



EMPLOYMENT TRIBUNALS (SCOTLAND)
Case No: 4107133/2023

Held in Glasgow on 10, 11, 12, 13 and 14 June 2024

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Employment Judge M Robison

Ms J Tempany

**Claimant
Represented by
Mr I Burke
Solicitor**

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**The Board of Management of Forth Valley
College of Further and Higher Education**

**Respondent
Represented by
Mr S Miller
Solicitor Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for unfair dismissal is not well-founded. The claim is therefore dismissed.

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REASONS

1. The claimant lodged a claim with the Employment Tribunal on 23 November 2023 claiming unfair dismissal. The respondent entered a defence resisting the claim and lodged a counterclaim.
- 25 2. This claim relates to dismissal of the claimant following her secondment to an apprenticeship challenge project. The respondent asserts that the claimant was summarily dismissed on the grounds of gross misconduct and that dismissal in the circumstances was fair. During the course of the hearing the respondent advised that they did not insist on their counterclaim. Accordingly
30 the only issue for determination by the Tribunal was whether dismissal was fair or unfair.
3. At this final hearing, the Tribunal heard from the following witnesses for the respondent: Mrs Alison Stewart, vice principal of corporate affairs and finance and secretary to the board; Mrs Higgins-Rollo, vice principal learning and

student experience, who conducted the investigation; Mr Kenny MacInnes, principal and chief executive officer, disciplinary hearing chair; and Miss Lorna Dougall, board member, chair of audit committee and disciplinary appeal panel chair.

- 5 4. The Tribunal then heard evidence from the claimant and from Mr David Reid, third party external consultant engaged by the respondent.
5. Two joint volumes of productions were lodged with a further supplementary volume, totalling around 1,350 pages, lodged on the morning of the hearing. The claimant lodged documents relating to remedy during her evidence.

10 **Findings in fact**

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.
7. The respondent is a college of further and higher education with campuses in Falkirk, Alloa and Stirling.
- 15 8. The claimant was employed by the respondent from 26 March 2007 until her summary dismissal on 5 July 2023. Latterly her role was director of strategic partnerships and regional economy.
9. In early 2020, the respondent took the lead in setting up a project to deliver an apprenticeship challenge linked to the climate change conference, COP
20 26. Funding for the apprenticeship challenge was secured through Skills Development Scotland (SDS) and the Scottish Funding Council (SFC) by the then chair of the respondent's board, Mr Ross Martin. Primary responsibility for delivery of the project was delegated to the claimant in line with her role profile. The project became known as Fuel Change.
- 25 10. The claimant's line manager initially was Alison Stewart. Subsequently, following her secondment to the project, she reported directly to the then principal, Ken Thomson.
11. David Reid, a consultant who traded as Paradigm Futures Limited, was appointed and paid by the respondent to support the management of the

project. In or around July 2020, on the instruction of the respondent, Mr Reid registered a wholly-owned subsidiary of the respondent, with the intention that this subsidiary company, called Fuel Change Limited, would deliver the project on behalf of the respondent. The company never in fact traded but remained a dormant company with the trademark “Fuel Change” registered in its name. The delivery of the Fuel Change project therefore remained within Forth Valley College (FVC).

12. In or around November 2021 a further three years of public funding was secured for the project.
- 10 13. On 30 November 2021, Mr Thomson, Mrs Stewart and Mr Reid met formally to discuss operational issues, specifically how the project would be managed and what governance was needed to be put in place going forward. At that meeting it was recorded that it had been agreed that “income should not be processed through Paradigm Futures – all sales invoicing should be done through FVC”.
- 15 14. The three year grant was terminated earlier than originally intended due to national economic priorities. This meant that it was anticipated that the project would require to be wound up at the end of March 2023. The respondent did not wish to continue the project beyond that date.
- 20 15. The claimant and Mr Reid believed that the Fuel Change project could become a sustainable venture in the long term with private funding. The respondent agreed that the project could be transferred to Fuel Change Limited.
- 25 16. In September 2022, the claimant therefore proposed that shares in Fuel Change Limited be transferred to her and Mr Reid. The sale was accepted in principle at a price of £1 per share, and the agreement was due to be ratified by the respondent in November 2022. In October 2022, discussions commenced about the transfer of the project.
- 30 17. During the course of 2022, it became evident that there had been irregularities in relation to the governance of the project. Mrs Stewart was asked to do a

review of governance of the project and an explanation of how that had happened.

18. In November 2022, the annual procurement report went to the finance committee which reported that in relation to the relationship of the college with
5 Paradigm Futures Limited there had been non-compliant spend, in breach of the Public Contracts Scotland (PCS) procurement threshold of £50,000. It became clear that at the point at which Paradigm Futures Limited was appointed to do work on the project in May 2020 no procurement process was undertaken and as a result there was no contract between the respondent
10 and Paradigm Futures Limited.
19. Notwithstanding these irregularities, it was agreed that efforts to effect a smooth transition of the project to the claimant and Mr Reid would continue.
20. The respondent understood, having taken legal advice, that TUPE applied in regard to the claimant's transfer to the new entity. However the claimant and
15 Mr Reid disagreed. The legal advice to the respondent was that the transfer agreement could not be concluded until the TUPE situation was resolved. Although there had been attempts to agree matters by an intended transfer date of 31 January 2023, so that the new entity could participate in an apprenticeship challenge commencing February, that did not prove possible.
- 20 21. In February 2023 a paper went to the board for approval of the change in status of the Fuel Change project. The board was advised that discussions around the transfer of the project were challenging but that it was proposed that the claimant would exit under a voluntary resignation settlement agreement, which was subsequently approved by the board.
- 25 22. On 3 March 2023, Mrs Stewart wrote to SFC in regard to obtaining approval for the settlement agreement, when she required to explain project governance failures, in particular that spend had escalated over financial memo and PCS.
23. While working through the transfer agreement and the settlement agreement,
30 the respondent sought to set out the full financial picture as at the termination

of the project. This required an understanding of outstanding invoices with a view to undertaking a financial reconciliation up to the date of transfer. The arrangement was that the claimant and/or Mr Reid would advise the college what to invoice and the college would raise the invoice. Senga McKerr, finance director and Marie France, finance manager asked the claimant and Mr Reid on a number of occasions about outstanding invoices which they had been expecting to come into the college.

24. On 22 March 2023 at a meeting attended by Mrs Stewart, Mr Thomson, Ms McKerr, Mr Reid and the claimant, the claimant was advised that the lawyers for the college were seeking indemnities in regard to the disclosure of all information to the college on the termination of the respondent's involvement in the project. This was related to the reporting which the respondent required to do to SFC within six months of the conclusion of the project. At the meeting, Mrs Stewart confirmed that all charges and income should continue to be processed through FVC. She also asked about all income due to be collected and in particular about a grant of £26,000 from Grangemouth Future Industry Board (GFIB). There was some confusion at the meeting about whether this related to work done in the previous year. The claimant and Mr Reid gave the respondent to understand that this related to work for the following year, so would not be due to the college.

25. Given the lack of clarity about this income and the whereabouts of other income understood to be due to the college, it was not possible to meet the target date of 31 March 2023, so this moved to 21 April 2023.

26. On 13 April 2023, Mrs Stewart asked Mr Reid to submit details of all income collected and to be collected, and Mr Reid submitted a spreadsheet setting that out on 14 April 2023.

27. On 17 April 2023 Mrs Stewart, Ms McKerr and Ms France met to consider the spreadsheet. It was not clear to them from the spreadsheet where income due to the college had been placed. Mrs Stewart was concerned with a lack of transparency about income due to the college and that Paradigm Futures Limited was invoicing without the college's knowledge, contrary to the agreed

practice. Mrs Stewart expressed concern that the transactions could potentially be fraudulent. She had concerns about the GFIB grant which was included in the schedule. In discussions with Ms McKerr and Ms France, the claimant maintained that the GFIB grant was not due to the college.

5 28. A request was made for copies of all invoices raised and for bank statements of Paradigm Futures Limited to establish if any income due to the college had been paid to Paradigm Futures Limited.

29. On 17 April 2023 Ms France e-mailed Mr Reid requesting copies of all invoices raised, in response to which he advised (copying in the claimant) that
10 GFIB were still trying to work out how they wished to engage their investment.

30. Given Mrs Stewart's concerns, she asked permission from Kenny MacInnes, the incoming principal, to access the claimant's emails. Having taken legal advice and with the assistance of the head of information technology, she undertook a search of the claimant's e-mails.

15 31. During this search, Mrs Stewart found an e-mail relating to the GFIB grant which had been submitted by the claimant on 17 April 2023. This included an application for the grant which the claimant had signed confirming that the work had been done as at the end of 2022, and in respect of which she included a company number for payment. Mrs Stewart ascertained that this
20 related to a company called Fuel Change Futures Limited, which had been incorporated on 17 February 2023 with the claimant and Mr Reid as sole shareholders and directors. Mrs Stewart had not been aware of the existence of that company prior to that point.

32. It was also apparent to Mrs Stewart from reading the claimant's e-mails that
25 from November 2022 Mr Reid and Paradigm Futures Limited had started to raise manual invoices in the name of Fuel Change but referencing the bank details for Paradigm Futures Limited.

33. Mrs Stewart also became aware of an e-mail dated 8 January 2023 from Mr Reid to the claimant titled "FC cashflow" with an attachment named "true
30 cashflow Jan onwards.xlsx" in which he stated, "the attached is what I think

our real cashflow is and I have moved some income to when I think it will arrive. We have not been invoicing due to the issues and I am concerned Paradigm invoicing is either illegal or at best clandestine. However if the college invoice it could extend the project beyond 31st March and I cannot
5 imagine they want a tail. In a reasonable world we would say paradigm is invoicing and as this will be the modus operandi until FC Ltd is set up properly and trading”.

34. Mrs Stewart decided given her concerns that she should inform the interim chair Ms Trudie Chappie. She also decided that she should inform the
10 principal, but the outgoing principal, Mr Thomson, who was due to retire within a fortnight, was tied up in meetings. In any event Mrs Stewart was aware that he was heavily involved in the Fuel Change project. She accordingly decided to inform the incoming principal, Mr MacInnes.

35. The respondent took legal advice and a decision was made to apply the
15 college antifraud and anticorruption policy. That policy states that “following notification of suspected fraud, and after consultation with the Chair of the Audit Committee, the DCS or Principal will commence a full investigation into the allegations” and “as a general rule, either the College’s internal or external auditors will be asked to assist in the investigation and submit a report of their
20 findings to the Audit Committee”.

36. It was agreed, in consultation between Mrs Stewart, Ms Chappie, Mr
MacInnes and Mr Thomson, that there were sufficient grounds for an internal audit to be commissioned. Mr Thomson took the decision to suspend the project in line with the anti-fraud policy while that investigation was
25 undertaken.

37. An internal auditor report was produced dated 31 May 2023. The report found that the e-mail of 8 January 2023 represented “‘false representations by words, or writing or conduct’ and that there has been an ‘intention to deceive’ by not disclosing all of the income relating to Fuel Change activity.....[the
30 claimant] was aware of the discrepancy between the cashflow information shared with Senga McKerr on 8 January 2023 and the cash flow shared with

[the claimant] by David Reid less than half an hour later on 8 January 2023". The report went on to conclude that "because the amounts due to the College have not been lost the false representation and deception in withholding details of income due to the College has not been successful in gaining benefit or advantage, in that Fuel Change will not benefit as long as these amounts due are paid over to the College. Therefore a fraud is not present at this time because no financial loss has crystallised to date".

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38. The respondent's employee disciplinary and dismissal policy and procedure states that before any form of disciplinary action is taken or dismissal occurs the college will normally undertake an investigation. An investigating officer will be appointed, usually a manager from another department. Once the investigation is complete, the investigating officer will prepare a written report.

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39. Mr Thomson decided to suspend the claimant while an investigation took place into her actions in line with this policy. The claimant was therefore suspended on 24 April 2023.

40. Sarah Higgins-Rollo, vice principal learning and student experience, was appointed to investigate. She met with Mrs Stewart on 24 April 2023 to discuss the scope of the investigation. Mrs Stewart suggested areas for inquiry and provided documents (which she uploaded to a Teams page).

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41. Mrs Higgins-Rollo produced a report dated 2 June 2023. That report has 34 appendices. It records that the following people were interviewed as part of the investigation: Ms France, Ms McKerr, the claimant, Mrs Stewart, Mr Reid and Mr Thomson.

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42. It was recorded in the report that, from the initial interview and the initial review of evidence, five priority areas formed the basis of the investigation, namely:

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- a. the practice of PFL invoicing FC activities rather than FVC;
- b. discrepancy in cashflow reporting between FC/PFL employees and cash flow reported to FVC;
- c. the creation of Fuel Change Futures Ltd with the claimant and Mr Reid as directors;
- d. Zero Waste Scotland Fuel Change Contract; and

e. £26,000 grant offer for Grangemouth Net Zero Challenge project.

43. In regard to the second of these areas for inquiry, the report states that as financial audit did not fall within the scope of the investigation, an internal audit having been completed, accordingly the recommendation was taken no further because it was outwith scope.
44. In regard to the other areas of inquiry, after setting out the evidence collated relating to each area, a disciplinary hearing was recommended.
45. The respondent's employee disciplinary and dismissal policy and procedure states that once the investigation report is completed "the appropriate manager will take the decision if a disciplinary hearing is appropriate in the circumstances. Before a hearing is convened, the Manager, who would normally be the chair of the potential hearing, will review the investigatory report and associated evidence where appropriate. The manager will then decide whether they consider the alleged misconduct serious enough, and if there is sufficient evidence to take the case forward to a formal hearing".
46. On 8 June 2023, Mrs Higgins-Rollo sent a copy of the investigation report by e-mail to Mr MacInnes, who as principal was "the appropriate manager". On 11 June 2023, Mr MacInnes returned the report with an attachment called "investigation report final with KM formatting and clarification comments". He said "I have added some minor tracked changes, only related to how the report reads and flows, and also a number of comments related to formatting of points of clarity...it's your report and you can ignore the changed wording but the comments are more to do with formatting and points of clarification to make it easier for a lay person to follow". One of the comments reads, "I've added some words for strength of argument. Just a thought", which added a reference to the claimant's college role and remit and that the claimant was "not working in the college's best interests".
47. On 12 June 2023, Mrs Higgins-Rollo advised in an e-mail that she had made the requested changes. That version of the report included a copy of the internal audit report, sent to the HR director on 14 June 2023, who was

advised, "Kenny and I have had a discussion on the audit report and the investigation report. We both feel that it is right to include this and that it strengthens the disciplinary investigation". Some two and a half hours later, Mrs Higgins-Rollo e-mailed the report to Mr MacInnes and the HR director with the reference to the internal audit removed.

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48. By letter dated 15 June 2023, the claimant was advised that she was required to attend a disciplinary hearing in regard to allegations of misconduct following the investigation into a potential breach of trust and financial improprieties. The investigation had revealed that there was a case to answer in regard to the claimant's actions in the running of the project of Fuel Change, which it was alleged were significantly below that expected of a senior employee of the college; in particular in regard to:

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- you failed to support and protect the interests of your employer FVC through your complicity in improper invoicing practices undertaken by Paradigm Futures;
- you failed in your duty to disclose all income due to your employer and in turn risked potential financial loss to your employer;
- against the interests of FVC you created or alternatively were party to the creation of Fuel Change Futures Ltd and failed to get permission to use or act on behalf of this entity and did not disclose its use as method of receiving a grant payment that should have come through FVC;
- you failed in your obligation to serve the best interests of the college to bring potential funding opportunities to FVC (through your line manager) for consideration despite being aware of these opportunities.

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49. On 28 June 2023, Mrs Higgins-Rollo set out a list of questions in an e-mail for Mr MacInnes to ask at the investigation, which were additional to questions he had already identified.

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50. A disciplinary hearing took place on 29 June 2023, chaired by the principal, Mr MacInnes, with a note taker and HR adviser. The claimant was accompanied by her friend, Stuart Buchanan. Mrs Higgins-Rollo summarised

the key findings of her investigation. The claimant was given the opportunity to respond and to read out a statement.

51. The claimant was advised by letter dated 5 July 2023 that she was summarily dismissed effective 5 July 2023. That letter set out the reasons as follows:

5 “Although you have stated in your evidence that all income was shown on submitted spreadsheets, you did not highlight a change in a third party consultant’s invoicing practices and I conclude that this amounted to a failure to support and protect your employer’s interests. Invoicing practices for the Fuel Change project from its inception until November 2022 followed a process that was accepted by the College and Paradigm Futures Ltd with all
10 invoicing going through the College. From November 2022 this practice changed with Paradigm Futures Ltd invoicing for Fuel Change income.

As a result of your failure to highlight this change in invoicing practices your employer was left unsuspected to the receipt and location of income received for
15 a College project. Even after you had been given instructions by a member of the college’s SMT on 22 March 2023, that all invoicing had to be actioned through the College, you did not disclose the change in invoicing practices.

Further you failed to disclose that you deposited a cheque into a bank account not held by the College and that you were aware of other income invoiced and
20 received by Paradigm Futures Ltd. You did not inform your line manager of this. The college made repeated attempts in January, February and March 2023 to follow-up on outstanding income, yet during this period you failed to declare that Paradigm Futures Ltd had raised invoices for that income. Furthermore, you were sent an email by a third party where they identified
25 concerns that their invoicing practices were either illegal or at best clandestine. As a College employee, your responsibility should have been to immediately escalate this to your line manager. However, you did not do that. You accepted third party legal advice on invoicing practices of Paradigm Futures Ltd and did not escalate that to your line manager.

30 As an employee of the College you failed to seek permission from or disclose to your line manager that you and a third party had formed, and that you were

a director in, a new company with an almost identical name to the college project title. Your response that a new company was proposed by Paradigm Futures Ltd legal representation during a Teams meeting in December 2022, when discussing preparations to separate from the college, does not divest
5 you of your responsibility to inform your line manager that this new company had been created and registered two months later in February 2023. You failed to disclose you deposited a cheque in that company's bank account instead of the College's bank account and signed a grant letter for work already completed that designated this new company, instead of the College,
10 as the repository for this grant income.

Whilst it is recognised there were future challenges set to start in April 2023, the preparatory work undertaken for these challenges was invoiced by Paradigm Futures Ltd in February and March 2023. However the income related to this work was being directed outwith the college, potentially leaving
15 the college at a loss. In my view you failed to serve the best interests of the college by not making your line manager aware of these proposals and costs incurred at the time they occurred.

In reaching my conclusions I have considered your response to these allegations and the mitigation you presented. You maintain that there were
20 deep-rooted governance issues, which have contributed to this situation. While I agree that certain governance issues exist related to the Fuel Change project, they do not excuse or mitigate your actions or the resultant breach of your duty of fidelity to the college, as its project lead.

Your actions and your omissions in failing to inform your line manager of a
25 change in invoicing practices and the depositing of monies into bank accounts that the College was unaware of exposed the college to a potential financial loss.

In your senior role, demonstrating financial transparency and integrity is a central tenant of trust. Although a college employee, you put the interests of
30 a future opportunity before the interests of the college. In my view you failed

to act in the interests of Forth Valley College and this was a serious breach of your duty of fidelity towards your employer.

You mention in your defence that the Fuel Change project was a successful project and you delivered on the KPIs set by your line manager. This is not in question. However, in my view, as a Director of the College and the Project Lead you were the link and the overseer for the College. By failing to make your employer aware of decisions taken by Paradigm Futures Ltd and yourself, you did not protect the interests of the College.

I am also concerned that throughout the disciplinary hearing you did not demonstrate any acknowledgement that your actions and omissions placed the college at risk of financial loss”.

52. By letter dated 12 July 2023, the claimant intimated an appeal, although she stated that she did not seek reinstatement. She set out the reasons for her appeal as follows:

(i) Incomplete/inadequate investigation and effect on subsequent procedure: my view is that crucial evidence which I presented, and which discussed key issues has either been ignored or not properly considered. The timeline of the investigation starting in November 2022 ignores lots of context, which is relevant, and in my view has not been properly considered which has prejudiced the outcome. Moreover, incidents and comments are taken out of context, or have been looked at narrowly or in isolation, particularly given the broader pictures.

(ii) Ignorance of overarching governance issues: while there is a very brief acknowledgement of ongoing governance issues at FVC in the outcome letter, my view is that these issues have not been properly considered in relation to the allegations presented to me. My view is that I am a scapegoat for the over-arching governance problems and the issues that have been presented in the allegations against me seek to ignore clear and over-arching governance issues that are so intrinsically linked that ignoring them has prejudiced the outcome of the process to date.

(iii) Predetermined/unjustified outcome: given my view that key evidence has been ignored, and that the overarching issues around governance have not been addressed as part of the process, my view is that the outcome here was pre-determined and the conclusion that the allegations should be upheld unjustified. It is clear from papers and documents provided that my exit from FVC was already planned before this process began. For these reasons my dismissal is procedurally and substantively unfair.

53. On 3 August 2023, the claimant's appeal was heard by Lorna Dougall, vice-chair of the board, along with Liam McCabe, board member. The claimant was again accompanied by her friend, Mr Buchanan. Notes were taken. During the appeal hearing, the claimant read out a statement.

54. Following the appeal hearing, the claimant received additional information on 3 and 10 August 2023 from the chair and she submitted additional information on 7 and 14 August 2023.

55. By letter dated 24 August 2023, the claimant was advised that the original sanction of dismissal was upheld.

56. In response to the first ground of appeal referencing failings in governance, it was stated that "the disciplinary investigation was instigated due to invoicing irregularities and was not related to the procurement breach. When asked at the Appeal meeting to directly link the governance failures to the issues directly relating to your dismissal you did not respond. You later provided a response including the longer time line but with no link between the governance issues you had identified and your own behaviour which had led to the disciplinary investigation. While I acknowledge that there were governance issues for some time during the running of this project, I find that the large amounts of information provided to both the investigation and to the Appeal Panel do not explain your conduct, which fell short of the requirements as the College Director lead. In more specific terms, why monies were paid into accounts which the College did not know about, why a bank account to

which you had access received payments which were due to the college or why these issues were not disclosed to the College”.

57. In response to the second ground of appeal, it is stated that: “while you did not set the overall governance framework, by virtue of your [senior] role, you had responsibility for aspects of governance in the way you carried out your duties. When asked at the Appeal Hearing about your understanding of the term governance, you were clear that in your view you did not have any responsibility for the governance of the Fuel Change Project....Given your length of service with the College and your regular access to the Principal and other colleagues, it is not clear why the change to invoicing practices after the agreement to transfer Fuel Change was not discussed with them. It is not clear why the College was not made aware of the formation of the new company “Fuel Change Futures Limited” which was incorporated on 17 February 2023 and you and David Reid as shareholders and directors and that bank details of this company were provided to the Scottish Government on 30 March 2023 in order to receive payments from Scottish Government or its agencies. I note that you stated that the Principal was only concerned with Key Performance Indicators and was delighted the project was going so well, but such fundamental change should have been brought to his attention by you as a senior staff member”.

58. In regard to ground 3, it is stated that it was known that she was working towards exiting the college to work for the spin off company, and while it had been agreed that would be effected through a settlement agreement, “when the final financial reconciliation took place (this was a condition of the transfer of Fuel Change to the new company) issues were identified with invoicing and receipt of monies. At this point the internal auditor was asked to investigate and the transfer of both Fuel Change and your own exit from the College halted and eventually stopped. The disciplinary investigation did not make reference to the internal auditor report, however you submitted this report in full to the Appeal Panel. Having considered the information submitted we do not consider that over-arching governance issues were ignored but that their relevance to mitigating your behaviour could not be established. We do not

find any evidence that the outcome of the disciplinary hearing was pre-determined.... you were at pains to impress upon the Appeal Panel that fraud, in terms loss of income to the College was not established due to final payments of monies being made by the deadline. However, in the full Internal Auditor Report, it is clear that the intention to deceive was established.....”

Relevant law

59. Section 98(1) the Employment Rights Act 1996 (ERA) provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within s.98(2). Conduct is one of these potentially fair reasons for dismissal.
60. Section 98(4) provides that where the employer has shown a potentially fair reason for dismissal, the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.
61. In a dismissal for misconduct, in *British Homes Stores Ltd v Burchell* [1980] ICR 303 the EAT held that the employer must show that: he believed the employee was guilty of misconduct; he had in his mind reasonable grounds upon which to sustain that belief, and at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
62. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses (*Iceland Frozen Foods Ltd –v- Jones* [1982] IRLR 439). The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached (*Sainsbury v Hitt* 2003 IRLR 23).

Tribunal's deliberations and decision

- 5 63. Although the factual backdrop to this case is quite complex, it is in fact a straightforward case of unfair dismissal given that the counter claim was not pursued. Further, I came to the view in any event that there was actually little if any dispute about the material facts. Rather as is often the case, the case turned on a different interpretation of events.
- 10 64. In a case where the reason for the dismissal is misconduct, as noted above, the Tribunal must apply the Burchell test. The first limb of the Burchell test requires the employer to show that they believed that the employee was guilty of misconduct. As I understood it, it was accepted that the claimant was dismissed for misconduct and that is a potentially fair reason for dismissal.
- 15 65. In cases where the reason for dismissal is stated to be misconduct, I am enjoined to consider the other limbs of the Burchell test, specifically whether, after a reasonable investigation, the respondent had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct. Both the investigation and the decision to dismiss must fall within the range of reasonable responses open to the employer if the dismissal is to be found fair. The question is whether it was reasonable in all the
20 circumstances for the respondent to dismiss the claimant for misconduct, and not whether this Tribunal would have dismissed the claimant in these circumstances.
- 25 66. Mr Burke's central argument in submissions was that the decision maker in this case lacked the necessary impartiality for the Tribunal to be satisfied that dismissal fell within the range of reasonable responses open to the respondent. He referenced in particular another decision of the employment tribunal in the case of *Dibnah v Craigclowan School* ET Case no. 4103114/23. In that case the Tribunal found that the decision-maker had been involved in
30 both the investigation of the allegations and the conduct of the disciplinary hearing, which the Tribunal found fell short of the objective standards of the reasonable employer. The Tribunal found that this did not satisfy the requirement for "as much investigation into the matter as was reasonable in

all the circumstances of the case”. In that case, the decision-maker having involved herself to a significant degree in the investigation, lacked the necessary degree of impartiality to conduct a fair disciplinary hearing.

5 67. That is of course the decision of another employment tribunal but in any event it is clearly distinguishable on its facts, not least because no investigation was apparently carried out in that case, at least not by a person other than the decision maker.

10 68. That did not happen here. Nonetheless, in considering whether there was as much investigation into the matter as was reasonable, I considered whether because of Mr MacInnes’ involvement at the investigation stage, he could be said to lack the necessary degree of impartiality to conduct a fair disciplinary hearing.

Investigation

15 69. In submissions, Mr Burke raised particular concerns about Mr MacInnes’ involvement prior to the investigation, as well as his involvement in finalising the report. He argued that Mr MacInnes was at least party to the decision to suspend the claimant and to conduct an internal investigation, as well as to instruct an internal audit. He pointed out that Mr MacInnes was at the board meeting when this matter was discussed and decisions were made to take matters forward. Mr Burke asserted that the outcome had been pre-judged and that it would not be possible for Mr MacInnes to “unhear” what he had heard which was suggestive of the claimant’s guilt.

25 70. Mr Burke raised concerns about correspondence between Mr MacInnes and Mrs Higgins-Rollo, given that Mr MacInnes had reviewed the investigation report and made amendments to it. He was concerned in particular about comments Mr MacInnes made where he said that he had “added some words for strength of argument”, and other references to strengthening the report. He did not accept the witnesses explanations as plausible and submitted that it could only mean to strengthen the allegations against the claimant.

71. He suggested that Mr MacInnes's position and the investigation report were further compromised because it is clear from the e-mail correspondence between him and Mrs Higgins-Rollo that he was doing more than simply reviewing the report. In regard to the change of position relating to the
5 auditors' report, Mrs Higgins-Rollo said that she and Mr MacInnes discussed the auditors' report and they both initially believed it should be included because it "strengthens the disciplinary investigation" report. However, although Mrs Higgins-Rollo had said that she had reconsidered that over several days, in fact within two and a half hours she had done a complete
10 about turn and decided that it should not after all be included. Mr Burke submitted her assertions that she had made that decision herself were unconvincing and asked the Tribunal to infer from this that someone told her that she had to take it out.
72. Mrs Higgins-Rollo gave Mr MacInnes a list of questions to ask at the
15 disciplinary hearing. He said that this was in response to him asking her to check the questions he intended to ask, but that communication is not lodged.
73. Mr Burke pointed out that when the ET1 was originally drafted the claimant
20 did not know about the exchange between them because she was only made aware of this correspondence through disclosure. This, he argued, ties in with her position that she had always felt that there was something unfair about the process but she did not know what. This disclosure shows that there was a concerted effort to prove her guilt whether this was to save the severance pay or to cover up for Mrs Stewart's failings of governance. Both Mr MacInnes and Miss Dougall were clear in evidence that they would have expected a
25 senior officer to have addressed those failings. While that does not absolve the claimant as a senior director, the claimant said that when she saw that those more senior were not doing anything about these governance failings, she thought that there was nothing to worry about. Further, she assumed the company was going to be activated, but it was only after concerns were raised
30 by the finance committee that the tone changed and that these failings very rapidly became a real issue.

74. Mr Burke also argued that the process is tainted by the involvement of Mrs Stewart, who set the time lines for the investigation and identified the areas to be investigated after she had met with Mr Thomson and Ms Craggs. Further, although she states that she was simply setting up a Teams page with documents for the investigation, he argued that the evidence indicates she did more than that because she prepared a paper for the board and was aware that the auditor's report referencing deceit. All this was discussed at a meeting which Mr MacInnes and the appeal panel members attended when significant concerns were discussed and the outcome was a referral to the police. Mr MacInnes having been made aware of this could not be impartial.
75. In submissions Mr Miller submitted with regard in particular to Mr MacInnes' role in commenting on the investigation report, that this was largely to correct typographical errors and to provide further clarification, mainly to add the year that events occurred.
76. Relying on the Acas disciplinary and grievance code of practice, and the respondent's disciplinary policy, he argued that Mr MacInnes's involvement was not improper. The policy states that the disciplinary chair should review the investigation report, which is what Mr MacInnes did, bearing in mind he is an academic who will have a particular view of what "review" means. He submitted that the disciplinary chair would be expected to review the report in order to frame the charges for the disciplinary, so that the claimant has fair notice of the claims which she has to answer.
77. Mr Miller's position was that the only controversial comment was the reference to strengthening the report which it was suggested was to build a case against the claimant. He asked the Tribunal to accept Mr MacInnes' evidence that this was to tie up the comments to comments earlier in the report.
78. Mr Miller also relied on the Acas code in regard to the provisions which direct that if possible in misconduct cases different people should carry out the investigation and the disciplinary hearing. This, he submitted, was what happened in this case. The fact of Mr MacInnes' involvement and proposals

for changes to the report is not suggestive of him having combined those roles, or having interfered inappropriately with the investigation.

5 79. Mr Miller also addressed concerns which had been raised about the way areas were investigated. When the claimant was asked about what aspect of the investigation she thought was unfair, she raised concern in particular about the fact that the parameters of the investigation were set by Mrs Stewart who, she claimed, had deliberately excluded events prior to November 2022. That was not in fact put to Mrs Stewart, but her explanation that she had already produced a time line to November 2022 for the grievance clearly explained the omission.

10 80. He submitted that Mrs Higgins-Rollo's paperwork backs up a painstaking and objective report, and she should be commended for her approach to the investigation and for completing it in five weeks.

15 81. Taking account of these submissions, I gave consideration to whether Mr MacInnes' interventions prior to the disciplinary hearing were such that he could not be said to be impartial. I noted that he had liaised with Mrs Stewart and Ms Chappie at the outset, had been party to the decision to suspend, and was involved in meetings when matters were initially reported to the board. Given that he was the incoming principal, which meant he would chair the disciplinary hearing, I did not consider that any involvement in decisions to suspend the claimant and to instruct an auditor's report would mean that he could not be impartial. That was not least because this was simply following college policies. It was Mr Thomson who approved the step of Mrs Stewart searching the claimant's emails after she grew suspicious, and it was Mrs Stewart who gathered data which was cause for concern. Mrs Stewart was not party to the decision-making process.

20 25 30 82. I also took account of the fact that it was expected and clearly entirely appropriate for a disciplinary chair to consider a report and its recommendations in order to assess whether it should be taken to the next stage. It might not normally be the case that an investigation report would be "reviewed" at that level of detail, but I was aware that Mr MacInnes had

stressed that it was Mrs Higgins-Rollo's report and also agreed that the corrections were largely for clarity and consistency.

- 5 83. With regard to the comment which caused particular concern, and related to strengthening the conclusion, I accepted Mr MacInnes' evidence that it was to link that conclusion with conclusions made throughout the report. In any event I did not accept that the use of the word strengthening here self evidently equates to an attempt to strengthen the case against the claimant, rather than the report itself.
- 10 84. With regard to the controversy over the inclusion of the audit report, it was apparent that there was a discussion about whether to include it or not. This was clearly a dilemma for Mrs Higgins-Rollo and she did consult Mr MacInnes about it. However, I accepted that she made the decision ultimately that it should not be included, given the scope of her investigation and the fact that it was separate from the financial audit. Given what it references about deceit, 15 it might be assumed that it was in the claimant's interests for that report not to be included. Indeed it was the claimant herself who submitted it for the appeal, all decision-makers including the investigation officer being of the view that it was not directly relevant to the matters being explored.
- 20 85. I came to the view that Mr MacInnes's involvement in the investigation report was in accordance with college policy in regard to the role of the disciplinary chair, and in line with standard practice to determine the charges to be alleged. The amendments he made to the report, de minimis in the main, did not mean that he was incapable of being impartial when it came to chairing the disciplinary hearing. This certainly did not mean that the investigation was 25 tainted such that it could be said that the respondent had not carried out as much investigation as was reasonable.
- 30 86. I concluded that there was no inappropriate interference with the investigation report, and that the investigation was thorough and the report comprehensive, not least because it included 34 appendices attaching the documents relied on to support the recommendation.

Conduct of the disciplinary hearing

87. In submissions, Mr Burke was particularly critical of failings on the part of Mr MacInnes in the way he conducted the disciplinary hearing. His position was that Mr MacInnes had focused on what had happened, but neither he nor anyone else throughout the disciplinary process had asked the claimant why this had happened. Mr Burke argued that had Mr MacInnes asked why it was happening then he would have got an explanation which confirmed that the claimant was not dishonest.
88. In particular, the circumstances are explained by the fact that the claimant and Mr Reid had to be in a position to transition from the public sector project to the private sector company, and the claimant's employment would otherwise come to an end. The college had full sight of all of the transactions. He relied on the fact that Mr Thomson in his statement taken for the investigation (which he put to Mr MacInnes in evidence) had said that "all of the money coming in whilst the Fuel Change project was running should have gone through the college whether this was directly or indirectly via Paradigm". Although Mr Thomson denied giving permission to change the invoicing practice, it was clear that he knew money was going to Paradigm and that it would be reconciled, which is what happened. With regard to GFIB, while there was some confusion about it as identified on the spreadsheet, the claimant had clearly identified it as project money and the only reason it went into the Fuel Change Futures Ltd account was that was the only way GFIB were prepared to pay it otherwise the college would not have got its money. It was acknowledged that the work had been done and it was included in the spreadsheet that Mr Reid had shared with the college.
89. Mr Burke argued that there was a failure to ask the claimant why payments went to Fuel Change for which there was a good explanation. The claimant was doing the best job she could in compromising circumstances, and she even brought opportunities for investment to the college which the college.
90. Mr Burke submitted that Mr MacInnes had ignored exculpatory evidence of Mr Thomson. In particular, he knew about the invoicing practices and that they

were not hiding any money since Mr Thomson had been given all that he had asked for. Further he failed to take into account the statement of Ms McKerr, the finance director who dealt throughout with the financial aspects of the project, that she did not believe the claimant or Mr Reid to be dishonest. Mr
5 MacInnes ignored or disregarded this is because he was lacking impartiality because of his earlier involvement.

91. In considering these submissions, I was aware that Mr Burke put forward a convincing and potentially innocent explanation for the claimant's actions in the way that he presented the claimant's case. I noted and took account of
10 the claimant's explanation in evidence when Mr Burke put to the claimant in terms the specifics of the allegations and sought her response. In regard for example to a question about the setting up of the new company, she said that she did not believe she had to tell them because it had been explained by Mr Reid's lawyer and because it related to work after the end of the project. When
15 asked by Mr Burke whether she had put that forward to Mr MacInnes, her answer was "I don't think I was directly asked in that way". While Mr Burke quite successfully enabled the claimant to present a plausible explanation for her conduct during evidence, it was apparent that the claimant had failed to make that explanation clear to the respondent during the disciplinary hearing.

20 92. What this does not explain, is why the claimant did not take the initiative when she had the opportunity to do so at the disciplinary hearing to give the reasons why she had acted as she did. After all, the role of this Tribunal is to consider whether the respondent acted within the range of reasonable responses, not whether or not this Tribunal would have dismissed in the circumstances.

25 93. Whether it was because she was being deliberately obtuse, or she genuinely did not appreciate understand how best to present her case, I came to the view that the claimant had failed to explain to the respondent that there was an innocent explanation for her actions. This was based on a consideration of what was said at the disciplinary meeting, or rather what was not said.

30 94. In the notes on the discussion of the change in practice of Paradigm Futures Ltd invoicing Fuel Change activities rather than FVC, at no point does the

claimant actually say, let alone stress, that she had assumed/understood that Mr Thomson knew and that he had told the college. As I understand this was what she relied on in this hearing in regard to that allegation.

5 95. On the issue about the creation of the company Fuel Change Futures Ltd, the claimant appears to have made an assumption that because Mr Flint (Mr Reid's lawyer) had mentioned the creation of a company at a meeting on 21 December 2022, when Mrs Stewart and Ms McKerr were present, that explains why she had not felt the need to advise the college of its incorporation. Mrs Higgins-Rollo is noted to have said during the disciplinary hearing that she would have expected the claimant to have notified not only 10 Mr Thomson but also Mrs Stewart, Ms McKerr and Ms France that had actually happened and that a cheque had been deposited into the bank account of the new company. The claimant is noted as replying that "SH was entitled to her perspective but stated that all the money was known about and 15 all income was declared in the spreadsheets that were sent". She does not take the opportunity to explain why she did not believe it was necessary to inform the college about the creation of that new company.

20 96. In regard to the specific concerns around the Zero Waste Scotland Fuel Change Contract, and in particular the failure of the claimant to offer this as a funding opportunity, she advised that this was for future work after transfer. However, in response to being informed that Mr Thomson was not aware of the planned contract, she does not suggest that she should have told him about it but says she assumed it would happen after the planned transfer.

25 97. With regard to the grant offer, while the claimant states that there was a clear misunderstanding, she is not recorded as having given a clear explanation about the grant, suggesting that there was confusion over what £26,000 was being referred to and that it was a bone of contention where this money would land and that GFIB wanted to pay Fuel Change directly. She did not explain why she did not tell them before the money was put into the Fuel Change 30 Futures Limited bank account that they needed to place it there given GFIB's instructions. Nor did she explain what might be meant by "they are working out how they wish to engage their investment" at a point in time when they

confirmed that the work had been done and returned the grant letter. She only stated that “there was never a point where the money was not declared”, but that was not the focus of any of the allegations, not least because the audit report had make it clear that there was no financial loss to the college as a result of the claimant’s actions.

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98. When asked about mitigating factors, the claimant focused on the lack of reference to failures of governance which she argued meant that the investigation was fundamentally flawed. The claimant appeared to seek to deflect from the specifics by focusing on the governance issues. She did not however explain how these failures of governance were related to the actions/allegations. In so doing, she failed to present her defence in a convincing way at the disciplinary hearing. It is otherwise apparent that the claimant was not being blamed for the failures of governance, and the reason for the claimant’s dismissal was nothing to do with those failures of governance.

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99. Even if the claimant’s actions are now accepted as having a plausible explanation, the claimant at the very least failed during the disciplinary hearing to properly explain her position and the rationale for her actions. Given what was at stake however, it does not make sense that the claimant would wait to be asked before she put forward an explanation that might exculpate her. Even if I accept that Mr MacInnes failed to press her on why she did what she did, I could not say that failure rendered the process unreasonable, since the claimant has a responsibility to present her own defence when she is given the opportunity to do so.

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100. Given the information which had upon which to base his decision, I could not say that the decision of Mr MacInnes fell outwith the range of reasonable responses open to an employer.

Appeal

101. Notwithstanding, the claimant got another opportunity to put her case during the appeal hearing, when he claimant was given the opportunity to read from a pre-prepared statement.

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102. If, for the sake of argument, I were to accept everything presented by the claimant about what happened in regard to governance and the time line of events, still the claimant did not give her answer to the specific allegations which are made against her. This was despite the clear opportunities given to her at the appeal (and indeed after the hearing) to explain the link between the failures of governance which she relied on and the specific allegations made against her.
103. However, as recorded in the outcome letter, when Miss Dougall states that she specifically asked the claimant to directly link the governance failures to the issues directly relating to her dismissal and it is stated that she did not respond. That was not challenged so I have to assume that is correct. That being the case, not least when she states in her grounds of appeal that they are “inextricably linked”, it is apparent that she did not take that opportunity to explain the link as she saw it. Perhaps more importantly nor did she take the opportunity to set out her defence to the specific allegations made against her, in regard for example to the change in practice of the invoices, the setting up of a new company without telling anyone at the college or the position with the GFIB grant.
104. Her failures are well illustrated by considering the specific allegation relating to the change of invoicing practices. Her position is that Mr Thomson was aware of this but she did not stress this in the appeal hearing. Having ascertained that Mr Thomson said that he did not recognise the phrase parallel tracks of income or give permission for the invoice practice to change, this is barely mentioned at the appeal. The claimant apparently did not make any effort to show that her alternative understanding about that was correct.
105. The accusations she was facing were after all very serious and she does not appear to have helped herself in the way that she presented her defence.
106. Instead, it appears that the claimant focussed on blaming others, particularly Mrs Stewart, for failures in governance, to the exclusion of focusing on her own defence. Even if it is accepted that there were extensive failures of governance in regard to this project, and accepting that none of those failures

could be laid at the door of the claimant, she was never able to explain why those failures were linked to the allegations made, or specifically how they could exculpate her in regard to the specific allegations.

5 107. It was clear that both Miss Dougall and Mr Liam McCabe found the exact relevance of the bigger picture to the specific reasons for the claimant's dismissal difficult to marry. Indeed it is noted that the claimant said, "if LD wanted her to get down into detail and operational minutia then she didn't think this was correct". To the extent that she genuinely did not believe that she needed to respond with detail relating to the specific allegations, then it
10 seems to me that she seriously misjudged the situation. It is clear to that Miss Dougall was rightly asking for more detail "so that they could understand where the broad context was appropriate for each reason for her dismissal". Yet the claimant replies that she didn't understand what they didn't understand. If it is accepted that there was no deliberate attempt to obfuscate,
15 then the claimant has unfortunately seriously misunderstood what she was there to do, which is quite inexplicable.

108. Accordingly, it cannot be said, if this was being argued, that anything done at or after the appeal hearing could render an otherwise fair dismissal unreasonable or unfair.

20 **Conclusion**

109. I therefore conclude that the decision made by the respondent did not fall outwith the range of reasonable responses open to them, and accordingly that dismissal in the circumstances was fair, and this claim must be dismissed.

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M Robison
Employment Judge

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25 July 2024
Date of Judgment

Date sent to parties

26 July 2024