EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106638/2024

Held in Glasgow on 14 & 15 January 2025

Employment Judge E Mannion

Mr J Turner	**Claimant** **In Person**
Allied Vehicles Ltd	**Respondent** **Represented by:** **Ms L Wilson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant's application for unfair dismissal succeeds and so is entitled to the following remedy:

1. The respondent is ordered to pay to the claimant a basic award of £3,000;

2. The respondent is ordered to pay to the claimant a compensatory award of £5,159.44;

3. The respondent is ordered to pay notice pay of £3,000 from which tax and national insurance may be deemed to be deducted.

4. The claimant's claim for unpaid holiday pay is not successful.

REASONS

Introduction

1. This is a claim for unfair dismissal. The respondent asserted that they dismissed the claimant fairly for gross misconduct.

2. The claimant also makes a claim for notice, holiday pay and other payments.

3. I heard from the following witnesses in the following order:

    a. Gerry Facenna, Chief Executive (witness for the respondent)

    b. Janine McGlone, Strategic Project Lead and Executive Assistant (witness for the respondent)

    c. The claimant.

4. A joint bundle of documents was agreed in advance of the hearing.

5. CCTV evidence of events central to the allegation of gross misconduct was shown during the course of the hearing with witnesses speaking to this. Prior to the hearing, attempts were made by the respondent to share this with the claimant but he was unable to watch it in the format sent to him. He was provided with an opportunity to attend at the office of the respondent's representatives to review this but he did not take up that opportunity. The claimant did not object to the inclusion of the CCTV. He was informed that if after it is shown to the first witness, he felt he needed some additional time to review it, that would be made available to him.

6. The claimant emailed the tribunal the Friday before the hearing began seeking witness orders for three potential witnesses. The email application did not include full names or contact information. This was dealt with as a preliminary matter at the outset of the hearing and it was explained to the claimant that at the time the application was made, there was a good chance that the witness orders would not have arrived by post before the hearing began. It would also not be possible to issue witness orders that day, again given the delay in receiving these by post and the fact that the case was only scheduled to run for three days. The claimant confirmed that he asked the witnesses to attend voluntarily but they are concerned for their job security. The potential evidence of these witnesses was discussed and it was explained to the claimant that the hearing would not amount to a re-run of the disciplinary process but instead to look at the decision of the respondent and whether it was reasonable. The claimant heard the evidence of the respondent witnesses in

the first instance and ultimately confirmed that he did not require the witnesses to attend.

Observations of the evidence

7. Submissions were made from the respondent in respect of the credibility of the witnesses and the Tribunal was invited to find that the claimant was not a credible witness, that the respondent witnesses were wholly relevant and where there were disputes in the evidence, the respondent witnesses should be preferred.

8. The Tribunal considered this submission carefully but did not wholly agree with the respondent position. The Tribunal found that Mrs McGlone gave her evidence in a clear manner and to the best of her memory of what occurred at the time.

9. Miss Wilson submitted that the claimant failed to provide cohesive answers to yes/no questions and that his position regarding the allegations was inconsistent with the position during the disciplinary process or as set out in the pleadings. Based on this, Miss Wilson invited the Tribunal to find the claimant's evidence was not credible. The Tribunal found that the claimant was a credible witness. During cross examination the claimant answered the questions posed of him. At times when providing further detail than required, Miss Wilson informed him that a yes or no answer was required. There was a point towards the end of cross examination where Miss Wilson asked the claimant to confirm that he accepted Mrs McGlone did not have knowledge about the claimant being on the phone at a particular point in time. There was some back and forth on this as the claimant was not answering yes or no, instead responding with additional information. I do not find that this instance or how he gave his evidence generally impacted on his credibility to the point where he was no longer a credible witness. He was representing himself, in an environment which was out of his comfort zone and faced with the stress that comes with a formal tribunal hearing. The Tribunal did not consider that he attempted to evade questions posed by Miss Wilson or that he was not being truthful with the Tribunal. If he accepted a position, he generally

responded with yes but if he did not, he tended to explain his position by providing further information in response rather than respond with 'no'. While it is appreciated some questions were posed specifically for the claimant to accept or deny a position by answering yes or no, providing the explanation as to why the position was not accepted rather than simply saying 'no' does not, in this case, impact on the claimant's credibility.

10. In respect of Mr Facenna, during examination in chief, he answered all the questions of him clearly but was more evasive on cross examination. He was asked about three very specific instances by the claimant: 1. Telephoning the claimant working overtime to ask about the number of hours he was working; 2. Giving the claimant a cash in hand bonus for his hard work; and 3. Giving the claimant and another colleague, Jamie, a lift to the claimant's car. The questions on these points were very specific, outlining what the claimant stated occurred and what was said by both parties. Mr Facenna responded stating both that did not remember the incidents and that they did not happen. He went further, making the following statements "that is a stupid question" "that is all rubbish" "lies, lies, lies" and "this is all made up in your head". While it is appreciated that giving evidence is stressful and that it can be frustrating to defend a claim, the questions being asked were background to the disciplinary issue and, at best, provided some context to the employment relationship and how the claimant believed he was viewed by the respondent prior to the dismissal. The entirely dismissive manner in which they were approached by Mr Facenna suggested that he simply did not want to engage with the claimant's position and so he was not wholly truthful in his answers.

Relevant law

11. **Section 94(1) of the Employment Rights Act 1996** (the ERA) states that 'An employee as the right not to be unfairly dismissed by his employer.'

12. **Section 98 of the ERA** provides that in determining whether a dismissal is fair or unfair in law, an employer must show that the reason amounts to one of the following: conduct; capability (including performance and ill health);

redundancy; that holding the role contravenes the law; or some other substantial reason justifying dismissal.

13. **Section 98(4) of the ERA** outlines that where an employer has shown the reason for the dismissal is one of the above quoted reasons, the Tribunal must determine where the dismissal was procedurally fair or unfair having regard to whether the employer acted reasonably or unreasonably in treating it as a reason for dismissal, having regard to their size and administrative resources and also determining same in accordance with equity and the substantial merits of the case.

14. A three-fold test for misconduct dismissals was established by the EAT in **British Home Stores Ltd v Burchell 1980 ICR 303 EAT** and remains good law (irrespective of the changes to the burden of proof which have been made since this case was decided). This test is as follows:

    a. The employer must believe the employee guilty of misconduct;

    b. The employer must have in its mind reasonable grounds upon which to sustain this belief; and

    c. At the stage at which the belief was formed, the employer carried out as much investigation into the matter as was reasonable in the circumstances.

15. The second and third limbs of the test now have a neutral burden of proof.

16. The sanction of dismissal should also fall within the band of reasonable responses as per **British Leyland (UK) Ltd v Swift 1981 URKR 91, CA**. where Lord Denning MR stated: *'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view.'*

17. Once a potentially fair reason has been established, the considerations of reasonableness as to the respondent's actions in respect of Section 98(4) must be considered. This is a neutral burden between the parties.

18. When coming to the decision, the Tribunal is reminded that they cannot substitute their view for that of the employer. It is recognised in case law that different reasonable employers might react in a variety of reasonable ways to a given situation. **British Leyland (UK) Lt d v Swift 1981 IRLR 91 CA.** The Tribunal must decide whether the decision to dismiss fell within the "range of reasonable responses" open to a reasonable employer. This applies both to the procedural matters as well as the decision that dismissal was the appropriate sanction as per **Sainsbury's Supermarkets v HItt [2002] EWCA Civ 1588.**

19. When considering the reasonableness of the investigation, the Court of Appeal in **Shrestha v Genesis Housing Association Ltd 2015 IRLR 399, CA** confirmed that an employer does not have to investigate every possible explanation by the employee. On the other hand, the investigation should be even handed as per **A v B 2003 IRLR 405, EAT,** and include evidence which assists the employee and not simply be a search for information against the employee.

20. The Acas Code of Practice on Discipline and Grievance states that notification of the disciplinary case to answer should have sufficient information to enable the employee to prepare to answer the case at the disciplinary hearing. This normally incudes provision of copies of written evidence. The Court of Appeal in **Strouthos v London Underground Limited 2004 IRLR 636 CA** confirms that an employee should know the evidence the employer is relying on when considering the disciplinary allegations. Where a statement or evidence discloses the essence of the case against the employee, this information should be provided to them. Where a statement or evidence is peripheral to the decision to dismiss, the failure to disclose these statements or evidence will not render a dismissal unfair as per **Hussain v Elonex plc 1999 IRLR 420 CA.**

21. The Acas Code of Practice on Discipline an Grievance procedure requires at paragraph nine that when notifying an employee of the allegation in a disciplinary process, they should be given "sufficient information about the alleged misconduct…..to enable the employee to prepare to answer the case at a disciplinary meeting." And again at paragraph 12, the Code requires that at the disciplinary meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. This was confirmed by the Court of Appeal case of **Kenyon Road Haulage Ltd v Kingston [2016] EWCA Civ 967** where they found that it was never made clear to the claimant that he was facing an allegation of gross misconduct based on theft. This was not clear in the letter inviting him to the disciplinary hearing, the outcome letter nor was it explained in the disciplinary hearing itself.

22. The formula for calculating the basic award is set out in **Section 119 of the ERA** and provides that a claimant is entitled to one week's pay for each complete year of continuous service where the claimant was below the age of 41 but not younger than 22. A week's pay is capped at £700 under statute.

23. As per **Secretary of State for Employment v John Woodrow and Sons (Builders) Ltd 1983 ICR 582, EAT**, a week's pay is calculated based on gross pay.

24. The compensatory award is provided for in **Section 123 of the ERA** and is such amount "as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained" by the claimant in consequence of the dismissal. The loss must be attributable to the actions taken by the respondent employer. As per **Norton Tool Ltd v Tewson 1972 ICR 501 NIRC**, the compensatory award should include items such as loss of earnings loss between the date of dismissal and the hearing; estimated loss after the hearing; expenses incurred as a consequence of dismissal; and loss of statutory protection rights.

25. Where it is established that the claimant would have been dismissed in any event had the dismissal process not contained procedural flaws, it is for the

Tribunal to consider if there should be a deduction to the compensatory award to reflect this. This is often referred to as a Polkey deduction from the lead case of the same name. **Software 2000 Ltd v Andrews and others 2007 ICR 825 EAT** summarises the up to date position on what is required of the Tribunal in making that assessment. In short, the Tribunal must assess the loss flowing from the dismissal, which involves an assessment of how long the employee would have been employed but for the dismissal. In making this assessment, the Tribunal must have regard to all relevant evidence, including that from the claimant. A finding that an employee would have continued in employment indefinitely should only be made where the evidence to the contrary is so scant that it can be effectively ignored.

26. Where it is established that an employee's conduct has contributed to the decision to dismiss, the Tribunal may reduce the compensation to the claimant to reflect this. This reduction may be to the basic award, or the compensatory award or both. When considering a reduction to the basic award, Langstaff P (as he was then) stated in **Steen v ASP Packaging Ltd 2014 ICR 56, EAT** that the reduction considers what is just an equitable. When considering a reduction to the compensatory award, it is also necessary to look at whether the conduct caused or contributed to the dismissal. **Nelson v BBC (No.2) 1980 ICR 110 CA** determined that when looking at contributory conduct, this considers conduct which is blameworthy or culpable. **Steen** also confirmed that the assessment of whether the claimant's actions were blameworthy or culpable is for the Tribunal, who is not constrained by the employer's decision.

27. A claimant has an obligation to mitigate their loss. It is for the respondent to evidence that the claimant has acted unreasonably. **Fyfe v Scientific Furnishings Limited 1989 ICR 648 EAT** confirms that the onus of showing the claimant's failure to mitigate loss falls to the employer. Further in **Cooper Contracting Ltd v Lindsey 2016 ICR D3 EAT** it is for the employer to prove that the claimant acted unreasonably, not for the claimant to show what he did was reasonable.

28. **Section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992** provides that: 'If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'

29. As such a failure by an employer to comply with the Acas Code of Practice on Discipline and Grievance in dismissing an employee can result in an increase to a successful employee's compensatory award. As per **Kuehne and Nagel Ltd v Cosgrove EAT 0165/13** a breach of the Code will not automatically trigger an adjustment to the compensatory award. Rather, the employer must have acted unreasonably in their breach. The Tribunal has discretion to increase the compensatory award, having regard to what is "just and equitable in all the circumstances" and further guidance was provided by Underhill P (as he was then) in **Lawless v Print Plus EAT 0333/09.** The circumstances for considering an uplift will differ from case to case but should always include:

    a. whether the procedures were applied to some extent or were ignored altogether;

    b. whether the failure to comply with the procedures was deliberate or inadvertent;

    c. whether there were circumstances that mitigated the blameworthiness of the failure to comply; and

    d. the size and resources of the employer.

Findings in fact

30. Having considered the evidence from the parties, the Tribunal makes the following findings in fact on the balance of probabilities.

31. The claimant was employed by the respondent initially as gatehouse security and later as a yard coordinator. His employment with the respondent began on 21 January 2019.

32. The respondent organization manufactures wheelchair facility vehicles, adapting vans so that they can be used by people in wheelchairs and also repairing such vehicles. They employ approximately 900 employees.

33. The claimant's role as yard coordinator was primarily concerned with moving vehicles from one site to another for production or repairs.

34. At some stage in 2024, the respondent began providing free fruit to staff as an employee perk. They engaged a fruit supplier to provide boxes of fruit which were then placed in various staff locations each week. In or around August 2024, Mr David Facenna Corporate Cultural Director came to Mr Gerry Facenna, Chairman stating that either an employee was taking fruit or the fruit supplier was not delivering the correct amount. After some initial investigation into CCTV footage, it was established that a Mr McAuley, who was employed by the respondent, collected some of the fruit as instructed in a company van but placed some in his car so it was not available to other employees. On one occasion, 29 July 2024, the claimant was in the van with Mr McAuley when he picked up a fruit delivery and placed one box of fruit in his car.

35. On 7 August 2024 the claimant was called into a meeting with Mr Gerry Facenna. Mr David Facenna was also in attendance. Mr Gerry Facenna informed the claimant that a colleague, Mr McAuley, admitted to stealing a box of fruit. He informed the claimant that he believed the claimant watched Mr McAuley steal a box of fruit and did not report it even though the claimant was in a position of trust. The claimant was suspended that day.

36. By letter dated 8 August 2024, the claimant's suspension was confirmed and he was invited to a disciplinary hearing on 12 August 2024. The letter confirmed: "it is alleged you have been witness to theft of company property on 29 July 2024" and notes that dishonesty, theft and fraud are viewed by the respondent as gross misconduct.

37. The letter enclosed a short investigation report and three stills from CCTV. The investigation was undertaken by Bekka Smith, HR adviser. It states that the allegation being considered was “breach of trust and confidence”. The report notes that a witness statement was taken from Mr David Facenna. This statement is not appended to the report. It also refers to information provided by HR by Mr Gerry Facenna. A statement is not attached to the report. The information from Mr Gerry Facenna refers also to a phonecall with Mr Scott Bonnyman and what was discussed. A statement from Mr Bonnyman was not appended to the report. Ms Smith did not speak to the claimant as part of this investigation.

38. The report recommended that the matter proceed to a disciplinary hearing and that the allegation was potential gross misconduct.

39. The respondent had two pieces of CCTV footage from 29 June. The first showed the claimant and Mr McAuley in a van arrive at a location called The Pit Stop. The claimant was in the front passenger seat of the van. Mr McAuley was in the driving seat. Mr McAuley got out of the driving seat and walked into The Pit Stop, returning with a box of fruit which he put into the back of the van. He then walked back into The Pit Stop, returning with a second box of fruit which he put in the back of the van. The second piece of CCTV footage showed the van a few minutes later pulling up to a car outside the gate to the respondent premises. This was Mr McAuley’s car. Mr McAuley got out of the van, opened the passenger door behind the claimant, took out a box of fruit and placed it in his car. He then returned to the driving seat and drove through the gate at the respondent premises.

40. The CCTV footage was not made available to the claimant at any point prior to his dismissal.

41. On the morning of 12 August, the claimant attended at the respondent premises for the disciplinary hearing. He was not a member of a trade union and the respondent does not recognise a trade union for collective bargaining. He had not spoken to his colleagues to see if they would be willing to accompany him to his disciplinary hearing as he understood he could not do

so, based on the contents of the invite letter. He spoke initially with Mr Bobby McConville but was informed by Mr McConville that Mr Gerry Facenna had instructed him not to get involved. He informed the claimant that George Facenna could not represent the claimant and it would need to be someone in the department. The claimant also spoke to James Andrews, Chris McDonald and Phil McDonald but they were unwilling to represent the claimant at the hearing. Mr Scott Bonnyman agreed to undertake the role. The claimant was not entirely happy with this choice as he had concerns about Mr Bonnyman's trustworthiness but felt he had no other options. At the outset of the disciplinary hearing, the claimant confirmed that he was happy to proceed and did not need additional time to speak to Mr Bonnyman.

42. The disciplinary hearing was conducted by Mrs McGlone, Strategic Project Lead and Executive Assistant to the Managing Director. Meghan Rooney, People Adviser was also present to take notes. During the hearing, the claimant stated that he was not paying attention to what Mr McAuley was doing, that the journey was one of 40 or more made in a day, that Mr McAuley regularly collects the fruit box for his department. He stated that it is not uncommon for employees to stop on the road or at their cars. When asked about the stop at Mr McAuley's car where Mr McAuley transferred one box from the van to his car, the claimant stated that he did not know why they stopped, that he was on his phone. When asked if he was aware that Mr McAuley was taking fruit without authorisation, the claimant confirmed that he was not aware, and that it made no sense to him to take the fruit, that he knew Mr Gerry Facenna's view on theft. The claimant was not asked about whether he asked Mr McAuley what was happening or whether there was any discussion between the two that would inform the claimant's knowledge about what was happening.

43. The hearing adjourned to allow Mrs McGlone to look further at CCTV to establish why the claimant was in the van with Mr McAuley and what he had been doing prior to and after the event. This additional CCTV was not shown to the claimant. There was no investigation of whether a conversation took place between the claimant and Mr McAuley and no investigation into the

claimant's explanation that it was not uncommon for employees to stop on the road or at their car.

44. The disciplinary hearing resumed on 13 August. In the interim, Mrs McGlone reviewed CCTV footage and established that the claimant dropped car keys at the production department and was then picked up by Mr McAuley in the van. This was explained to the claimant at the outset of the meeting. Mrs McGlone further stated that if the claimant can communicate with Mr McAuley to arrange to be picked up after dropping off the keys, "then I have a reasonable belief that you communicated why he was stopping at pitstop and then stopping at the car." She also stated that she struggled to believe why the claimant would not know what Mr McAuley was doing or why he did not question it. The claimant responded that it is not unusual to stop at a car and Mrs McGlone responded stating that "I am saying you were aware of what was happening and didn't report." She stated that all employees have a duty to report suspicious activity to which the claimant responded to stated that he would have raised concerns if he thought it was suspicious. Mrs McGlone then confirmed that the claimant was summarily dismissed from his role. The hearing ended at that point.

45. The decision to dismiss was taken by Mrs McGlone prior to the hearing on 13 August. This hearing on 13 August was scheduled to confirm the investigation undertaken by Mrs McGlone and to inform him of the outcome of the hearing.

46. The dismissal was confirmed in writing by letter dated 14 August. It stated that the hearing was arranged to consider the allegation "that you were in a vehicle on the 29 July 2024 with Andrew McAuley whilst he took two boxes of fruit from the pitstop and then drove to his own vehicle and put a box of fruit in his car before going into the yard with the second box of fruit which has resulted in a breakdown of trust and confidence." This was confirmed to be gross misconduct.

47. The letter went on to outline the claimant's position, that he was in the van when Mr McAuley stopped at the pitstop but was on his phone, that he did not ask Mr McAuley why he stopped at the pitstop or at his car, that it was not

unusual for employees to stop at other cars and the journey was one which he takes 40+ times per day. It also confirmed that the claimant agreed withholding information of wrongdoing would impact negatively on his reputation with the respondent and that if the claimant saw something suspicious. The letter went on to state that the claimant's employment is terminated "due to a reasonable belief that you were aware what Andrew was doing which has resulted in a breach of trust and confidence."

48. Mrs McGlone came to the belief that the claimant had knowledge of what Mr McAuley was doing because it would be natural instinct to ask where Mr McAuley was going when he stopped at The Pit Stop and again to ask why Mr McAuley had stopped at his car. She would have asked these questions at the time.

49. The claimant was dismissed for conduct, namely dishonesty in not coming forward and highlighting wrongdoing. This caused a breakdown in the relationship between the respondent and the claimant.

50. The letter confirmed the claimant's right to appeal the decision to dismiss but he did not do so.

51. The letter also confirmed that the claimant was entitled to payment of four and a half accrued but untaken annual leave days and that this payment would be included in his final salary payment.

52. The claimant was dismissed summarily and so not paid his contractual or statutory notice pay.

53. The claimant sought to obtain work relatively quickly following his dismissal. He had worked previously as a chef and took up at role at Beefeater on 27 August. His salary was £337.31 net per week. The hours of work did not suit him, particularly as he has children and so he sought an alternative role BCA on 30 September. This role was similar to the one he held with the respondent organisation but is not paid at the same rate. His salary is £424.72 net per week. He continued to be employed in that role at the time of the hearing.

Submissions

54. The respondent and claimant made submissions following the evidence. These submissions were considered in full when coming to the decision below but for brevity are not included here.

Decision

Reason for dismissal

55. The decision for the Tribunal was whether the claimant was unfairly dismissed and if so, the appropriate remedy. In coming to this decision, the key question was whether the dismissal was fair in terms of **Section 98 of the ERA.**

56. The first issue to consider was the reason for the claimant's dismissal. It is for the respondent to show the reason for the dismissal, and that it is one of the potentially fair reasons as set out in **Section 98 of the ERA.** The reason is the set of facts known to the respondent or their beliefs which cause them to dismiss the employee. The question of reasonableness is not considered at this stage.

57. It was not in dispute that the claimant was in the van on the day in question and was present when Mr McAuley collected the fruit and then placed one box in his car. The allegation is more than the claimant being present; it specifically refers to him witnessing theft. The crux therefore is the claimant's knowledge of Mr McAuley's theft.

58. Ms McGlone confirmed in evidence that she believed the claimant was aware of Mr McAuley's actions. She formed this belief from the CCTV footage which showed the claimant looking around him and being aware of people on the street or in other vehicles. She also believed that the "natural instinct" would have caused the claimant to ask Mr McAuley what was happening and why he had stopped. She believed a conversation did take place. She confirmed in evidence that the claimant's conduct was the reason for dismissal. While reference was made to a breakdown in trust and confidence, the dismissal was because of the claimant's conduct rather than a dismissal for some other substantial reason justifying dismissal.

59. The Tribunal was satisfied that the respondent had shown the reason for dismissal was misconduct and therefore for a potentially fair reason.

60. The Tribunal then considered if the dismissal was fair or unfair in accordance with **Section 98(4) of the ERA.** It noted that in determining whether the dismissal was fair or unfair, it had to have regard to the reasons shown by the employer and the answer to that question depends upon whether, in the circumstances (including the size and administrative resources of the employer's undertaking), the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee; and that this should be determined in accordance with equity and the substantial merits of the case.

61. The Tribunal considered the reasonableness of the respondent's conduct. The Tribunal noted that it must not substitute its own decision for that of the respondent. The Tribunal applied the band of reasonable responses approach to whether the respondent had carried out a reasonable investigation and had reasonable grounds for its belief that the claimant was guilty of misconduct.

62. The Tribunal asked if the respondent have a genuine belief in the misconduct. The Tribunal found that Ms McGlone believed that the claimant knew that Mr McAuley was stealing from the respondent when he took a second box of fruit from the Pit Stop and placed it in his car. The Tribunal concluded that the respondent did have a genuine belief in the misconduct.

63. The Tribunal then asked if the respondent had reasonable grounds for the belief in the alleged misconduct and if at the time the respondent formed that belief the respondent had carried out as much investigation into the matter as was reasonable in the circumstances. The Tribunal's role is not to substitute their view of the misconduct for that of the employer. Further it is not for the respondent to prove that the claimant in fact committed the misconduct. Rather, the Tribunal has to assess the reasonableness of the respondent's belief against the band of reasonable responses to decide whether the

respondent had carried out a reasonable investigation and had reasonable grounds for its belief the claimant was guilty of misconduct.

64. Per the findings in fact, Ms Smith was appointed to investigate the claimant's conduct. She spoke with Mr David and Mr Gerry Facenna and prepared an investigation report. She did not speak with the claimant.

65. The investigation report was short, the narrative amounting to one page. The majority of this was focused on Mr McAuley and his actions. There was limited information about the claimant's involvement or his actions, save for a confirmation that the claimant is shown on CCTV in the van with Mr McAuley on 27 July and confirmation from Mr Gerry Facenna that the claimant denied "knowledge of Mr McAuley's taking the fruit boxes."

66. The investigation report recommended that the matter proceed to a disciplinary hearing and that the allegation, a breach of trust and confidence, had the potential to amount to gross misconduct. Ms Smith did not give evidence and the report itself gave no indication as to why at that point gross misconduct was under consideration.

67. There is no automatic requirement under the Acas Code of Practice on Discipline and Grievance or case law to speak to an employee at investigation stage. The specifics of each case will inform the approach.

68. CCTV was taken up and reviewed. Three screenshots from this were appended to the investigation report. Ms McGlone reviewed the CCTV in total in advance of the disciplinary hearing. The claimant was not provided with a copy of the CCTV and it was not shown during the disciplinary hearing.

69. Further CCTV investigation was undertaken by Ms McGlone after the disciplinary hearing. In response to the claimant's assertion that Mr McAuley picked him up after he delivered keys to another part of the respondent premises, Ms McGlone looked at the CCTV to confirm the claimant's whereabouts before being picked up by Mr McAuley.

70. The disciplinary hearing was the first opportunity for the claimant to set out his case. His position was essentially that 1) he was unaware of Mr McAuley's

actions as he was focused on other things and 2) it is not unusual to stop on the road or at a car on one of these journeys. He explained that he makes the journey between the production department and the depot upwards of 40 times per day. Stopping in the street is not unusual and at times people stop at their cars. He was not paying attention to what Mr McAuley was doing. He was thinking about his workload and dealing with keys. He was also on his phone. Had he known that Mr McAuley was stealing fruit he would have "told him to walk himself with it to his car." He repeatedly stated that he had no knowledge of what Mr McAuley was doing. He accepted that withholding information of wrongdoing can have a negative impact on his relationship and reputation with the business.

71. Mrs McGlone did not accept the claimant's alleged lack of knowledge partly because she believed a conversation would have taken place between the claimant and Mr McAuley as to what was happening, namely him stopping at the Pit Stop and at his car. At the disciplinary hearing, the claimant was asked about his understanding of what was happening, what went through his head at certain points, what did he believe was happening. He was consistent in his explanations that he was unaware and not paying attention as he was dealing with keys, thinking about work and on his phone. He is not asked at any point whether he spoke to Mr McAuley about what was happening. He does not provide an account of any conversation with Mr McAuley during the short journey nor is he asked about it. The respondent did not speak to Mr McAuley about what if any discussion or conversation took place between him and the claimant about his actions.

72. On the second point of the claimant's position, there was no investigation into whether Mr McAuley's actions, stopping at the Pit Stop and again at his car, was the normal course of business for the claimant and others in that team or something that would give rise to suspicion.

73. The Tribunal accepted the submission of the respondent that they are not held to the standard of investigation where no stone is unturned. The question is one of reasonableness and not perfection. Further an investigation does not need to turn over every metaphorical stone or every possible explanation from

the employee (**Shrestha**). The investigation should include evidence which assists the employee's position (**A v B**). Having considered the case law and the evidence, the Tribunal found that the level of investigation up to and including the disciplinary hearing fell outside of the band of reasonableness. Further reasonable investigation could have been undertaken by Ms McGlone into the assertion that stopping on the road or at cars was not uncommon by speaking to other members of the claimant's team or the claimant's manager. Ms McGlone could also have ascertained what if any discussion took place between Mr McAuley and the claimant by asking him directly and/or speaking to Mr McAuley. She recognised that further investigation was necessary to confirm the claimant's explanation as to how he came to be in the van with Mr McAuley and reviewed additional CCTV but not the claimant's explanation as to why he was unaware of Mr McAuley's actions.

74. The Tribunal considered that the respondent did not have reasonable grounds for the belief in the alleged conduct. The level of investigation of the claimant's position was limited and the investigation as a whole, over the investigation and disciplinary hearing, focused primarily on information to support the allegation. The lack of investigation into the claimant's explanation impacted on the reasonableness of the belief held by the respondents in the claimant's guilt. By failing to investigate the claimant's explanations, they did not adequately consider his position and take this into account before coming to their belief.

75. The next step for the Tribunal was to apply the band of reasonable responses test to the decision to dismiss and the procedure by which that decision has been reached. Again, the Tribunal's role is not to substitute their view of the appropriate sanction for that of the employer.

76. Mrs McGlone believed that the conduct amounted to gross misconduct as it demonstrated the claimant's dishonesty, stating that the claimant did not come forward and inform the respondent about Mr McAuley's actions. She confirmed in evidence that a warning was not appropriate because she believed the relationship of trust and confidence between the respondent and claimant was broken as a result of the claimant's actions. Specifically, she

described the claimant as acting dishonestly for failing to inform the employer of Mr McAuley's theft. Reporting wrongdoing was something expected of all employees. Failing to do so was dishonest and so impacted the relationship to the point that Mrs McGlone did not see how it could continue.

77. The dismissal letter stated "after careful consideration, I have decided to terminate your employment on 13 August 2024 due to the reasonable belief that you were aware of what Andrew was doing which has resulted in a breach of confidence."

78. The Tribunal is not satisfied that the respondent's decision to dismiss was within the band of reasonable responses. There is a conflict between the allegation in the invitation letter and the basis for dismissal. The allegation was clear on its terms – the claimant witnessed theft. There is then a reference to the fact that dishonesty, theft and fraud are viewed by the respondent as gross misconduct. It is not immediately clear in that letter what the alleged dishonest conduct is. The Tribunal noted that Mrs McGlone was required to reassure the claimant in the disciplinary hearing that he was not being accused of theft. Her evidence was that the failure to inform the respondent of Mr McAuley's theft demonstrated dishonesty on the part of the claimant. This dishonesty was why the respondent viewed the claimant's conduct as gross misconduct. It also caused the breakdown in the employment relationship and was why dismissal, per the respondent's evidence, was the appropriate sanction.

79. A failure to report theft was not included in any of the disciplinary paperwork. It was not apparent that this was the dishonest conduct being considered by the respondent. The investigation of this amounts to one question at the disciplinary hearing when the claimant is asked if he understands that withholding information of wrongdoing can have a negative impact on his reputation and relationship with the business to which he agrees.

80. The outcome letter similarly avoids any reference to dishonesty, and only obliquely refers to a failure to inform the respondent of theft by including the above question about reputation and his relationship with the business. The

breach of trust and confidence which meant that dismissal was the only appropriate sanction was a result of his awareness "of what [Mr McAuley] was doing".

81. The Tribunal considered that while dishonesty for failing to inform the respondent of theft was the basis of the decision to dismiss by the respondent as per their evidence, the claimant was not given adequate notice of this in the disciplinary process and so was not given an opportunity to make representations and put his case in response.

82. The Tribunal then considered the procedure that had been followed. The claimant was not provided with all the information which was available to the respondent. The Tribunal considered that the CCTV from 29 July was central rather than peripheral to the decision to dismiss (**Hussain v Elonex**). In Mrs McGlone's evidence about the CCTV footage she stated that in the first clip, the claimant was looking around and can see the movement of other people passing by and that in the second clip, he can see "everything around about him." This she believed contradicted his explanation that he was unaware of what Mr McAuley was doing.

83. The CCTV footage was therefore more than peripheral; it assisted Mrs McGlone in coming to a view of the claimant's knowledge of Mr McAuley's actions. This should have been made available to the claimant in advance of the disciplinary hearing. The responsibility for providing the CCTV footage fell to the respondent rather than the claimant to seek a copy of same.

84. No witness statements were attached to the investigation report despite HR speaking to both Mr David and Mr Gerry Facenna. The information provided to Ms Smith by Mr David Facena was background on how the theft and the claimant's presence in the van came to the attention of the respondent. The information Mr Gerry Facena provided to HR included the claimant's denial of knowledge of Mr McAuley's theft and Mr Bonnyman's assertion that his team were unaware of the theft.

85. Mrs McGlone's evidence did not cover what if any consideration was given to this information from the investigation report, although she was aware of the

contents of the report having reviewed it in advance of the disciplinary hearing. The question of the claimant's knowledge being the focus of the disciplinary allegation the information from Mr Gerry Facenna was not peripherial and so formal statements should have been taken and shared with the claimant.

86. The claimant had difficulty in finding a colleague to accompany him to the disciplinary hearing. At the outset of the disciplinary hearing he confirmed that he was happy to proceed and did not seek additional time.

87. The claimant alleged that Mrs McGlone did not come to her decision independently and was influenced by Mr Gerry Facenna. This was denied by Mrs McGlone. The only evidence which could suggest a lack of independence was the fact that Mr Gerry Facenna was the chairman of the respondent and believed at the time of suspension that the claimant knew of Mr McAuley's theft. The Tribunal did not consider that an inference could be drawn from this and viewed Mrs McGlone as a wholly credible witness.

88. On the whole, the Tribunal considered that the procedure followed by the respondent was not in the band of reasonable responses. There was a failure to adequately notify the claimant of the allegation. Witnessing theft was only part of what was under consideration by the respondent. There was also a failure to provide the claimant with all the relevant evidence in failing to provide him or show him the CCTV gathered and failing to provide statements collated for the investigation report. The Tribunal did not find that the claimant's right to be accompanied was hindered nor did they find a lack of independent decision making.

89. The Tribunal therefore concluded that the claimant's dismissal was unfair.

Remedy

90. The claimant is entitled to a basic award and a compensatory award as per **Section 118 of the ERA.**

Basic award

91. The claimant was 34 at the time of his dismissal and had 5 complete years of service. His gross weekly wage was £600. Using the formula of a weeks' pay per completed year of service, the claimant is entitled to a basic award of £3,000.

Compensatory award

92. The claimant had an immediate period of unemployment which lasted 11 days. His net weekly salary from the respondent was £480.54. His immediate losses therefore amount to £1,057.18.

93. Following this, he took up a role at the Beefeater as a grill chef on 27 August, earning £337.31 net per week. He remained in that role until 29 September. The shortfall in salary in this period came to £143.23 per week amounting to £1,059.90 over the period of employment with the Beefeater.

94. The claimant then secured a role at BCA as a vehicle appraiser, starting on 30 September. His net monthly salary for that role is £1,840.46. This gives a weekly net wage of £424.72 and a net short fall of £55.81 per week. He continues in that role and stated that it is similar to the role he held at the respondent, albeit for lower pay.

95. The claimant is entitled to a compensatory award to reflect his losses from the date of dismissal on 13 August 2024 to the date of hearing which was the 13 and 14 January 2025. This encompasses his total losses initially(£1057.18) the shortfall in wages in his first role (£1,059.90) and shortfall in wages in current role (19 weeks at £55.81 per week £1,060.39).

96. The claimant is also entitled to a future losses for a further 12 week period to reflect the ongoing loss suffered by the decision to dismiss. This comes to £669.72.

97. The claimant was also paid a monthly uniform bonus of £80 per calendar month. He is therefore entitled to the past loss of this bonus from date of dismissal to date of hearing (five months at £80 per month £400). He is also

entitled to future losses in line with wages and so three months loss of uniform bonus coming to £240.

98. The claimant is also entitled to compensation for loss of statutory rights at £400.

99. The claimant sought payment of fuel and parking costs for his attendance at job interviews as well as the cost of clothes for these interviews. There is no basis for the tribunal to award such costs.

100. The claimant also sought compensation for the stress caused by his dismissal. While it is appreciated that dismissal is a stressful event, the compensatory award does not cover non-financial losses for pain and suffering as can be awarded by the civil courts. As such the Tribunal cannot make such an award in an unfair dismissal case.

101. The total compensatory award comes to £4,486.47.

102. The Tribunal considered that the claimant mitigated his losses and that the respondent had not established a failure to mitigate his loss. He sought employment shortly after dismissal, taking up a role some 11 days post dismissal. This role, as a chef, was different to the role carried out when working for the respondent and illustrated his desire to get back to work as soon as possible. He then moved to a role similar to the one he undertook for the respondent at a slightly lower salary. The respondent's submission that as he failed to continue to look for alternative roles at the same rate of pay as the respondent once he took up the BCA role, he failed to mitigate his loss is not successful. No evidence was provided to suggest that such roles exist at the same rate of pay as the respondent.

103. The respondent submitted that the claimant's compensation should be reduced to zero due to his contributory conduct which led to his dismissal. The submission did not specify if this relates to both the basic and compensatory award but it is taken that both awards should be considered. There were minimal submissions on this point.

104. It is for the Tribunal to assess the culpable nature of the claimant's behaviour. The Tribunal is not constrained by the respondent's assessment of the wrongfulness of the claimant's behaviour (**Steen**).

105. Mrs McGlone's evidence was clear that she took the decision to dismiss the claimant because he failed to inform his employer of Mr McAuley's theft and was dishonest in this failure. This was the true reason for his dismissal. The claimant's evidence was that he knew of Mr Gerry Facenna's view of theft. The Tribunal was referred to notes from the disciplinary hearing where the claimant confirmed that would have reported a theft had he been aware of it. The Tribunal considered that the claimant did not have the requisite knowledge of Mr McAuley's actions, but that had he been aware, he would have made this known to the respondent. The Tribunal reached this conclusion based on the claimant's evidence that he was on his phone at various points and not paying attention to what Mr McAuley was doing. Mrs McGlone also confirmed that at the disciplinary hearing, the claimant was "adamant" he was on his phone. While the CCTV footage at the Pit Stop showed the claimant engaging with other people and vehicles on the street, the CCTV footage at Mr McAuley's car is head on with the van and so it cannot be said that this shows him looking around or engaged with what Mr McAuley is doing. The claimant was at pains to make clear in his evidence as well as his submission and his questioning of other witnesses that he was an honest person. The Tribunal considers that the was not aware of Mr McAuley's actions but had he been aware, he would have reported these. As such the Tribunal considers that the claimant was not engaged in blameworthy conduct which led to his dismissal and so it would not be just and equitable to reduce either the basic and compensatory awards.

106. The respondent also submitted that any compensation to the claimant should be reduced by applying a Polkey reduction, on the basis that if fair procedures had been applied, the same outcome would have resulted, namely the claimant's dismissal. This was the extent of the submission on this point.

107. The Tribunal was not convinced that even if the procedural flaws were remedied, the outcome would have been the same. One of the primary

procedural flaws was the failure to investigate the claimant's explanation while another was the failure to provide copies of the CCTV in advance of the disciplinary hearing. Mrs McGlone's evidence was that she came to her decision independently and set out the information she based this on. Had there been further investigation and so further information to consider, and had the claimant been given an opportunity to speak to the CCTV footage, this may have been led to a different outcome. As a result, the Tribunal does not accept that compensation should be reduced in these circumstances.

108. The Tribunal considered that some of the failures in procedure leading to the claimant's dismissal breached the Acas Code of Conduct on Discipline and Grievance, specifically: the failure to adequately inform the claimant of the allegations against him; the failure to provide him with the evidence considered by the respondent; the failure to carry out the necessary investigation to establish the facts.

109. The respondent is a large organisation, employing 900 people with a HR department. Although not brought to the various documents, the Tribunal was aware that the respondent has written policies and procedures on disciplinary matters. The Tribunal concluded that the paperwork in evidence which formed part of the disciplinary process namely the investigation report, invite letter and dismissal letters were all drafted in a manner which would suggest the input of HR and an understanding of the requirements of the Acas Code of Practice.

110. The Tribunal accepts that the failures on the part of the respondent were partial rather than total. In considering whether the failure was deliberate or inadvertent, the Tribunal looked at the respondent position put to the claimant in respect of the CCTV footage, that the claimant had ample opportunity to request this in the seven days prior to the disciplinary hearing. The responsibility for providing the evidence being considered falls to the employer not the employee. The Tribunal had regard for the fact that Mrs McGlone undertook further investigation to confirm what the claimant said about how he came to be in the van with Mr McAuley but failed to investigate the other aspects of the claimant's position. The Tribunal also had regard to

the fact that the allegations changed at each stage – investigation, disciplinary, outcome- but the respondent at each stage did not take the opportunity to set out the true nature of the gross misconduct as they saw it, the failure to report theft. The Tribunal did not hear evidence that these failures were deliberate nor was there evidence to infer these breaches were deliberate. While concluding that these failures were inadvertent, it is concerning that a well-established employer of this size, with a HR department, made such errors. The Tribunal did not consider that there were factors mitigating the blameworthiness of the failures. Taking into account what is set out above and the relevant case law, the Tribunal considers that the compensatory award should be increased by 15%. This increase brings the total compensatory award to £5,159.44.

111. The claimant being summarily dismissed was not paid for his statutory notice which was five weeks' pay. As his dismissal has been found to be unfair, the respondent was not entitled to summarily dismiss him. The claimant's gross weekly wage was £600 and so five weeks' pay comes to £3,000. It may be that tax and national insurance require to be deducted from this amount.

112. The claimant also sought payment for the annual leave he would have been entitled to had he remained employed by the respondent for the remainder of the annual leave year. An employee is only entitled to accrued but untaken leave at the date of dismissal. Where an employee leaves employment part way through an annual leave year, they are not entitled to the holidays they would have accrued if they remained employed. This claim does not succeed.

Date sent to parties **01 April 2025**