



EMPLOYMENT TRIBUNALS

Claimant: Mr Thomas Everitt

Respondent: Kirkee Limited

Heard at: By CVP **On:** 2, 3 and 4 September 2024

Before: Employment Judge Beever

Appearances

For the Claimant: Mr Street, Solicitor

For the Respondent: Mr Vincent, Director of the Respondent

JUDGMENT WITH REASONS

Introduction

1. At a Hearing between 2-4 September 2024, the Tribunal heard the Claimant's claims of unfair and wrongful dismissal. By a decision with oral reasons given to the parties at the Hearing on 4 September 2024, the Tribunal dismissed the claims. A written judgment was sent to the parties. Parties are entitled to seek written reasons, and the Tribunal reminded the parties of that on 4 September 2024.
2. On 9 September 2024, and in time for the purposes of rule 62 and for seeking written reasons, the Respondent applied to the Tribunal for written reasons. These are the reasons produced as a result of that request.

Issues

3. By a claim form dated 18 January 2024, the Claimant brought a claim of unfair dismissal following a summary termination of his employment on 4 September 2023. The dates of the ACAS conciliation were 28 November 2023 to 21 December 2023.
4. This claim has been fast-tracked to a final hearing without the benefit of a Case Management Preliminary Hearing. Despite that, this hearing was effective in no small measure because both Mr Street and Mr Vincent had approached the matter in a co-

operative manner and in such a way as enabled the Tribunal to hear the evidence and submissions and reach a decision in the time allocated timeframe.

5. In the absence of a prior list of issues, on the second day of the Hearing the Tribunal provided to the parties a List of the issues that it proposed to deal with in order to allow the parties the opportunity for any representations and comments. The issues included a claim of wrongful dismissal in respect of which the Tribunal had permitted an amendment in the course of the Hearing and gave oral reasons at the time. Mr Vincent did not object to the amendment.
6. The Respondent had made an application to strike out the claim on the grounds that the Claimant had been vexatious, and that the Claimant was attempting to use the proceedings as a lever to gain compensation. The Tribunal concluded that, in essence, the Respondent was contending that there was no merit in the claims. For reasons given orally at the time, the Tribunal rejected the application to strike out stating that it was not proportionate to do so as the Tribunal was in a position at this Hearing to determine the substantive issues.
7. The issues which the Tribunal will determine are as follows:

1 Unfair Dismissal

1.1 Was the Claimant dismissed?

1.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996. The Claimant does not accept this and contends that the Respondent's real reason was to deprive him of the value of his shareholding and oust him from his own company.

1.3 Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here

1.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts? The Claimant asserts that is plainly was not given that the other director(s) were plainly aware and acquiesced in the conduct.

1.5 Did the Respondent adopt a fair procedure?

1.6 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

1.7 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

2 Wrongful dismissal; notice pay

2.1 What was the Claimant's notice period?

2.2 Was the Claimant paid for that notice period?

2.3 If not, was the Claimant guilty of gross misconduct or did he do something so serious that the Respondent was entitled to dismiss without notice?

Evidence

8. The Tribunal had a bundle of 255 pages, and a small number of additional documents, meeting notes and screenshots that were made available to the Tribunal without objection from either party.
9. All witnesses attending were cross examined. The Tribunal heard evidence from the Claimant and from 4 witnesses from the Respondent: Mr Vincent and Mr Edwards, Directors of the Respondent, and Mr Cloves and Ms Morbey, external HR consultants who were involved in the decision-making process.
10. Both parties relied on oral submissions. Having heard the evidence and submissions, the Tribunal was in a position to make findings of fact on those matters that were necessary for the purposes of determining the Issues. The Tribunal has done so on a balance of probabilities.

Findings of Fact

Background

11. The Claimant had worked in the water plumbing and mechanical industry since 2008. He is a qualified plumber. The Respondent is a company which began its existence in 2018 whose principal activity is described in its statutory documents as "plumbing, heating and air-conditioning installation" and, by the Claimant, as "water hygiene and mechanical works".
12. The Claimant was initially an employee from 2018 and became a director and 50% shareholder. There is common ground between the parties that to all intents and purposes the Claimant was a founder member of the company and worked as if in partnership with the other founder member, director and 50% shareholder, Mr Vincent. Together, they grew the business. A valuation in January 2022 (done for the purpose of the prospective issue of shares to Mr Edwards) evidenced the growth of the business to a turnover of £330,000 in 2020 and £793,000 in 2022, with a valuation at least for share value purposes of between £469,000 - £513,000.

The Operation of the Respondent

13. Despite the increasing turnover of the business, the Respondent remained a small company run essentially by its founder members, who were friends and business

partners, and it was informal in many of its processes and dependant on the two directors' and shareholders' ongoing trust and confidence in each other for its effective operation.

14. The Claimant's role in the Respondent was a varied one: including quoting and organising jobs, running and operating the engineers including subcontractors where needed together with a variety of administrative tasks. It was a key role in the Respondent and reflected a high degree of autonomy and decision-making.
15. One of the Respondent's key clients was AJK Services, which in 2022 provided approximately £93,000 business and which, together with another client, Trident, were responsible for at least 50% of the business incoming to the Respondent. The Claimant's primary contact at AJK was Martin Anderson. The Claimant had close connections with both clients, further borne out by the fact that they did no further business with the Respondent after the Claimant left.
16. The scope of the Claimant's role reflected the fact that there was no formal structure. Mr Vincent had said that building structure had been an objective of his, but that "he had tried and met resistance from the Claimant". Perhaps one man's lack of structure was another man's "chaos", in the words of Mr Vincent. This hinted at the difference in approach of the respective shareholders; a difference that was reflected in numerous text messages and also, as evidenced in the meeting notes of Ms Morbey, that Mr Vincent was aware of "irregularities" from time to time and would seek to challenge the Claimant.
17. Both the Claimant and Mr Vincent had full access to the Respondent's bank account, and both operated it independently, each making payments. Mr Vincent was responsible for "99% of the BACS payments", often dealing with such administration late on Thursday evenings after a day's work had been done.

Mr Edwards joins the Respondent

18. In late 2021, discussions took place about Mr Edwards joining the Respondent as a director and shareholder. Mr Edwards was essentially a salesman, and he brought with him a sales book of opportunities. By mid-2022, Mr Edwards was on board with the Respondent as an employee with a view to becoming a director and thereafter with the prospect of growing the business alongside the Claimant and Mr Vincent as co-shareholders.
19. By the time of the events in March 2023, Mr Vincent, the Claimant and Mr Edwards were co-shareholders, according to Mr Vincent and as recorded in Ms Morbey's notes, in the ratio of 40/40/20.

Events Leading to the Claimant's Suspension

20. On 8 March 2023, Mr Vincent noticed that two large payments out of the Respondent's bank account had occurred on 3 March 2023. These were (i) £4,999 relating to a Cycle to Work Scheme and (ii) a £6,897 payment to Mr Anderson of AJK. Mr Vincent was unaware at the time of those payments. He spoke to Mr Edwards, who was similarly unaware.

21. Mr Edwards then interrogated QuickBooks, the Respondent's accounting system, and further details were discovered. The £4,999 payment related to a payment to the cycle to work scheme. Put neutrally, it was premature. However, the order was subsequently rescinded, and payment recovered. It played no further part in the subsequent processes. The other payment of £6,897 was a payment made on 3 March 2023 to Martin Anderson personally following payment of a larger invoice by AJK to the Respondent. It was common ground that AJK would provide a purchase order to the Respondent of a significantly larger amount than the Respondent's initial quote which in turn enabled the Claimant to make a payment to Mr Anderson personally. It was, in the words of Mr Vincent, a bribe – the facts of which, on the Claimant's own evidence, are not in dispute.
22. It was thus an unusual aspect of this case that the Claimant has not denied the substance of these actions (and, see later, other allegations relating to creating false invoices in order to cash payments), but instead contends that such actions were part of, in his words, a "company culture" which was widely known and in which Mr Vincent and presumably latterly Mr Edwards acquiesced.
23. On 4 March 2023, the day after payment of £6,897 to Mr Anderson, the Claimant received into his personal bank account the sum of £2,794.80. It was, mathematically speaking, exactly 40% of the sum paid to Mr Anderson. The Claimant was challenged on this in cross-examination. His initial answer was that he did not remember. That was a surprising answer given size and the relative recency of the payment. When pressed, the Claimant said that it "may have been a for a holiday or a contribution to a holiday"; still apparently unsure, the Claimant said that he might have travelled to Turkey that year. The bank payor details matched exactly those of Mr Anderson's bank details, save that the final "56" was instead "67". Mr Vincent invited the Tribunal to conclude this was no co-incidence and that this was a payment by Mr Anderson to the Claimant. The Tribunal concluded that Claimant did not provide the Tribunal with a persuasive explanation for a sum of the size involved that was paid as recently as 2023.
24. Mr Vincent found further examples of payments to AJK which, in his view, had inadequate or no supporting paperwork.
25. The fact that Mr Edwards was not aware of these transactions is consistent with what he did next: he contacted his own solicitor to get some personal advice as he felt it was "the end of the line" for him given what he saw as "frauds". The Tribunal accepted his evidence that this was all very frustrating as he had, "joined effectively as a friend to the Claimant and intended to work with the Claimant" and felt, in his words, "when I saw these payments, I felt I had been lied to".
26. On 22 March 2023, Mr Vincent met with Mr Edwards in a meeting that lasted 3 hours. Mr Edwards came away sympathising with Mr Vincent's position and that they had found a way forward but with, what in his words were, "many unanswered questions regarding what we do with the frauds".
27. On 3 May 2023, a meeting between the three took place, at the conclusion of a company training session. Mr Vincent said to the Claimant that these payments to Mr Anderson, "should never have happened" and must stop. He described that he "read the Riot Act" to the Claimant. The Claimant agreed to contact Mr Anderson albeit that, by this point,

Mr Vincent and Mr Edwards both told the Tribunal that they placed little trust in what the Claimant was promising.

28. Later in the same month, Mr Vincent and Mr Edwards decided that they needed advice from solicitors. The upshot of that advice was that an investigation was suggested. Following solicitor advice, the Claimant was suspended on 23 June 2023 pending a disciplinary investigation that was to be undertaken by Mr Vincent.

The Disciplinary Investigation

29. In cross examination, Mr Vincent was asked about whether he had a conflict of interest from the fact that he had carried out the investigation. The proposition was clear, namely, that if the end result of the investigation was a dismissal, it was a clear conflict for Mr Vincent who stood to gain “by the value of the Claimant’s shares” who would be treated (and was so treated) as a “bad leaver” under the terms of the shareholders’ agreement.
30. Mr Vincent was alive to this. He had discussed it with his solicitor. A number of factors were relevant; (i) the decision was taken that Mr Vincent was the best person to undertake the investigation given the level of specific knowledge of the context of company trading that was required, (ii) the fact that it was not to be a Decision Maker’s role, and the fairness of his investigation was capable of being objectively assessed by independent Decision Makers, and (iii) the conflict was, Mr Vincent believed, unrealistic because Mr Vincent (as consistently evidenced in Ms Morbey’s notes and in evidence to the Tribunal) regarded the Claimant as the Respondent’s “best engineer” and that his departure was not in fact a benefit to the Respondent. Mr Vincent had stated to Ms Morbey that, “I don’t know if I can hold [the Respondent] together”.
31. Mr Vincent undertook interviews. On 11 July 2023, he asked the Claimant for a response to 45 allegations, which taken together formed an (alleged) wider picture of payments that were undocumented and/or were incurred and were not in the proper interests of the Respondent.
32. The Claimant provided a response with the assistance of a public access barrister. Two points may be made at this stage. First, in terms of factual detail of the allegations, there was little dispute on the underlying facts, the tenor of which can be gleaned, for example, at [B12/para17] in which the Claimant admits to, “adding monies to Company invoices for Mr Anderson to benefit personally”. That instance was, as Mr Vincent submits, the Claimant admitting to acts of bribery.
33. The Claimant was confronted with this in cross-examination:
Q: Did you commit gross misconduct?
A: yes, we all did.....
34. Mr Street explored with Mr Vincent in cross examination a number of alleged activities undertaken by Mr Vincent on a myriad of other occasions, including relating to Health and Safety matters and illicit drug use. The gist of both the Claimant’s attitude, and Mr Street’s subsequent questioning, was that Mr Vincent was fully aware of all that was going on and participated himself in various activities.
35. Secondly, the Tribunal noted that Mr Vincent reflected on the 45 allegations received. Many (including for example allegation 5 which related to a laptop to Mr Edwards, which

Mr Edwards denied, and about which there was no further evidence to uncover the real facts) would not be pursued. Mr Vincent concluded, by recommending that 22 allegations, approximately half, should proceed to a disciplinary as there was a case to answer. Tellingly, he did not make findings of fact that they had in fact occurred and understood that was a matter for the Decision Maker.

The Decision to Dismiss

36. The Tribunal heard evidence from Mr Stephen Cloves. He is an independent HR Professional with significant experience as a former Group HR Director. He was instructed by the Respondent to chair a Disciplinary Hearing and authorised to reach a disciplinary outcome. There was no challenge to his independence or his ability to reach an independent decision. The Tribunal accepted Mr Cloves' evidence, which was given in an open and reflective manner and with an intention of assisting the Tribunal.
37. Mr Cloves met the Claimant on 7 August 2023. The Claimant accepted that he had a reasonable opportunity to address each of the 22 allegations; and his explanations for those are rehearsed in the minutes and in Mr Cloves' witness statement.
38. What Mr Cloves found was that the Claimant accepted that he had (i) made payments in cash to sub-contractors and covered them with false receipts, (ii) made payments to Mr Anderson personally in exchange for inflated invoices, (iii) used a company credit card for personal items, which had not been repaid, and (iv) had removed cash from the business for a series of unreceipted transactions. The Claimant said to Mr Cloves was that Mr Vincent had (i) also been guilty of gross misconduct, (ii) himself bought personal items through the company bank account, and (iii) been aware of arrangements and payments in cash to contractors and also to Mr Anderson. Mr Cloves investigated each of these and details them in his witness statement.
39. Mr Street helpfully, in the course of cross-examination of Mr Cloves, categorised the allegations against the Claimant in a manner which the Tribunal considers it is useful to adopt:
 - 39.1. Falsified business records to cover cash payments (Allegations 7, 8 and 9). It was an allegation of creating false invoices. Mr Cloves in evidence said, "I didn't get from the Claimant that he alleged that Mr Vincent was aware and instead it was the Claimant's case that his actions were for the benefit of the bookkeeper" ("Category 1")
 - 39.2. Personal purchases on the business account (Allegations 10, 11, 12, 13, 14, 24, 27, 32, 39 and 44): again, there was no dispute that the Claimant had made these purchases and that they were largely if not entirely not repaid. To Mr Cloves, the Claimant acknowledged that he should not have used company money in this way and that he should have paid it back. In cross-examination, the Claimant said that "it slipped my mind" to ensure that the monies were repaid. That is a difficult proposition to accept given the number of allegations involved. The Tribunal noted the allegation number 24 relating to the purchase of the tent and reflected that it was illustrative of the relationship of the Claimant and Mr Vincent who would challenge the Claimant without a great deal of success. It hints at the difficulties of working as if partners in a business and it establishes that even if Mr Vincent was "aware" in some respects, it does not follow that he had agreed or acquiesced or participated. The Claimant had also alleged that Mr Vincent had done the same i.e. "tit-for-tat".

The Tribunal accepts Mr Cloves' evidence that he asked the Claimant for examples, that a "list" was provided by the Claimant and in respect of that list Mr Vincent was able to satisfy Mr Cloves that each item was purchased for the benefit of the business and was not personal ("Category 2")

39.3. Bribery, and payments to Mr Anderson (Allegations 17, 18, 19, 20 and 21): again, the Claimant accepts the facts of the allegations. Mr Cloves addressed the Claimant's contention that Mr Vincent knew, and did so in the course of interviews with the Claimant, Mr Vincent and Mr Edwards. Mr Cloves concluded that payments to Mr Anderson were done without the knowledge of Mr Vincent. Factors relevant to Mr Cloves' decision included the evident anger of Mr Vincent, the actions of Mr Edwards consistent with that including his approach to the solicitors for advice on an exit strategy. Mr Cloves was challenged extensively on this cross-examination but was firm in his belief that the circumstances showed a clear inference that Mr Vincent did not know until he had discovered the payments in March 2023. Mr Cloves' objectivity is shown by his own reflection that he may not have considered the bribery to be gross misconduct if Mr Vincent had he found that, at the time, Mr Vincent had been aware and acquiesced. ("Category 3")

39.4. Payments in Kind (Allegations 26 and 40): this related to transactions involving a laptop and separately a bathroom suite. In the event, Mr Cloves disregarded this aspect. The Tribunal noted that this reflected positively on the objectivity of Mr Cloves' decision making process. The Tribunal does not therefore address this further in these reasons ("Category 4")

39.5. Undocumented Cash Withdrawals (Allegations 15 and 45): in so many words, this allegation reflected a state of affairs where the Claimant, while working in Portsmouth, paid staff/sub-contractors in cash. Mr Cloves found that the Claimant accepted that he should have kept documentary records and that this was poor practice on his part. The Tribunal noted that this aspect was the subject of some unsatisfactory evidence from the Claimant. When asked in evidence why he had paid in cash, the Claimant said that it was because Mr Vincent took so long in making bank payments to contractors. This did not sit well with the fact that the Claimant had full access to the bank account and frankly could and should have made bank payments rather than persisting with what was, in the finding of Mr Cloves, at the very least patently poor practice of making cash payments. ("Category 5").

40. The result of Mr Cloves' investigation is set out in his outcome letter [B40] dated 4 September 2023. The Tribunal has had regard to the full terms of that letter. Mr Cloves found that (with the exception of Category 4, which, as above, was disregarded by him) the Claimant had acted in the manner alleged, and that his actions amounted to misappropriation of company funds, bribery and use of company money for personal use. He considered the appropriate sanction and concluded that the Claimant should be summarily dismissed.

41. The Claimant appealed to Victoria Morbey. Ms Morbey is an independent experienced HR consultant (and independent of Mr Cloves). She dealt with the appeal, in the course of which she decided to hold fresh interviews with each of the key actors and she held an appeal meeting with the Claimant. In evidence, Ms Morbey was asked about the conflict point given Mr Vincent's responsibility for the investigation. She had been alive to this as part of the appeal and she had concluded (i) that the investigation was in substance conducted objectively fairly, particularly having regard to Mr Vincent's reduction of the recommended allegations from 45 to 22, and (ii) even if a "conflict" had "infected" the

process to any degree, that this was a robust process overall given that two independent consultants were brought in to make decisions and that they both had decided that dismissal was not unfair.

42. The Tribunal rejects Mr Street's submission that the fact in itself of Mr Vincent's involvement rendered the dismissal unfair; that would be to place form over substance. The Tribunal also noted that Ms Morbey addressed the question of Mr Vincent's knowledge/acquiescence and concluded (having questioned Mr Vincent again herself in interview, the notes of which were provided to the Tribunal during the course of the Hearing) that he was not aware.

The Claimant's Evidence

43. Evidence from the Claimant during cross examination was illuminating. Documents at [D6] and [D12] relate to a site report and invoice for work done. The site report is detailed and factual and is signed by the Claimant. It transpired during the Hearing that the site report was entirely false. In evidence, the Claimant acknowledged that "this job never went ahead, and Martin [Anderson] asked me to make an invoice". The Claimant did not suggest that Mr Vincent was a party to that or of the subsequent false invoicing. The Respondent had adduced the report/invoice as part of its belief that it was indicative of inflated invoicing for the benefit of Mr Anderson and was not aware of the true extent of the false site report as has now been uncovered. The Tribunal's finding is that the Claimant created and signed a false site report, together with a resulting false invoice; and had done so without the knowledge of the other directors of the Respondent.

The Law

44. In relation to unfair dismissal, section 98(1) and (2) of the Employment Rights Act 1996 sets out the potentially fair reasons for dismissal. Section 98(2) states that a reason falls within this subsection, *inter alia*, if it relates to conduct.
45. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Birchell [1980] ICR 303, a tribunal must consider a three-fold test: (i) the employer must show that he believed that the employee was guilty of misconduct, (ii) that he had in his mind reasonable grounds upon which to sustain that belief, (iii) that at the stage at which the employer formed that belief he had carried out as much investigation into the matter as was reasonable in the circumstances.
46. Section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states "determination of the question whether dismissal is fair or unfair.... (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".
47. For the purpose of section 98(1) and 98(2) the burden of proof is on the Respondent. What matters is whether the respondent has established the operative reason for the dismissal: see Brady v ASLEF [2006] IRLR 576. The relevant reason for dismissal relies

on a finding as to the ,” set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee”: Abernethy v Mott [1974] ICR 323; Beedell v West Ferry Printers Ltd [2000] IRLR 650.

48. There are thus 2 statutory questions that need to be answered: (i) per section 98(1) and 98(2), what was the reason for dismissal? and (ii) per section 98(4), was the dismissal fair?
49. For the purpose of section 98(4) the burden of proof is neutral in applying section 98(4). The Tribunal does not stand in the shoes of the employer and decide what it would have done if it were the employer. Rather the Tribunal has to ask whether the decision to dismiss fell within the range of reasonable responses open to the employer judged against the objective standards of a hypothetical and reasonable employer. The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses applies to all aspects of the dismissal decision. The Tribunal is required to consider whether dismissal fell within the range of reasonable responses: see Iceland Frozen Foods v Jones [1983] ICR. Here the question of whether an employer has acted reasonably in dismissing will depend upon the range of responses of reasonable employers. Some might dismiss others might not.
50. Consistency of treatment may be relevant in terms of fairness in circumstances where there is evidence of decisions being made in truly parallel circumstances: Hadjiioannou v Coral Casinos [1981] IRLR 352.
51. Fairness is a feature of the statutory test in section 98(4). Not infrequently, complaint is made of aspects of the process and/or the decision which amount to a breach of procedure or policy or is otherwise reasonable. The Tribunal falls into error if in considering those deficiencies it fails to consider the statutory test in the round: Westminster City Council v Cabaj [1996] IRLR 339; Taylor v OCS Group [2006] IRLR 613; Reilly v Sandwell Metropolitan Borough Council [2018] IRLR 558; Christou v LB Haringey [2013] IRLR 379. The Christou is helpful in the present situation, see for example, at para 56, “when a tribunal is considering whether the dismissal is fair, it will perforce have to ask itself whether it was fair to institute the second proceedings at all”.
52. Turning to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects, then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Thornett v Scope [2007] ICR 236 affirmed the obligation on an employment tribunal to consider what the future may hold regarding an employee's ongoing employment.
53. Section 122(2) ERA provides that where a tribunal finds that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the tribunal must reduce that amount accordingly. Section 123(6) ERA provides that where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable. Before any such deduction, a tribunal must make three findings (in accordance with Nelson v BBC (no2) [1979] IRLR 346): (i) that there was conduct which was culpable or blameworthy; (ii) that the dismissal was contributed to some extent at least by the claimant's culpable

or blameworthy action, (iii) that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

54. In relation to wrongful dismissal, a different test applies. It is necessary for a tribunal to reach a finding of fact as to whether the Claimant had in fact committed a breach of her contract that was sufficiently serious that it amounted to a repudiatory breach which entitled her contract to be terminated without notice. If not, then a breach of contract occurs when a respondent terminates without notice, and the usual measure of damages is the contractual notice period to which the claimant was entitled.
55. In a wrongful dismissal case, questions of reasonableness do not arise, and the issue is whether the employee was guilty of conduct so serious as to amount to a repudiation breach of the contract of employment entitling the employer to summarily terminate contract: Enable Care and Home Support Ltd v Pearson EAT/0366/09. In Palmeri v Charles Stanley [2021] IRLR 563, the test was described as, "whether objectively and from the perspective of a reasonable person in the position of the employer, the employee had clearly shown an intention to abandon and altogether refused to perform the contract".
56. An employer may be entitled to rely on acts of gross misconduct discovered after termination of employment: see Boston Deep Sea Fishing v Ansell [1888] 39 ChD.

Discussion and Conclusions

Unfair Dismissal

57. Turning first to the reason for dismissal, under section 98(1), the Tribunal reminded itself that the onus falls on an employer dismissing an employee to establish that the reason for dismissal was one which was potentially fair.
58. In turn, this requires the Tribunal to determine two issues: (i) identify the decision maker, and (ii) make findings as to the facts and beliefs in the mind of the decision maker.
59. The Respondent took legal advice. An internal investigation found that there was a case to answer. The Respondent instructed an independent HR professional, an experienced former HR Group Director, Mr Cloves. It is perfectly clear that he undertook the task of a disciplinary hearing and was instructed to, and did, make a decision on the Claimant's employment. It was that decision that resulted in the termination of the Claimant's employment.
60. The Claimant did not suggest that Mr Vincent was nevertheless the real decision maker: and, on the facts, it would have been unrealistic if he had. The suggestion that Mr Vincent might have been personally invested in the decision was not new to the Respondent. It took legal advice from solicitors which resulted in the instruction of Mr Cloves to make a decision.
61. The Tribunal finds that Mr Cloves was the decision maker.

62. So far as what was in his mind, there are two competing narratives. First, it is the Claimant's actions of alleged misconduct. Secondly, it is the alleged desire on the part of Mr Vincent and/or Mr Edwards to oust the Claimant so as to benefit from his exiting shareholding.
63. The termination letter sent to the Claimant is plain and unambiguous. Of itself, it is persuasive evidence of what was on the mind of Mr Cloves. Mr Cloves was challenged about the fact that termination would be likely to lead to a loss of shareholding and that [e.g.B18] he was on notice that it was the Claimant's belief that this represented the real motivation.
64. In response, Mr Cloves stated that he had recognised the risk of conflict of interest of Mr Vincent and that he had conducted his own independent review and indeed had interviewed each director himself. He did not rely on Mr Vincent's investigation to make his decision. He also felt that Mr Vincent's investigation was, in any event, an appropriate one with little if any evidence of leading questions. When pressed, he reaffirmed that Mr Vincent, "was not involved in the decision to dismiss" and he rejected any notion that he, Mr Cloves, was participating in any process whose purpose was to oust the Claimant from his shareholding. Indeed, for that to be the case, the Tribunal is being asked in effect to find that the outcome had in some way been predetermined or in some way there was covert pressure applied to Mr Cloves to reach a "convenient" outcome.
65. By contrast, Mr Cloves' evidence was clear and genuine, and the Tribunal had no difficulty in accepting it. He had disregarded one of the five categories and indeed had reflected in the Hearing that the Category 3 allegation of bribery might not have been gross misconduct if Mr Vincent had been found to be aware.
66. The Tribunal finds that the reason for dismissal was the conduct of the Claimant as explained in the outcome letter. The reason for dismissal by Mr Cloves was not to oust the Claimant so as to facilitate access to the Claimant's shareholding. The Tribunal is therefore satisfied on the evidence that the reason for dismissal was the Claimant's conduct, and the Respondent has accordingly satisfied the burden of establishing the reason for dismissal was a potentially fair reason, namely, conduct.
67. Turning to the second question, under section 98(4), of whether all of the requirements of that section have been satisfied. Neither party has an onus to prove their case over the other under these provisions. The Tribunal has considered that the Burchell principles will be relevant. According to that authority, three things must be established for a conduct related dismissal to be fair. First, the employer must genuinely believe the employee guilty of misconduct. Secondly, there must be reasonable grounds for holding the belief. Thirdly, the employer must have carried out as much investigation as was reasonable in the circumstances in reaching that belief.
68. Did the employer genuinely believe the employee is guilty of misconduct? The Tribunal has no difficulty in finding that Mr Cloves held such a genuine belief. His findings are sufficient to support a belief as to misconduct. Mr Cloves satisfied the Tribunal that he was genuine in his belief about the Claimant and that he genuinely believed that he was guilty of gross misconduct.
69. Secondly, were there reasonable grounds for holding that belief? The Claimant himself acknowledged in evidence (and indeed had consistently done so) that he did not dispute

the facts of the allegations, specifically in relation to Category 1, the false invoices, and Category 3, the Martin Anderson payments. Mr Cloves made findings to the effect that Mr Vincent was not aware of the material facts and had not acquiesced in the Claimant's activities. Mr Cloves had reasonable grounds for holding the belief that the Claimant had committed acts of misconduct.

70. Thirdly, did the Respondent carry out as much investigation as was reasonable in all the circumstances? That does not require an employer to carry out all possible investigations. The purpose is to establish whether there were reasonable grounds of the belief formed. The scope of the investigation needs to be reasonable in all the circumstances. The legal test, as emphasised in Hitt, is whether the investigation fell within the band of reasonable approaches, regardless of whether or not the Tribunal might have approached any particular aspect differently.
71. The Tribunal concludes that the Respondent did act reasonably. There was limited challenge to the process itself. In point of fact, the process had the hallmarks of an independent hearing process, bearing in mind the decisions of both Mr Cloves and Ms Morbey to conduct further interviews. Mr Street challenged the absence of further enquiries of named witnesses, but Mr Cloves had an answer to that, which was that he had in part approached witnesses who had failed to respond and in part had concluded that suggested witnesses were not relevant (where proffered by the Claimant to deal with aspects of the Claimant's timekeeping). Mr Street also challenged the fairness of the process given Mr Vincent's involvement as investigating officer. Was it unreasonable? The Tribunal took account of several factors: that the Respondent had taken independent legal advice; that Mr Vincent was best placed in terms of his knowledge and insight into the whole context; thirdly the checks and balances resulting from the independent consideration by two experienced HR consultants. This is about substance over form. Mr Vincent's investigation was in substance entirely appropriate and reasonable and no unfairness in fact arises from it. Nor did he extend his conclusion beyond simply concluding that there was a case to answer and even then, in respect of only half of the initial allegations.
72. The real question it might be said was whether the decision to dismiss was a fair sanction? To answer this question the Tribunal must ask itself whether the dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. This principle recognises that in a given disciplinary scenario there may not be a single approach available, and provided the employer chooses one of a potentially wider number of fair outcomes that would be lawful even if another employer in similar circumstances would have chosen an alternative option with different consequences. In some cases, one employer could decide to dismiss one another equally reasonable employer might only issue a warning.
73. The Claimant's response to the allegations was essentially to accept that it was gross misconduct but also to assert that "we all did it", i.e. that Mr Vincent was both guilty himself of gross misconduct and was also aware/acquiesced in the Claimant's conduct. The Tribunal has found that Mr Cloves reasonably rejected suggestions that other alleged conduct of Mr Vincent, such health and safety issues, and illicit drug use should restrict a finding of gross misconduct on the part of the Claimant. Mr Cloves was reasonably entitled to reach that view.

74. Additionally, Mr Cloves was reasonably entitled to reach the view that he did that Mr Vincent was not aware of and/or did not acquiesce in the Claimant's conduct. It is not for the Tribunal to substitute its view in this regard. It is nevertheless relevant to note the following factors which each and together indicate that Mr Cloves' finding was reasonable. Small founder-member companies require trust and confidence. It is apparent that Mr Vincent was frustrated at times by the Claimant's actions and had challenged him to no avail. Mr Cloves reached the conclusion that Mr Vincent was not aware of the key aspects of falsifying invoices and of the covert payments to Mr Anderson. That was a conclusion that was reasonably open to him.
75. In any event, the Tribunal considers that there was evidence that supported the conclusions of Mr Cloves. Mr Vincent was clear and consistent in his evidence when painting a picture of challenge of the Claimant followed by the Claimant expressing the view that he was allowed to do as he wanted since he was a director. This caused frustration to Mr Vincent. The awareness that Mr Vincent may have had in no sense supports a conclusion that he condoned or acquiesced let alone participated in the Claimant's wrongdoing. The Tribunal accepts Mr Vincent's evidence.
76. By contrast, the evidence of the Claimant was unsatisfactory. Three key instances can be highlighted: (i) the Tribunal is not persuaded by the Claimant's evidence relating to a significant sum of money, mathematically 40% of a covert payment made to Mr Anderson by the Claimant, which appeared in the Claimant's personal bank account the day after the payment to Mr Anderson; (ii) nor is the Tribunal persuaded by the Claimant's evidence relating to cash payments to contractors in Portsmouth. He had full access to the bank account, and it was no answer to suggest that Mr Vincent had delayed in making bank payments, (iii) perhaps most illuminating was the discovery during the course of the Hearing of the fictitious site report signed by the Claimant as a means of creating a false invoice plainly at the expense of the Respondent and of its other shareholders.
77. Mr Cloves considered lesser options and rejected them. He considered that dismissal was an appropriate sanction. The relevant question for the Tribunal to answer is not to ask what it would have done or what other outcomes might have been available to the decision-maker. The question is whether this dismissal fell outside the range of reasonable responses. The Tribunal concludes that it did not. It was not outside the range of reasonable responses for Mr Cloves to conclude that dismissal was the appropriate sanction for the Claimant's gross misconduct of misappropriation of the Respondent's funds, bribery and use of the Respondent's funds for personal use. Persistent failures over a long period of time to make appropriate declarations of interest.
78. Did the Respondent adopt a fair procedure? Having regard to its findings set out above, the Tribunal concludes that the procedure adopted by the Respondent was fair in all material respects. No unfairness arises from the fact that Mr Vincent undertook the initial investigation. The Tribunal is not satisfied that the procedure was unfair.
79. The Tribunal therefore finds that dismissal was within the range of reasonable responses and that the dismissal was both procedurally and substantively fair. The claim for unfair dismissal is not well founded and is dismissed.

Wrongful Dismissal

80. Turning to the claim of wrongful dismissal, the Tribunal reminds itself that the test that the Tribunal has to apply in a wrongful dismissal case is different to that in an unfair dismissal case. It is not a question of belief or reasonableness, but rather whether the Claimant's conduct amounted to a fundamental breach of the contract of employment.
81. The Tribunal's conclusion can be stated in two ways.
82. First, the Claimant admitted in substance the allegations of fact. The Tribunal finds that these are serious acts of misconduct, and they plainly go to the root of the contract. Unless the Claimant can satisfy the Tribunal that in each respect all the other directors/shareholders were complicit, the Tribunal is likely to conclude that the acts of the Claimant were repudiatory breaches of his contract of employment.
83. The Claimant has not satisfied the Tribunal that the state of awareness of Mr Vincent and/or Mr Edwards was capable of showing that they had acquiesced let alone participated in the Claimant's acts. The Claimant's own evidence to the Tribunal was unsatisfactory in material respects. By contrast, the evidence of Mr Vincent of a picture of "challenge" and "frustration" not one of complicity or acquiescence was clear and genuine and was accepted by the Tribunal.
84. The Claimant's actions in falsifying invoices to cover cash payments and also of covert payments made to Martin Anderson amounted to repudiatory breaches of his contract which entitled the Respondent to terminate his contract without notice and which, through the decision of Mr Cloves, the Respondent did terminate.
85. Secondly, in respect of claims of wrongful dismissal, it is established law that an employer may be entitled to rely on acts of gross misconduct discovered after termination of employment: see Boston Deep Sea Fishing v Ansell [1888] 39 ChD.
86. The Tribunal is satisfied that the acts of the Claimant in creating and putting his signature to a fictitious site report and its resulting false invoice without the knowledge or acquiescence of the other directors of the Respondent did amount to conduct serious enough to amount to a repudiatory breach justifying immediate termination of the contract. Following the Boston Deep Sea Fishing line of authority, the Tribunal concludes that the Respondent would be entitled to rely on these facts in defence of a claim for wrongful dismissal.
87. For these two reasons, the claim for wrongful dismissal is not well founded and is dismissed.

The Respondent's Costs Application

88. At the end of his submissions, Mr Vincent contended that the claim was vexatious and had no chance of success and asked that the Tribunal should "make the appropriate penalties including costs incurred". The Tribunal treated this submission as a costs application by the Respondent in respect of costs incurred claim.
89. Rule 76 of the ET Regulations provides for circumstances where the Tribunal may make a costs order. In particular, it provides, so far as may be relevant to the Application, that:

Rule 76: A Tribunal may make a costs order...and shall consider whether to do so, where it considers that—

89.1.1. a party...has acted...vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

89.1.2. any claim...had no reasonable prospect of success.

90. See Radia v Jeffries International Limited, HHJ Auerbach, UKEAT/0007/18, para 61+. In summary:

90.1. Costs applications involve a 2-stage process.

90.2. First, to consider whether the threshold is made out: here, “no reasonable prospect of success” and “unreasonable” in the sense that C knew he had no prospect from the outset

90.3. Secondly, even if so, it does not automatically follow that a costs order will be made. This is an exercise of the tribunal’s discretion.

91. Costs in the employment tribunal are still the exception rather than the rule. See Yerrakalva v Barnsley MBC [2012] ICR 420.

92. Mr Vincent contended that the proceedings had been used by the Claimant as a means to extract a financial payment from the Respondent. Of itself, such a motivation would not necessarily be vexatious as it is frequently the motivation (or part of mixed motives) of a Claimant to obtain financial compensation from the circumstances they find themselves in. It is not inconsistent with a genuine belief as to the merits of their claim.

93. The Tribunal considers that the real point underlying the application for costs is whether there was in fact no reasonable prospect of success.

94. It is not enough for a party to have won or lost a claim because, unlike in civil proceeding, costs do not follow the event in Tribunal proceedings. Nor is it enough in itself for a party to have won convincingly in circumstances where the Tribunal does not accept the evidence given by the losing party. That is the common and natural consequence of cases determined at a final hearing by a Tribunal.

95. The threshold that the Claimant knew he had no prospect represents a high threshold to achieve. The Claimant’s position throughout these proceedings has been that he had always acknowledged the underlying facts of the allegations, and as such they were not in dispute, but that it was the existence of “company culture” and/or Mr Vincent’s awareness and acquiescence that meant that it was now unfair to permit the allegations to be used as a means to dismiss him.

96. The tribunal is not satisfied that the Claimant knew that this argument had no real prospect of success notwithstanding the Tribunal’s clear findings in its decision. To apply those findings in this application runs the real risk of judging the matter with the benefit of hindsight.

97. The Claimant has lost his claim. He can be under no doubt that he has lost and that he has done so because of his own conduct which was not participated in by Mr Vincent or Mr Edwards. That said, the Tribunal is not satisfied that the case meets the appropriate threshold for costs or that it meets the Radia test.

98. The Respondent's application for costs is refused.

EMPLOYMENT JUDGE BEEVER

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 29 September 2024**

**ORIGINAL JUDGMENT SENT TO THE
PARTIES ON 11 October 2024**

**AMENDED JUDGMENT SENT TO THE
PARTIES ON 24 February 2025
By Mr J McCormick**

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