonableness of an employer's actions.

126. The test of whether or not the employer acted reasonably is usually expressed as an objective one meaning that tribunals must use their own collective wisdom as industrial juries to determine 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved' (see for example *NC Watling and Co Ltd v Richardson 1978 ICR 1049, EAT*.) Nonetheless, there is also a subjective element involved, in that tribunals must also take account of the genuinely held beliefs of the employer at the time of the dismissal. However, I remind myself that what a tribunal must not do is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal. Whilst a tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting *themselves* for the employer and forming an opinion of what they would have done had they been the employer (Per Court of Appeal explained in *Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA).* , although members of the

127. The fact that the standard of the hypothetical reasonable employer is so central to the S.98(4) assessment of reasonableness means that tribunals are able to take account of good industrial relations practice in making their decisions.

Polkey

128. If a tribunal finds that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted, I remind myself that compensation can be reduced to reflect the percentage chance of that possibility. *I have been referred to Polkey-v-AE Dayton Services [1988] ICR 142 which*

introduced an approach which requires a tribunal to reduce compensation. I also remind myself, as relevant in this case, that a tribunal might conclude that a fair of procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the impact of any likely delay. What I must consider is whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM).

129. I remind myself that it is for the employer to adduce relevant evidence on this issue, although a tribunal should have regards to any relevant evidence when making the assessment.

130. A degree of uncertainty is inevitable, but a tribunal should not be reluctant to undertake an examination of a *Polkey* issue simply because it involves some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

Contribution

131. I have been invited to consider whether the Claimant's dismissal was caused by or contributed to by her own conduct within the meaning of s 123 (6) of the Act. In order for a deduction to have been made under these sections the conduct needs to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract or tortious (*Nelson-v-BBC* [1980] ICR 110).

132. I have applied the test recommended in *Steen-v-ASP Packaging Ltd* [2014] ICR 56; I have had to;

(i) Identify the conduct;

(ii) Consider whether it was blameworthy;

(iii) Consider whether it caused or contributed to the dismissal;

(iv) Determined whether it was just and equitable to reduce compensation;

(v) Determined by what level such a reduction was just and equitable.

133. I have also considered the slightly different test under s. 122 (2); whether any of the Claimant's conduct prior to her dismissal made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

Conclusions

134. I conclude as follows:

135. I find that the reason why the claimant was dismissed was that Miss Borowski had formed a genuine belief that the claimant had committed gross misconduct, by submitting a false and/or constructed claim for expenses, which she believed exceeded by about £35 the amount the claimant had in fact spent.

136. Whilst the claimant was also dismissed because of her failure to seek prior approval for her visit I accept Miss Borowski's evidence that the primary reason why the claimant was dismissed was because she believed the claimant to have been dishonest and I also accept her evidence that she would have dismissed the claimant for that reason alone.

137. I find that Miss Borowski did carry out an investigation, as a result of which she formed a view about the claimant's actions.

138. I accept that Miss Borowski had valid reasons for the view that she formed. I accept that her genuine belief, having spoken to the hotel and having reviewed the two invoices before her, was that there was a serious discrepancy between the two invoices which pointed to Miss Stout having done something which required serious explanation. I find that this was a reasonable view for Miss Borowski to have reached at that point.

139. However, considering and applying the test set out in *Burchill*, above, I conclude that she did not carry out as much investigation as was necessary, and that a full and fair investigation was particularly necessary because this was a case where Miss Borowski was drawing inferences from the information she had in front of her.

140. I come to this conclusion because firstly Miss Borowski did not follow her own company disciplinary procedure, which required her to interview the claimant before any decision was made about whether or not to proceed to disciplinary action.

141. Secondly, she did not try to find out whether there was any information or evidence which might be contrary to her developing view that the claimant had committed fraud. On her own evidence, once she had formed that view, she decided not to speak to the claimant, because she said she did not want to antagonise her. I conclude that she did not want to give the claimant an opportunity to provide an explanation. She considered the claimant had committed a fraud and that was sufficient.

142. The claimant was never given the opportunity, prior to disciplinary proceedings to answer the allegations. This meant that she was not able to take time to consider her own response, or to go back to the hotel herself if she chose to do so, and ask the receptionist for a witness statement. She was not able to go back to the clients she had visited and asked them to confirm to her that she had in fact visited. This might have assisted her in demonstrating her credibility and honesty to the respondent. Nor was she able to retrieve and provide to the respondents bank statements or other evidence which demonstrated either of the payments which she had made.

143. I have also considered the ACAS guidance, which emphasises that the more serious the allegations against the employee, the more thorough the investigation should be. I remind myself of the guidance in A v B 2003 IRLR 405

in which the EAT stated that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation.

144. In this case there was a factual dispute about the provenance and validity of the invoice and allegations of dishonesty. The allegations were extremely serious and potentially career ending for the claimant. Any allegation of dishonesty is likely to be viewed very seriously by any employer, but a finding of dishonesty also has an impact on any claimant's future career prospects.

145. I conclude that a thorough investigation which included the opportunity for the claimant to respond to, and explain any allegations before proceeding to a disciplinary process, was vital.

146. I conclude that by proceeding to a disciplinary hearing with Miss Borowski as the chair, the respondent did not operate a fair disciplinary process, which was free from bias.

147. I do not accept that this was a company where it was acceptable to have the same person carrying out the investigation and the hearing.

148. The company's own policy required a different person to chair the disciplinary hearing, and this case is an example of why. In order to be fair, it was necessary for a different person , and one who had not already formed a view, to chair the disciplinary and take responsibility for the decisions about disciplinary action.

149. This does not mean that Miss Borowski's views would not have been heard in the disciplinary hearing. Miss Borowski could have been called as the investigating officer to give her evidence to a disciplinary hearing chaired by an independent person. If that independent person had then reached a decision

that the claimant had committed gross misconduct it is probable that such a dismissal would have been procedurally fair.

150. A further failing was that the disciplinary letter did not identify in specific terms the allegations, because it did not specify what the anomaly in the claimant's invoice was. The Claimant was not clear about what accusation she was facing.

151. The claimant was not provided with a copy of the second invoice at any time prior to the hearing. She was taken by surprise by being asked to explain the discrepancy, but was still not told that the respondent had formed the view that they believed she had committed a fraud.

152. However, if the respondent had set out in full the allegations prior to any such meeting it is probable that any subsequent dismissal for gross misconduct would have been fair. I find that by the point of the appeal the claimant was aware of the allegations but still did not provide any effective evidence to refute the suggestion that she had forged or created a false invoice, for an amount of money which she had not in fact spent.

153. Whilst the appeal hearing was not a complete rehearing, the claimant did have every opportunity to put forward new evidence and had she done so Mr Dain would have considered it.

154. The claimant has criticised the sanction. I find, on the basis of her oral evidence , that Miss Borowski did consider very briefly whether or not a lesser sanction should be imposed. I accept her evidence as I accept the evidence of Mr Dain, that the nature of the gross misconduct alleged and found by Miss Borowski was such that it destroyed the trust that the respondent had in the claimant, and that both considered that summary dismissal was the only appropriate sanction.

155. If that decision had been reached following a fair investigation and a fair disciplinary hearing, then I would have found it to have been within the range of reasonable responses open to an employer of this type, given the type of work the claimant was doing and the level of trust to the respondent necessarily needed to place on its sales representatives.

156. The respondent has stated in its submissions that at no time did the claimant ask for an adjournment of the hearing. I observe that since the respondent had not told the claimant what their allegation really was and since they had taken the claimant by surprise, she may not have had the presence of mind to realise the seriousness of the situation, or to be able to consider what she ought to do in the circumstances.

157. The reason why it is necessary to provide somebody accused of serious misconduct with all the information in advance, at an investigation, but also in a disciplinary invite letter is so that the person can fully prepare to answer those allegations. The right to know the case being brought against them, and the right to know the basis of the allegations, and to see evidence which supports it is a fundamental principle of fairness in disciplinary matters.

158. I conclude that the disciplinary hearing was further unfair because Miss Borowski was acting both as the prosecutor, witness and the judge. She had carried out the investigation by contacting the hotel. She was the only person who knew what had been said in the conversation between her and the hotel receptionist. There was a clear conflict, with the claimant asserting one thing and a person who had not written a statement or even sent an e-mail with a statement attached to it, allegedly asserting something else. I note that the e-mail produced during the course of this hearing on the instruction of the judge, which was sent to Miss Borowski, does not contain any narrative at all, but simply has the name Miss Stout, the date of the stay and the invoice attached to it.

159. The Hotel Receptionist did not provide a statement, and Miss Borowski, who also did not provide a statement, relied upon her own knowledge of that conversation. She preferred her own evidence to that of the claimant, who asserted that her invoice had been prepared for her by a hotel receptionist.

160. The need for impartiality is of central importance. An employer must keep an open mind when carrying out an investigation. The task is to look for evidence that supports as well as that which does not support the employees case.

161. In this case, I conclude for all my findings that Miss Borowski had prejudged the outcome, and I conclude that the respondent did not follow a fair process and the result of that unfairness is to render the dismissal procedurally unfair.

162. I have therefore turned to the question of *Polkey* and I have also considered the question of contributory fault. The question I have to consider is what the effect of a proper and fair procedure would have been in this case.

163. I conclude that fair procedure would have included a full and fair investigation at which the claimant was given an opportunity to answer the allegations at an early stage.

164. I conclude that a full and fair investigation would have resulted in the claimant being able to satisfy the respondent that no misconduct had been committed when she sought leave to incur expenses on the 20 December 2022 rather than earlier and that the failure of Miss Borowski to respond did not impact upon that.

165. Miss Borowski's own evidence was that she would have accepted the explanation and would not have proceeded with disciplinary action in respect of that matter alone.

166. I also conclude that a full and fair process involving a proper investigation would inevitably have taken longer than the process followed in this case. I conclude that an investigation meeting with the claimant would have delayed matters by two weeks.

167. I conclude that even if there has been an investigatory meeting, the claimant would not have been able to provide a full and satisfactory explanation for the invoice she submitted, and that a disciplinary hearing would have inevitably followed.

168. In that respect, I conclude that a disciplinary hearing would have been held two weeks later than it was.

169. I have considered what the outcome would have been had the claimant attended the hearing with full knowledge of the accusations against her and in possession of all the evidence, and if the hearing had been conducted by an impartial chair.

170. I conclude that the most that the claimant would have been able to do, would have been to provide the explanation to the disciplinary hearing which she has now been able to provide to the employment tribunal.

171. I agree with the respondent, that even as at today's date it is not entirely clear what the expenditure was for. Even if it was accepted that the claimant paid for some items in cash, I conclude that there would have remained a genuine and reasonable concern about the provenance and accuracy of the invoice submitted by Miss Stout.

172. That explanation does not fully account for the differences between the invoice she submitted and the invoice provided by the hotel. Nor has the claimant been able to explain the basis of the amount which she claimed. Even on her best account there is still a basis for concluding that she had claimed for more than she

had spent and that the invoice she submitted was one which she herself had constructed.

173. The discrepancies on the face of the invoice provided by Miss Stout were peculiar and unexplained. I conclude that any reasonable chair would have been bound to find on the evidence before them, particularly bearing in mind the statements that would have been provided by Miss Borowski, that Miss Stout had fabricated the invoice.

174. I have taken into account that Miss Borowski would have maintained her view that the claimant had been dishonest and that she would have pointed out the discrepancies between the two invoices to any disciplinary chair. Further she would have given evidence of the investigations which she had undertaken, by speaking to the hotel and to the clients the claimant said that she had visited, and I conclude that her evidence would be persuasive in the absence of a full explanation from the claimant.

175. I am satisfied that even following a full and fair investigation and an impartial disciplinary process, the inevitable conclusion would have been that the claimant had not provided a satisfactory explanation and that therefore the allegation that she had committed gross misconduct in respect of the invoice alone would have been upheld.

176. I accept the evidence from both Miss Borowski and Mr Dain on behalf of the respondents that gross misconduct of this type would lead to a destruction of the necessary trust between employer and employee. I accept that this employer would treat any sort of fraud in respect of expenses, regardless of a previous clean record, as fundamental, particularly where there was no mitigation and no explanation and where expenses were part and parcel of the everyday work that the claimant was doing. I conclude that in this industry, in this company, where trust is so important, it was inevitable that the decision would be to dismiss.

177. I conclude that there is a 100% chance that this employer would have decided to dismiss this employee for gross misconduct, even though it was a first offence.

178. I therefore conclude that any compensatory award due to the claimant is reduced by 100%.

179. I have also considered whether it would be just and equitable to reduce the amount of the basic award, because of any consideration of the tribunal in respect of any conduct of the complainant before the dismissal in accordance with section 122 (2) of the Employment Rights Act 1996.

180. I have not made any finding about the conduct of the claimant before the dismissal such that it would be just I and equitable to reduce the amount accordingly. My finding is that on the basis of the evidence I have heard that following a fair process, this respondent would have concluded that this claimant had committed an act of gross misconduct. That is different to the tribunal considering and concluding that any conduct was such that it would be just and equitable to reduce the basic award.

181. the claimants conduct was not the reason for the lack of fairness in the process and I conclude that the claimant is entitled to a basic award, and make no reduction in respect of it.

182. However, I conclude that the claimant is not entitled to any compensatory award, including any compensatory award for the additional 2 weeks that the process would have taken, because of my findings in applying *Polkey,* above.

Remedy

183. The claimant is therefore awarded a basic award calculated as 1/2 weeks pay for each of 6 years employment. The current limit on a week's pay is £571 per week. The amount is paid gross.

184. On her claim form the claimant states that she was paid £3100.00 pcm gross. This is approx. £715.38 per week gross. The statutory minimum therefore applies.

185. The claimant is awarded a basic award of £5139.00.

Employment Judge Rayner
Dated: 07 June 2024

Sent to the parties on
28 June 2024 By Mr J McCormick

For the Tribunal

Note: Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless a written request is received from either party within 14 days of the sending of this record of the decision.