



EMPLOYMENT TRIBUNALS

Claimant: Mr Timothy Knibbs

Respondent: Openreach Limited

Heard at: London Central (by CVP) **On:** 15 & 16 May; 30 July; 1 August 2024; 7 January 2025

Before: Employment Judge Professor A C Neal

Appearances

Claimant: Ms S Bewley (Counsel)

Respondent: Ms A Jervis (Counsel)

JUDGMENT

- (1) The Claimant's claim alleging unfair dismissal by the Respondent is dismissed.
- (2) The Claimant's claim alleging breach of contract is dismissed.

REASONS

Background

1. By a Claim Form ET1 presented on 2 January 2024 the Claimant brings two claims alleging (1) unfair dismissal and (2) breach of contract (notice money).
2. The initial hearing took place over two days in May 2024, following which an additional two days were listed at the end of July and beginning of August. While every effort was made to complete the hearing by the end of Day 4, the lateness of the hour led to a "rushed" conclusion to the hearing day. Following discussion between Counsel for the respective parties and the Employment Judge it was agreed that a final day should be listed for Monday 19 August 2024. The Employment Judge notes that both Counsel made adjustments to their personal as well as their professional diaries in

order to ensure as speedy a disposal of the matter as possible. The Employment Judge places on record his appreciation of the high level of co-operation displayed by the parties and their representatives to that end.

3. Unfortunately, as was notified to the parties, events then ensued which took matters out of the hands of the parties and which necessitated the intended final listing day being vacated. In particular, the Employment Judge was taken ill and underwent emergency surgery in hospital – making it impossible for him to sit as anticipated.

4. Eventually, following the Employment Judge's return to health, correspondence between the Tribunal and the representatives of the parties led to agreement that the Employment Judge should reserve his decision and that, on the basis of the evidence and submissions already made by the end of Day 4, a judgment with reasons should be promulgated forthwith. This judgment has been drawn up on the basis of that agreement and the Employment Judge places on record both his appreciation of the understanding shown by all concerned in relation to the events which unfolded in the Autumn and his apologies to the parties for the inevitable inconvenience to which those events have given rise.

Conduct of the Proceedings

5. The Claimant gave evidence under oath on the basis of a prepared witness statement and was subjected to cross-examination as well as supplementary questioning from the Tribunal.

6. Evidence was given on behalf of the Respondent by Mr Ed Wilson and Mr Harry Higgins. Both witnesses gave evidence on the basis of prepared witness statements and were cross-examined in relation to that evidence.

7. Reference was made from time to time to documentation contained in an initial trial bundle (running to 486 pages) produced by the parties together with supplementary documents expanding the bundle to a total of 675 pages.

Primary Findings of Fact

8. In the light of the oral and documentary evidence produced to the Tribunal the following primary findings of fact have been made:

- (1) The Respondent is a nationally known actor in the telecommunications sector. It has a significant workforce and operates with substantial HR resources.
- (2) The Claimant commenced employment with the Respondent on 15 December 1997. He was originally employed as a "telecoms engineer", after which he progressed into a "manager" role in 2013. In 2020 he became a "Patch Lead" which was the position that he held until the termination of his employment at the time of the events which have given rise to this litigation.
- (3) The Respondent operates a procedure known as "Speak Up" which is intended to facilitate (anonymised) disclosure of allegations or concerns arising within the workplace – a species of "whistleblowing" procedure. The Respondent describes

the “Speak Up” procedure as being “a confidential hotline, where employees can share concerns or suspicions related to ethical or compliance related wrongdoing such as discrimination and bullying and harassment”.

- (4) Within the framework of the “Speak Up” procedure, an email was sent on 23 November 2022 to five members of the Respondent organisation making various allegations about the conduct of the Claimant and others. [B/60-61]. The communication, which was sent anonymously, was set out in the following terms:

I am sending this anonymously as I was bullied by these people so much so that I have now left and moved away as they made my life a misery.

This is after a lot of thinking and deciding that what this person does is wrong.

Tim Knibbs is a patch lead on BVK556. He runs the team using the managers log in. He pins all the work decides who is being loaned out and allocates overtime to his closest allies.

If your not in his click he makes your life a misery and allocates all the difficult jobs to you. If your in his little group then you will be looked after working local and given easy tasks to make you look good.

He also claims and dishes out overtime even when not leaving home. Examples of this are on Saturdays and Sundays when they work off the books.

One example recently worth a look is the weekend of the French air traffic control strike weekend of 23/8-24/9. A patch lead was stuck in Italy and wanted to work the Saturday but obviously couldn't. Tim may have put hours in for this person even though he wasn't in the country. The time sheets for Knibbs, Tiller and Bovell are well worth a look as they brag about how much they earn whilst sitting at home or the pub. They can be regularly found in the Beehive pub or nearby pubs sitting on jobs drinking from early afternoon.

There is a lot of cannabis being smoked whilst at work by Tiller and Bovell who are often high and can hardly speak but still driving and working.

Tim doesn't do this he's too clever for that but the amount he earns is outrageous. He allocates pair proves that never get done and dummy jobs to cover themselves. The managers he works for become reliant on him as he makes their job easy and then he can manipulate the work and make themselves look good.

He is a bully and people are actually frightened off him and won't say anything. Wherever he's worked he's left engineers with MH issues due to his bullying tactics. He also orders equipment on the managers profile that he then takes and either sells or gives to family.

This man is a disgrace to Openreach and not what the company is about.

He needs to be disciplined for what he does and either sacked or moved away from his empire. He knows that ultimately the manager will take the rap for a lot of it as he knows a lot of what is going on.

Some of the van trackers may be off or not working properly as they seem to go where they want. I know Tim knows how to do this. He recently ordered a bulk of ad blu which his van does not require. Weird.

I can come up with at least 18 people who this man had bullied and are living with fear of this man.

There are many more if you gave people a chance to talk anonymously who would tell you the same.

I was with the company a long time and this man wherever he crops up is trouble. He even keeps the ID of engineers he's sacked in his draw and shows them to new recruits and brags. He is currently building a team of impressionable youngsters so that he continues his rule.

I'm sure he will throw his so called mates under the bus to protect himself.

I hope you look into this man before he does any more damage. It's up to you now whether a few targets are more important than the engineers he torments.

During lockdown at Christmas 2021 he was allocating hours to himself, Dave Tiller and Joe O'Donnell. They were bragging about taking home over £5000 for a couple of months when in fact they were hardly at work.

There is so much regarding this man that most know about but allow it to happen because he makes the team figures look good. If this is what the company is about then fair enough but if you want a productive happy work force then people like these need getting rid of.

This may seem like sour grapes but I assure you that is not the case. They are scamming your business out of thousands of pounds and are corrupt and bullies.

- (5) The allegations contained in the anonymous communication were processed through the “Speak Up” procedure, with a formal complaint being raised against the Claimant and other colleagues on 30 November 2022. In order to further the investigation into the allegations BT Security were asked to look into the various matters and on 16 December 2022 Mr Christopher Norton (a Senior Manager) was appointed as the Investigations Manager. The Tribunal was shown the relevant procedures relied upon by the Respondent: in particular, their “Disciplinary Policy” [B/43-45] and their “Disciplinary Procedure” [B/46-58] – noting that the electronic versions of those documents include links to a number of more detailed supplementary documents [see, in particular, the links at B/45].
- (6) The internal investigation was eventually completed in May 2022, having looked into the conduct of the Claimant during the period November 2022 – May 2023. Once that investigation had been concluded the Claimant was called to attend what was described as “a fact find meeting” on 10 May 2023. A note was produced of that meeting, at which the Claimant was accompanied by his CWU trade union representative (Ms Sharon Turner) [B/197-200].
- (7) In the wake of that meeting Christopher Norton wrote to the Claimant informing him that he was to be suspended forthwith “whilst investigations are carried out into the allegations of misconduct regarding your behaviour in the workplace” [B/201-202]. The reason for the suspension was stated as being “to make sure that the integrity of the investigation is protected and to protect the business”.
- (8) A “Closing Report” was then prepared by Mr Dave Reynolds (described as Investigation Specialist BT Security Corporate Investigations) and dated 17 May 2023 [B/203-215]. This report was then discussed in a meeting between Mr Reynolds and Mr Richard Kirchin on 19 May 2023, a transcript of which has been presented to the Tribunal [B/216-242].
- (9) On 25 July 2023 the Claimant was invited to a disciplinary hearing which was scheduled to take place on 10 August 2023. The invitation [B/263-5], which was sent by recorded delivery, set out the position in terms that:

The allegations

I'm writing to let you know that the Company has now carried out its investigations relating to your conduct and specifically:-

Serious / Breach of our Standards of behaviour policy - Failure to follow process, policy or procedure. Between November 2022 and March 2023 you have:

Falsified timesheets for personal gain
Created/Utilised estimate numbers to book hours to with no work completed
Used your managers log in details to access and utilise allocation systems
Allocated already completed tasks to yourself and colleagues

Bullied team members with threats of dismissal sharing previous dismissal cases as evidence of what could happen

- (10) The scheduled disciplinary meeting duly took place on 10 August 2023 and was conducted by Mr Edward Wilson, who gave oral evidence to the Tribunal and was subjected to cross-examination of his evidence. A transcript of that meeting was produced [B/267-333], the content of which was not put in issue between the parties. That record showed the meeting being commenced at 0900 and being brought to a close at 1107.
- (11) Mr Wilson gave evidence confirming what documentation had been produced for the Claimant, and observed that, during the course of the disciplinary hearing, "...the Claimant never contested the evidence and only provided excuses as to why he had done the things he had done. He showed no remorse throughout."
- (12) Following completion of the disciplinary hearing, Mr Wilson made a decision that the Claimant should be summarily dismissed. That decision was communicated to the Claimant in a letter dated 24 August 2023, which set out the "Rationale" for the decision and also informed the Claimant of his right to appeal [B/348-357]. That "Rationale" was set out in the following terms:

Conclusion: Charges Proven

Having reviewed and considered all of the information provided to me for this case including the original investigation and associated documents from yourself, your peers and your management chain as well as the statements made in your hearing I have concluded that you have

- Falsified timesheets for personal gain
- Created/Utilised estimate numbers to book hours to with no work completed
- Used your managers log in details to access and utilise allocation systems
- Allocated already completed tasks to yourself and colleagues

I have also concluded that there is no evidence that you have

- Bullied team members with threats of dismissal sharing previous dismissal cases as evidence of what could happen

In your role as a patch lead you have been entrusted by your line manager with his log in details with the purpose of allocating work and reducing the tails position. This is a clear breach of policy by you and your manager and it is unacceptable that you have accessed the systems to do this using his log on details. You have then used this position of trust to create a culture of deceitful and fraudulent weekend activity with a group of engineers to inflate overtime payments for work carried out by using repeated job numbers, which were often already completed, or spurious job numbers to book hours to whilst yourself and your colleagues were not at work. You have breached and circumvented safety processes by insisting engineers do not Fos on at the weekend which has created duty of care risk as well as enabling engineers to break the European working time directive as the Fos system keeps a track on number of days worked and helps prevent engineers exceeding 12 in 14.

Your continued protestations that this was all under the direction of your manager do not align to the information I have reviewed. I do accept that some of the activity involving the sharing of log in details was at your managers request and your manager has shown a great deal of poor judgement by trusting in you by authorising hours without doing further due diligence however your manager has not financially

personally gained by the processes you have instilled and managed across the team. You have.

This is a very clear case of fraudulent activity and for this you will be dismissed and I will contact BT security to have you added to the CIFAS database.

- (13) Having received the decision terminating his employment the Claimant then exercised his right to appeal by way of an email dated 29 August 2023 [B/358]. It is common ground that the effective date of termination was 25 August 2023.
- (14) In response to the Claimant's notice of appeal Mr Harry Higgins, who had been appointed to conduct the appeal, sent an email to the Claimant notifying him that an appeal meeting would be scheduled for 19 September 2023 [B/359-360].
- (15) That appeal hearing duly took place and a transcript of the meeting was produced for the Tribunal [B/361-413]. This showed the meeting having commenced at 1032 and finishing at 1230. There was little dispute in relation to the content of that transcript, with complementary notes compiled for the benefit of the Claimant receiving broad agreement with that content [See in particular B/420-424].
- (16) Mr Higgins gave evidence of how he had conducted the appeal interview and the role played by Mr Gary Good, the Claimant's trade union representative. He was subjected to cross-examination of that evidence.
- (17) In the light of what had transpired during the appeal process Mr Higgins undertook a number of further enquiries – addressing supplementary questions to four individuals [B/421-431].
- (18) Thereafter Mr Higgins made a decision to reject the appeal and uphold the Claimant's dismissal. This was communicated to the Claimant by letter dated 28 September 2023 which also included the "Rationale" for that decision [B/432-441]. The letter stated that:

Following your disciplinary appeal meeting held on 19/09/2023, where you chose to be accompanied, I'm writing to confirm that your appeal is unsuccessful and the outcome of the disciplinary meeting held on 10/08/2023 remains in place. My decision is final.

My reasons for this decision are shown in the attached rationale.

I'm comfortable that at your original meeting the decision made was fair, reasonable and appropriate and as such your appeal has been unsuccessful.

This outcome letter concludes the appeal and the disciplinary process. This decision is final.

In his "Rationale", Mr Higgins specified that:

You attended a disciplinary appeal meeting with me on 19/09/2023; you were supported in the meeting by your trade union representative, Gary Good, to appeal the decision of dismissal.

The reason for your dismissal was a serious breach of our Standards of behaviour policy - Failure to follow process, policy, or procedure between November 2022 and March 2023.

The charges proven were:

- Falsified timesheets for personal gain.

- Created/Utilised estimate numbers to book hours to with no work completed.
 - Used your managers log in details to access and utilise allocation systems.
 - Allocated already completed tasks to yourself and colleagues.
- I have outlined the charges listed, along with the mitigation you discussed during our meeting regarding these charges.

Having outlined his response to various points raised on behalf of the Claimant, Mr Higgins concluded by stating that:

Summary Findings:

Having reviewed and considered all the information provided to me for this case, including the mitigation you provided at our appeal meeting, I have concluded that you have:

- Falsified timesheets for personal gain.
- Created/Utilised estimate numbers to book hours to with no work completed.
- Used your managers log in details to access and utilise allocation systems.
- Allocated already completed tasks to yourself and colleagues.

I've concluded that you:

Falsified timesheets for personal gain:

- You booked overtime hours to FTTP estimates inaccurately on hundreds of occasions.
- On at least 5 Sundays, you have fraudulently claimed premium overtime and no work was carried out.
- You fraudulently input overtime hours for a further 4 employees named in this investigation.
- On a further 2 Sundays, you have significantly inflated your time at work and fraudulently claimed overtime.
- On average, you claimed 1 hour 52 minutes of overtime every weekday, while your vehicle was parked at home your home address, with no evidence of work carried out.
- The ILM tracker evidence shows that between 24/11/2022 and 27/02/23 there have been 59 instances of Overtime being claimed when your van hasn't moved from your home address. This has led to 201 hours of Overtime being claimed where there has been no van movement.

Created/Utilised estimate numbers to book hours to with no work completed:

- It is your responsibility to input accurate timesheet data, booking to codes that outline the work that was carried out. You agreed at interview that you were booking to FTTP codes on your timesheet when no FTTP work was carried out.
- You are given regular training and briefings on the need to book time accurately, both regarding the hours worked and booking to correct job number/estimate number.

Used your managers log in details to access and utilise allocation systems:

- You choose to ignore the warning signs on Taskforce and CSS and your annual CBT training, when you logged in as Sam Johnson, and you should not have done this.
- Login in with your manager Sam Johnsons credentials enabled you to fraudulently input premium overtime hours for yourself and your colleagues, where no work was carried out.

Allocated already completed tasks to yourself and colleagues:

- I do not feel you addressed the pinning of already completed pair proves in your mitigation.

- You allocated work to the team, specifically estimates and pair diverts to Dave Tiller, Elliot Bovill, Daniel Nathalang and Joe O'Donnell, the 4 other engineers named in this investigation.
- The deliberate act of pinning already completed work to the 4 named engineers, is intended to give easier days to some of the team and not others.
- This action has led to a negative impact on other members of the team who have had to complete more difficult work and subsequently a speak up case being raised.

Your deliberate act of pinning already completed work to favoured team members in addition to your fraudulent claiming of overtime hours not worked, has created a divide between team members. Your behaviour had a negative impact on colleagues in your team. This ultimately led to a speak up case being raised into BT Security and this investigation taking place.

In falsifying yours and your colleagues' timesheets, you have breached the standards of behaviour policy. You have claimed overtime for yourself and your colleagues with no work carried out. This fraudulent behaviour has led to the business paying hundreds of hours of premium overtime rates. This has cost the business tens of thousands of pounds.

Conclusion: Appeal Unsuccessful

- (19) At around the same time as the investigation into the Claimant was taking place a number of parallel investigations were undertaken by the Respondent in relation to other members of staff who had been identified in the allegations contained in the anonymous "Speak Up" disclosure. These included investigations in relation to Mr Elliot Bovell, Mr Daniel Nathalang (who had not been named in the original "Speak Up" disclosure), Mr Joe O'Donnell and Mr Dave Tiller. "Disciplinary Transcripts" in relation to Mr Bovell, Mr Nathalang, Mr O'Donnell and Mr Tiller (along with a transcript relating to Mr Graham Moore) were produced for the Tribunal [B/541-675].
- (20) The initial investigations were undertaken by Mr Dave Reynolds, who was described as "Investigation Specialist BT Security Corporate Investigations". As well as producing reports of interviews with the employees concerned, Mr Reynolds and the BT Investigations team compiled substantial records in relation to computer log-in activity by the employees under consideration and in relation to the whereabouts and movements of vans operated by those employees. The Tribunal was taken through a wide variety of this material during the course of cross-examination of all of the witnesses who appeared for the hearing [See in particular B/62-178, along with data specific to the Claimant at B/179-185 and B/190-196].
- (21) It is common ground that Mr Wilson acted as the disciplinary officer in relation to allegations made against Mr Dave Tiler and Mr Joe O'Donnell. The respective "Rationales" for the outcomes in respect of those individuals were produced for the Tribunal [B/334-340 and B/341-345].
- (22) Investigation and disciplinary steps were also taken in relation to Mr Elliott Bovell and Mr Dan Natalang.
- (23) It is also common ground that an investigation was launched in relation to allegations against Mr Sam Johnson, who was the line manager of the other

employees under investigation in the wake of the “Speak Up” allegations. A “fact finding” meeting had been held with him on 23 May 2023 and an account of that meeting was drawn up by Mr Dave Reynolds (on the basis of a sound recording of the meeting) and produced for the Tribunal in the form of a “Closing Report” [B/243-252] dated 24 May 2023. Mr Johnson subsequently tendered a “resignation email” for 25 August 2023 which was then overtaken by a resignation email dated 18 August 2023, timed at 06:44:47, which was headed “Resignation” and in which he had stated:

Please accept this letter of immediate resignation.
This should be no issue as it has been offered to me several times. It will also allow me to concentrate on my health that has declined of late.

In the light of that resignation no further steps were taken in respect of Mr Johnson.

- (24) Finally, it is also common ground that Mr Higgins conducted the appeals lodged on behalf of all four colleague employees (Mr Elliot Bovell, Mr Daniel Nathalang, Mr Joe O'Donnell and Mr Dave Tiller) as well as the Claimant.

The Basis of the Claimant's Claims

9. As emerges from the records of the investigation, disciplinary hearing, and appeal instance, the Claimant's position throughout the internal processes was not to challenge the underlying events as set out in the report prepared by Mr Dave Reynolds. In particular, the detailed data relating to login activity, positioning and movements of vans, and records indicating work claimed and remunerated was not subjected to forensic challenge.

10. This remained the case during the disciplinary process conducted by Mr Ed Wilson, who told the Tribunal in his oral evidence (upon which he was cross-examined) that:

The evidence collated by BT Security was extremely helpful to my investigations. The documents demonstrated that the Claimant had done all the things alleged and was pretty black and white. During the disciplinary meeting the Claimant never contested the evidence and only provided excuses as to why he had done the things he had done. He showed no remorse throughout.

11. In relation to the appeal process conducted by Mr Harry Higgins, while there was no “formal” statement of the grounds of appeal, the evidence given was that:

...the appeal was based on the severity of the punishment and the appeal hearing took the format of a re-hearing ...

Mr Higgins gave evidence that:

During the meeting, the Claimant's Union Representative, Gary Good primarily spoke. He was very emotive when making his case and focussed on the point that the Claimant was only following orders from his Manager, Sam Johnson. The main other points of mitigation were that the charges proven were all a consequence of the Claimant following orders ...

12. Throughout the course of this hearing the Claimant was extremely careful not to deny the accuracy of the narrative produced by Mr Dave Reynolds on the basis of his initial investigation. Instead, his position was, as maintained during the disciplinary and appeal stages, that responsibility for what happened lay elsewhere, that what he had done had been (in his understanding) authorised by line management, and that he had not committed any active wrongdoing – let alone taken a leading role in facilitating or organising improper behaviour.

The Applicable Law and Agreed Findings

(1) Unfair Dismissal

13. **Section 95(1)(a) of the Employment Rights Act 1996** provides that:

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) —
 - (a) the contract under which he is employed is terminated by the employer (whether with or without notice), ...

Against the background of its primary findings of fact the Tribunal notes and finds that it is common ground that there was a “dismissal” within the meaning of **Section 95(1)(a) of the Employment Rights Act 1996**.

14. The Tribunal finds that the Claimant was dismissed without notice and it is agreed that the “effective date of termination” for the purposes of **Section 97 of the Employment Rights Act 1996** was 25 August 2023.

15. **Section 98(2) of the Employment Rights Act 1996** provides that:

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —
 - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it —
 - (a) ...
 - (b) relates to the conduct of the employee, ...

The reason given by the Respondent for dismissal – which has not been challenged by the Claimant – is “conduct” as constituting a reason within **Section 98(2)(b) of the Employment Rights Act 1996**, reflecting:

- a. Falsified timesheets for personal gain (“First Charge”).
- b. Created/Utilised estimate number to book hours to with no work completed (“Second Charge”).
- c. Used managers log in detailed to access and utilise allocation systems (“Third Charge”).
- d. Allocated already completed tasks to himself and colleagues (“Fourth Charge”).

16. **Section 98(4) of the Employment Rights Act 1996** provides that:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

17. The issue for the Tribunal in relation to the Claimant's claim alleging unfair dismissal is therefore whether there was a fair or unfair dismissal having regard to the statutory "test of reasonableness" set out in **Section 98(4)**.

18. In addressing that statutory test the Tribunal is obliged to comply with **Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992** which provides that:

- (1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.
- (2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question. ...

The relevant Code of Practice for present purposes is the **ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)**.

19. It is agreed by both parties that application of the statutory test in the circumstances of the present proceedings involves application of the principles set out by the Employment Appeal Tribunal in the case of **British Home Stores Ltd v. Burchell, [1980] I.C.R. 303**. The observations of Arnold J. in that case (at page 304C-F) have been oft-quoted:

What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element, First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the

material which the employers had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion.

(2) **Breach of Contract**

20. **Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** provides that:

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if —

- (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
- (b) the claim is not one to which article 5 applies; and
- (c) the claim arises or is outstanding on the termination of the employee's employment.

21. It is the Claimant's position that he was dismissed without notice in circumstances where notice money was due and that the Respondent is liable for what is alleged to be a breach of contract outstanding on the termination of his employment.

Discussion

22. Having found that the Claimant was summarily dismissed for the reason of "conduct", the Tribunal has addressed the guidance set out in the case of **British Home Stores Ltd v. Burchell, [1980] I.C.R. 303**. Both representatives have addressed the Tribunal on the application of the "Burchell principles" and regard has been had to the guidance set out in the **ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)**.

23. The dismissal of the Claimant was decided upon by Mr Wilson. He communicated his decision to dismiss in a letter of 24 August 2024 which also set out the reasoning which had led to that decision. The content of that letter and the underlying reasoning (the "Rationale") has been set out in detail earlier in this judgment.

24. Mr Wilson gave evidence by way of a prepared witness statement in which he elaborated upon the procedure which he had followed, the material which he had before him, and the interaction which he had with the Claimant and his trade union representative during the course of the disciplinary hearing. The Tribunal has had the benefit of hearing Mr Wilson's account of events and his responses to detailed cross-examination in relation to details of what he said he had done.

25. The Tribunal is satisfied, without any doubt whatsoever, that Mr Wilson formed an honestly-held view that the Claimant had been guilty of the conduct alleged in the complaint raised against him – namely, the falsification of time sheets for personal

gain; the creation or utilisation of estimate numbers to book hours to with no work completed; the use of the manager's login details to access and utilise allocation systems; and the allocation of already completed tasks to himself and colleagues. In passing, it may also be noted that Mr Wilson concluded that there was no evidence to support the additional allegation of "bullying team members" as had been alleged.

26. The Tribunal thus asks itself whether Mr Wilson had in his mind reasonable grounds upon which to sustain that belief. In answer to that question the Tribunal is entirely satisfied that this was the case. The documentary evidence sets out much of the material upon which Mr Wilson based his belief. In addition, further details of the extent to which Mr Wilson endeavoured to interrogate data produced during the course of the initial investigation by the BT Investigations team emerged in the course of cross-examination. This showed Mr Wilson to have undertaken a careful and painstaking evaluation of the material provided to him, and to have engaged at length with the Claimant in attempts to elicit explanations for the events revealed by that material.

27. This leads the Tribunal to the question of whether, at the time he formed his belief in the Claimant's guilt on the basis of the material before him, Mr Wilson had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. In forming a view on that matter the Tribunal notes not only the matters raised by the Claimant and recorded during the course of the disciplinary procedure, but also the propositions and submissions made on behalf of the Claimant during the course of this hearing. While not directly denying much of the narrative developed during the course of the initial investigation and during Mr Wilson's conduct of the disciplinary procedure, the Claimant (both directly in cross-examination and through his legal representative) put forward a line of argument to the effect that, while not denying the events shown by the investigation data, there could be an "innocent" explanation of those events, and that the Respondent (at this stage, in the person of Mr Wilson) should have taken a much more "pro-active" or "inquisitorial" approach to considering and eliminating possible alternative explanations for what appeared on the face of the data gleaned from the BT Investigations team's enquiries.

28. Mr Wilson set out in his formal letter and "Rationale" the reasoning leading to him forming his belief in the guilt of the Claimant. He did that with specific reference to the material which he had considered during the course of that disciplinary procedure. In the course of his cross-examination, Mr Wilson went considerably further in terms of describing the detailed enquiries, interrogation and evaluation which he had undertaken. This included addressing a significant body of data (whether concerned with security login details, vehicle movements, or claims for payment in respect of work allegedly performed) under detailed cross-examination from Counsel for the Claimant.

29. The Tribunal is of the clear view that Mr Wilson not only "had carried out as much investigation into the matter as was reasonable in all the circumstances of the case", but had gone well "above and beyond" what might reasonably be demanded of the disciplinary officer in this case.

30. The Tribunal finds that Mr Wilson undoubtedly had evidence before him upon which he was entitled to reach the conclusions which he did. He formed an honestly-held view as to the reliability of various propositions put forward on behalf of the

Claimant, and explained clearly why, when he had cause to take a different view or to reject the position put forward by the Claimant, he had adopted that position and reached the conclusion that he had.

31. This included Mr Wilson's view that the Claimant was guilty of having abused the "trust" placed in him as "patch lead", the observations concerning the "great deal of poor judgement" demonstrated by the Claimant's line manager, and the view that what the Claimant had been involved with was "a very clear case of fraudulent activity".

32. It follows that the Tribunal is satisfied that Mr Wilson acted reasonably in reaching his conclusion that the Claimant was guilty of the four elements alleged against him.

33. For the avoidance of doubt the Tribunal places on record that it is satisfied that Mr Wilson acted reasonably in the context of the Respondent's relevant procedures and having regard to the guidance to be derived from the **ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)**.

34. The sanction to which Mr Wilson resorted in the light of his conclusions was twofold: First, the sanction of dismissal without notice; Second, activation of the procedure to have the Claimant's name added to the CIFAS database.

35. It is common ground between the parties that the Tribunal has to consider whether the sanction of dismissal without notice was reasonable. This requires consideration of the guidance established by the case of **Iceland Frozen Foods Ltd v. Jones, [1983] I.C.R. 17**, in relation to which both Counsel have made submissions. That decision of the Employment Appeal Tribunal has subsequently been repeatedly approved at the level of the Court of Appeal, and, in particular, the formulation of the position given by Browne-Wilkinson J. in the light of the authorities:

We consider that the authorities establish that in law the correct approach for the [employment] tribunal to adopt in answering the question posed by section [98(4) of the 1996 Act] is as follows.

- (1) the starting point should always be the words of section [98(4)] themselves;
- (2) in applying the section an [employment] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the [employment] tribunal) consider the dismissal to be fair;
- (3) in judging the reasonableness of the employer's conduct an [employment] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
- (4) in many (though not all) cases there is a "band of reasonable responses" to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
- (5) the function of the [employment] tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

36. In view of the serious finding of "fraudulent activity" and having regard to the circumstances of the Claimant's conduct as found by Mr Wilson, the Tribunal has no hesitation in finding that the sanction of dismissal without notice fell squarely within

the “band of reasonable responses” which a reasonable employer might have adopted. It follows that the dismissal determined upon by Mr Wilson was fair.

37. The Claimant’s subsequent appeal was lodged on 29 August 2023 and the appeal process was undertaken by Mr Harry Higgins. Mr Higgins gave evidence in person and was subjected to cross-examination on that evidence. He told the Tribunal that the appeal was based on the severity of the punishment. He also gave evidence that the appeal hearing “took the format of a re-hearing”. Mr Higgins was cross-examined on the steps which he took during the course of preparing for and hearing the Claimant’s appeal, and he explained in more detail how he had conducted further investigations following the formal appeal meeting.

38. Mr Higgins eventually dismissed the appeal and upheld the original decision of Mr Wilson to terminate the employment of the Claimant. The reasoning underlying that decision was communicated formally to the Claimant by letter dated 28 September 2023, the content of which has already been set out above. It is clear that Mr Higgins did not accept either the explanations given by the Claimant through his trade union representative or that mitigation had been shown sufficient to moderate the decision to dismiss.

39. On the basis of the evidence given by Mr Higgins the Tribunal is satisfied that he approached the Claimant’s appeal from a neutral and open-minded standpoint. It is clear that he addressed all of the documentary evidence produced by the BT Investigations team for the disciplinary procedure conducted by Mr Wilson, together with additional material presented on behalf of the Claimant during the course of the appeal hearing. This was all discussed with the Claimant’s trade union representative, and notes of the meeting were produced which were accepted as being accurate. Subsequent to the formal hearing and in response to points raised on behalf of the Claimant Mr Higgins undertook further detailed enquiries before reaching his final decision – the related exchanges between Mr Higgins and Mr Simon Walker, Mr Dave Reynolds, Mr Graham Moore and Mr Richard Kirchin were produced for the Tribunal.

40. The rejection of the Claimant’s appeal was expressed in trenchant terms. Mr Higgins was adamant in the course of his cross-examination that the Claimant had given “inconsistent” and “implausible” explanations, had been “dishonest”, and had acted fraudulently. His expressed view under oath was that:

During the hearing, the Claimant showed no remorse. The evidence was black and white however he did everything to try and convince me that he had done no wrong. He provided excuse after excuse with no accountability. I found this extremely worrying given his position and length of service. This didn’t give me the confidence that the claimant wouldn’t repeat his actions.

41. Mr Higgins also addressed the Claimant’s complaint – which also formed part of the submissions made on his behalf during the course of these proceedings – that he was a victim of inconsistent treatment. This was on the basis that the other named individuals investigated in the wake of the “Speak Up” disclosure were not subjected to the sanction of dismissal. In rejecting that proposition Mr Higgins gave evidence that he could see a distinction between the Claimant and the other persons investigated:

The Claimant had accessed his Manager's account. He did this alone and no one else other than the Claimant was responsible for booking the overtime and working hours. In the original investigation meetings, two people referred to the Claimant as being the one in charge and the ringleader of the operation. This was also noted in the original Speak Up. It was clear from the evidence collated and the meetings with individuals that the Claimant was in charge of the operation and had gone one step further than the others. The Claimant had been in a manager's position for a number of years and was fully aware of what was expected of him. His behaviour was not acceptable.

42. The Tribunal finds that Mr Higgins had before him evidence upon which he was entitled to reach that conclusion. There is no doubt that this was the honestly-held view of the appeals officer and that this formed part of the reasoning underlying the decision to reject the Claimant's appeal.

43. The Tribunal also finds that the non-availability of Mr Sam Johnson, following his resignation with immediate effect on 18 August 2023, did not serve to undermine either the decision-making process undertaken by Mr Wilson at the disciplinary stage or the enquiries made by Mr Higgins at the appeal stage. The record of an initial interview with Mr Johnson prior to his resignation was available and was taken into account. All parties have been commendably discreet about their view of Mr Johnson's role in these events, given that he has made himself unavailable to respond to further enquiries or to play any part in these proceedings. So far as the Tribunal is concerned the Respondent – both throughout the disciplinary process and during the conduct of the appeal – took their decisions on the basis of as much investigation into the matter as was reasonable in all the circumstances of the case.

44. Taking into account the Respondent's procedures in relation to the Claimant's appeal and having regard to the guidance to be derived from the **ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)** the Tribunal is of the view that the treatment of the appeal and the decision of Mr Higgins "Appeal Unsuccessful" was reasonable in the circumstances.

45. In the round, therefore, the Tribunal finds that in the circumstances of this case the Respondent acted reasonably in treating the conduct of the Claimant as a sufficient reason for dismissing him. The dismissal without notice of the Claimant was fair.

46. The remaining issue for the Tribunal to consider is the Claimant's claim of breach of contract (non-payment of notice money on termination without notice).

47. For the reasons already set out the Tribunal finds that the contract of employment of the Claimant was terminated in the light of the Claimant's conduct ("misconduct"). That conduct – including, but not confined to, "fraudulent activity" – constituted a repudiatory breach of the Claimant's contract of employment, entitling the Respondent to terminate that contract without notice.

48. It therefore follows that no notice was required to be given by the Respondent and no "notice money" was due to the Claimant or was outstanding at the time of his dismissal. The Claimant's claim alleging breach of contract by reference to **Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** is dismissed.

Disposal

49. The judgment of the Tribunal is that:

- (1) The Claimant's claim alleging unfair dismissal by the Respondent is dismissed.
- (2) The Claimant's claim alleging breach of contract is dismissed.

Employment Judge Professor A C Neal

Date: 14 January 2025

Sent to the parties on:

21 January 2025

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For the Tribunal:

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