EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001777/2024

Hearing Held by Cloud Video Platform on 18, 19 and 27 March 2025

Employment Judge A Strain

G Elrick	**Claimant** **In Person** **Assisted by,** **Ms M Grey,** **Friend**
Bilfinger UK Limited	**Respondent** **Represented by:** **Mr A McCrone -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) the claimant was fairly dismissed. His claim of unfair dismissal is unsuccessful and is dismissed.

(2) the claimant's claims of wrongful dismissal and for notice pay are unsuccessful and are dismissed.

(3) the respondent's counterclaim is successful and the Tribunal order the claimant to pay the respondent the sum of Ten Thousand, Nine Hundred and Nineteen Pounds and Ninety-One Pence (£10,919.91) as damages for breach of contract.

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Background

1. The claimant represented himself although he was assisted by a friend Ms Michelle Grey who was permitted to ask questions on the claimant's behalf during the course of the hearing. He asserted a claim of unfair dismissal, wrongful dismissal and notice pay.

2. The claimant sought a basic award and a compensatory award as detailed in his schedule of loss.

3. The issues for determination were set out in the PH Note of 10 January 2025 (paragraphs 20-25 at pages 56-57).

4. The respondent was represented by Mr A McCrone, Solicitor.

5. The respondent had a counterclaim seeking the sum of £10,919.91 as damages for breach of contract.

6. The parties had lodged a joint bundle of documents with the Tribunal in advance of the Hearing which extended to 282 pages. Additional documents were produced during the course of the hearing. These were an email exchange of 19 February 2024 between the respondent's HR Business partner and Dr A Carroll, Occupational Health Adviser and also a spreadsheet detailing the claimant's dates of employment with the respondent.

7. The parties agreed for the purposes of the hearing that the claimant's gross annual basic salary was £73,391.14 (£48,935.57 net) at the date of his dismissal. This was £6,115.93 (gross) (£4,077.96 net) per month and £1,411.37 (gross) (£941.07 net) per week.

8. Employer pension contributions were agreed to be £2,201.73 per year, £183.48 per month, or £42.34 per week.

9. The Tribunal heard evidence from the claimant and Fergus Cameron (**FC**) (Access Manager), Neale Watson (**NW**) (Operations Manager) and David Hall (**DH**) (Vice President Inspection & Global Product Line Manager Inspection) for the respondent.

10. Following conclusion of the evidence on 19 March 2025 the Tribunal adjourned to 27 March 2025 for final submissions. Both parties lodged written submissions in advance and supplemented these with oral submissions to the Tribunal.

Findings in Fact

11. Having heard the evidence and considered the documentary evidence before it the Tribunal made the following findings in fact:

12. The claimant was employed by the respondent as a Materials Controller working offshore on oil and gas installations in the North Sea from 5 October 2011 until the summary termination of his employment by the respondent 9 July 2024. The claimant worked a rota of 2 weeks on and 3 weeks of.

13. The claimant was employed under a contract of employment signed and dated 12 December 2016 (Pages 65-78).

14. Clause 18 of his contract of employment provided that the claimant "*shall not at any time during his employment, either on his own behalf (whether alone or in partnership), or as an employee, agent, Director, consultant of any other person, partnership, business, firm or corporation, engage in any other trade, business, profession, or fee-earning activity without the prior written consent of a Director of the Company*."(Pages 76-77).

15. The claimant was on sickness absence from 30 January 2024 until the termination of his employment. He submitted statements of fitness to work from his GP covering that period detailing anxiety and stress.

16. During his sickness absence from 30 January 2024 until the termination of his employment the claimant received the sum of £10,919.91 in respect of sick pay from the Respondent.

17. Sick Pay was payable to the claimant under the terms of his contract of employment with the respondent (Clause 9). Clause 9 was to be read as providing that any sickness absence must be genuine.

18. The claimant was fit for work during the period 30 January 2024 until the termination of his employment.

19. The claimant worked in his garage business at River House MOT Centre Limited from 30 January 2024 until the date of termination of his employment.

20. The claimant worked in his Webuyaberdeencars Limited business from 29 March 2024 until the date of termination of his employment.

21. The respondent instructed Dr A Carroll (**AC**), an occupational health physician to undertake a report on the claimant's fitness for work. She reported on 4 March 2024 (Page 103) to the effect that *"it seems to be that the main problem is that he has taken on too many commitments onshore and is finding it difficult to cope.*

He feels he is too irritable to be able to function offshore however he would consider working onshore should any suitable role be available.

It is difficult to give any indication of how long he will continue to be unable to return offshore but I feel that it is most likely to be until he deals with the underlying cause."

22. On 24 April 2024 Gary Newson (**GN**) (Project Manager) and Rebecca Gunn (**RG**) (HR Business Partner) attempted to conduct a welfare visit with the claimant at his home. The claimant was not there. They then visited River House MOT Centre Limited, a garage where it was believed the claimant worked. The claimant was not there. They were told by an individual (who identified himself as the claimant's son) that the claimant was not there but that he worked there most days. GN made a statement to this effect (Page 110).

Investigation

23. Following receipt of GN's statement the respondent's HR approached FC to investigate the following 3 allegations which were detialed to the claimant in an Invite to Investigatory Meeting letter dated 26 April 2024 (Pages 108-109):

"

a. *You have not followed the Company's Absence Reporting Procedure, BMS-HR-GEN-PRO-006, Version 3, Section 7, Evidence of Incapacity during your sickness absence commencing 30 January 2024;*
b. *You have breached Section 18, Other Work from your Contract of Employment "An employee shall not at any time during his employment, either on his own behalf (whether alone or in partnership), or as an employee, agent, Director,consultant of any other person, partnership, business, firm or corporation, engage in any other trade, business, profession, or fee earning activity without the written consent of a Director of the Company";*
c. *You have been dishonest and fraudulently claiming sick pay, we have genuine reason to believe during the period of sickness absence commencing 30 January 2024 that you have been working elsewhere."*

24. In that letter he was also told *"If you know of any documents or information that you think will be relevant to the matters under investigation please let me know as soon as possible. I enclose a copy of the Company Disciplinary Procedure for your information"*

25. The respondent's Disciplinary Procedure is at pages 79-85. At page 84 it describes dishonesty as constituting gross misconduct.

26. The claimant attended an Investigation Meeting on 1 May 2024 conducted by FC. The claimant attended with a family member in support and FC was accompanied by RG (HR). Notes of the meeting were provided by the respondent (Pages 111-114).

27. The claimant accepted that he had the opportunity to put forward his case and any documentation in support of his case at the Investigatory Meeting.

28. During the course of the Investigatory Meeting the claimant (1) accepted that he had breached Clause 18 of his contract of employment under the explanation that he was unaware of its terms and (2) denied working in his garage business at River House MOT Centre Limited.

29. The claimant accepted that he was a Director of River House MOT Centre Limited from 30 January 2024. This was also confirmed by records from Companies House (Page 125).

30. The claimant stated that his son was lying about him working in the business.

31. The claimant accepted that he was a Director of another company Webuyaberdeen cars Limited with effect from 29 March 2024 but that company was dormant and not yet trading. This was also confirmed by records from Companies House (Page 126).

32. Following the meeting FC had sight of an updated report from AC dated 24 May 2024 (Page 115). This report stated that the Claimant was fit to work offshore and that the reason he felt he was unfit to do so was entirely due to his *"onshore commitments"* which seemed to be *"incompatible with his ability to travel onshore"*.

33. FC issued an investigation report (Pages 121-124) which recommended disciplinary action be taken.

Disciplinary Hearing

34. By email of 3 June 2024 the claimant was invited to attend a Disciplinary Meeting on 5 June 2024 to be conducted by NW (Pages 118-126). This letter informed the claimant of the outcome of the investigation and included (amongst others) a copy of the Investigation Report and the updated OH report from AC of 24 May 2024. The claimant was again informed that if he wished to provide any other documentation then he should do so as soon as possible.

35. The letter set out the following allegations againt the claimant to be discussed at the Disciplinary Meeting:

"It is alleged that you have committed the following acts of misconduct.
1. It is alleged that you have:
set up a business under the name River House MOT Centre Limited, in which you are the sole director and a majority shareholder, and
become a director and shareholder of Webuyaberdeencars Limited without the prior written consent of a director of the Company. You are accordingly in breach of Clause 18 of your contract of employment, which provides that "An employee shall not at any time during his employment, either on his own behalf (whether alone or in partnership), or as an employee, agent, Director, consultant of any other person, partnership, business, firm or corporation, engage in any other trade, business, profession, or fee earning activity without the written consent of a Director of the Company".
2. It is alleged that, while absent from work and claiming Company sick pay, you have worked in your own business, River House MOT Centre Limited,

without the prior consent or knowledge of the Company. As a consequence, (i) you have acted in breach of clause 18 of your contract of employment with the Company and (ii) you have made a false claim for Company sick pay. It has been confirmed by the Company's Occupational Health adviser that you are fit for work offshore, according to OGUK guidelines, and the reason for your absence from work is that you believe you are not fit for work due to "irritability" related entirely to the additional onshore commitments that you have taken on. These additional commitments are considered by the Company's Occupational Health adviser to be incompatible with your alleged inability to travel to work offshore."

36. The letter also warned the claimant that if established then the allegations could amount to gross misconduct and may result in his dismissal with or without notice.

37. The Disciplinary Meeting took place on 11 June 2024 having been postponed due to the claimant's Trade Union Representative not being available.

38. The claimant attended the Disciplinary Meeting with his Trade Union Representative, Isabella Sutherland (**IS**). The meeting was conducted by NW along with support from Ms Ann Stuart (**AS**) HR Business Partner. Jemma Bruce (**JB**) HR Co-ordinator attended and took notes (Pages 128-135).

39. The claimant accepted that he had the opportunity to put forward his case and any documentation in support of his case at the Disciplinary Hearing.

40. The claimant denied the allegations made against him.

41. The claimant again asserted that he was unaware of the terms of Clause 18 of his contract of employment. He was a silent partner in River House MOT Centre Limited and did not work in that busness (the garage business). He did not consider this to be a conflict of interest with his employment with the respondent.

42. IS asked if NW would accept a statement from the claimant's son to confirm that he did not work there everyday. The response was that any statement provided now would be of no assistance given the potential influence over his son.

43. The claimant stated that he could provide bank statements and payroll records to establish he did not work at the garage. No such evidence was provided.

44. The claimant denied that he was working in Webuyaberdeencars Limited.

45. The claimant was referred to AC's updated report of 24 May 2024 and asked about it. His response was that he had not seen or spoken to AC since February 2024 and he denied that he had said he had taken on too many onshore responsibilities. He also asserted that there were no onshore stressors.

46. The claimant denied that he was fit to work offshore and stated he had been signed off by his GP due to stress and anxiety.

47. IS stated that the claimant was on medication which had been doubled and also included sleeping tablets.

48. The Disciplinary Meeting concluded on the basis that NW would investigate the claimant's current state of health and medication he was on.

49. By email of 19 June 2024 the claimant provided a list of prescribed medication (Pages 142-143).

50. The respondent sought comment from AC on the medication which was provided by email of 4 July 2024 (Page145). AC stated that the claimant's medication had not doubled.

51. AC's email was sent to the claimant for comment on 5 July 2024 (Page 149). The claimant responded by email of 5 July 2024 (Page 149).

52. By letter of 9 July 2024 the outcome of the Disciplinary Hearing was communicated to the claimant (Pages 152-155). The 2 allegations against the claimant were upheld and the Claimant was summarily dismissed. He was informed of his right to appeal.

Appeal

53. The claimant appealed the decision to dismiss by email of 11 July 2024 (Page 156). The claimant appealed against the decision and also the severity of the punishment.

54. On 16 July 2024 the claimant was informed of the appeal hearing date and time by letter of that date (Page157). He was also informed that DH would convene the hearing with support from HR.

55. On 23 July 2024 the claimant emailed the respondent to advise that he was not only appealing the severity of the sanction but also the accusations against him (Page 158).

56. The Appeal Hearing took place on 26 July 2024. The claimant was present along with his trade union representative IS. DH was present along with Ms Kelly Paddon (**KP**) an HR Business partner for support and JB who took notes (Pages 162-168).

57. At the outset the grounds of appeal were clarified by DH as follows:

"*1. You asserted that the procedure to dismiss you was unfair because:*
the disciplinary hearing had been adjourned but never reconvened;
this was a missed step in the procedure; it prejudiced your opportunity to respond to the additional medical evidence obtained from Dr Carroll.
2. You didn't have a full opportunity to put your points across.
3. You denied that you were working in your garage business.
4. You denied that you had falsely claimed sick pay.
5. The sanction of summary dismissal was too severe."

58. The clamant again denied that he was working in the garage business and asserted that it was run by his wife and a friend Gareth Whyte (GW). The claimant was only an investor and silent partner. The garage business had 7 employees.

59. The claimant was asked why his son would lie. In response the claimant offered to take his son in and he could be asked together.

60. The claimant admitted he was the sole Director of River House MOT Centre Limited and the majority shareholder.

61. The claimant stated that Webuyaberdeencars Limited was a non-trading company and he had bought the domain and name for the future. He was a Director of that company.

62. The claimant maintained that he had only spoken to AC in March 2024.

63. The claimant maintained his medication had more than doubled from 20mg to 50mg. He provided an excerpt from his GP medical records at the hearing (Pages 169-170). The entry on his GP records for 30 January 2024 referred to him being more stressed recently and having opened a garage.

64. The hearing concluded on the basis that DH would clarify the medical information with AC, deliberate and reach a decision on the appeal.

65. Following the conclusion of the appeal hearing on 26 July 2024 DH obtained a social media advert for the claimant's company Webuyaberdeencars Limited dated 10 June 2024 from KP (Page 171).

66. Following the conclusion of the appeal hearing on 26 July 2024 DH obtained pictures of business premises for the claimant's company Webuyaberdeencars Limited from AS by email of 26 July 2024 (Pages 172-174).

67. On 2 August 2024 DH emailed the claimant with the social media advert and the pictures of the premises and asked for his explanation in light of what he had stated at the appeal hearing (Page 176-177).

68. The claimant responded by email of 3 August 2024 (Page 176) and again asserted he did not work in the business, the business was non-operational and the social media post and premises were for the future.

69. AC provided a report based on the claimant's medical records which had been provided at the appeal hearing on 26 July 2024 on 5 August 2024 (Pages 178-179). AC concluded:

"Nothing in the records change my assessment of Mr Elrick's fitness to work offshore.The timeline confirms my assessment that he is suffering from stress which is directly related to him taking on a new business venture which is not compatible with offshore working. He has told me that he has had to sink

everything that he has into the garage, so it is understandable that he is feeling anxious about it. He tells me that he has been able to regularly attend the garage on a daily basis.The medication he takes regularly – sertraline until March then citalopram thereafter- are both prescribed here for anxiety and acceptable offshore. It is worth noting that neither seems to have improved his stress levels which is unsurprising given that the stressor has not changed. The Zopiclone (a sleeping tablet) mentioned has been prescribed only twice for a total of ten tablets over several months is not acceptable offshore but these are not recommended for anything other than very short term use and are not regular medication. He believes that he is not fit because he feels irritable however this related entirely to onshore commitments he has taken on which seem to be incompatible with his ability to travel offshore."

70. The report from AC was sent to the claimant for comment by email of 7 August 2024 (Page 181).

71. The claimant responded by email of 8 August 2024 (Page 180-181) in which he once again denied he was working in the businesses and refuted the contents of AC's report.

72. By letter of 9 August 2024 DH communicated the outcome of the appeal to the claimant (Pages 183-189). The claimant's appeal was refused.

73. The claimant accepted that he had the opportunity to put forward his case and any documentation in support of his case at the Appeal Hearing.

Mitigation of Loss

74. The claimant has made no attempt to secure alternative employment since the date of termination of his employment with the respondent.

The Relevant Law

75. The claimant asserts unfair dismissal.

Unfair Dismissal

76. Section 94 of the Employment Rights Act 1996 ("the ERA") provides for the right of an employee not to be unfairly dismissed by his employer.

Section 98(1) provides the following:-

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reasons) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of an employee,

(c) is that the employee was redundant, or

(d) or is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer`s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

77. In terms of Section 98(1) it is for the employer to establish the reason for dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).

78. The Tribunal should first examine the facts known to the employer at the time of the dismissal and ignore facts discovered later. The onus of proof is on the employer.

79. The Tribunal must then ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).

80. The Tribunal must also consider whether the respondent carried out a fair procedure taking into account the terms of the ACAS Code of Practice. In that regard, any procedural issues identified by the Tribunal should be considered alongside the other issues arising in the claim, including the reason for dismissal (***Taylor v OCS Group Ltd*** *[2006] EWCA Civ 702, paragraph 48)*.

81. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; ***Grundy (Teddington) Ltd v Willis***, ***HSBC Bank Plc (formerly Midland Bank plc) v Madden*** *2000 ICR 1283*. It should be recognised that different employers may reasonably react in different ways and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

82. Mr Justice Browne-Wilkinson in his judgement in ***Iceland Frozen Foods Ltd v Jones*** ICR 17, in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows: *" i. The starting out should always be the words of section 98(4) themselves, ii. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair, iii. In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt. In many (though not all) cases there is a band of reasonable responses to the employee's conduct in which the employer acting reasonably may take one view, another quite reasonably take another. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable*

responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if it falls outside the band it is unfair."

83. In terms of procedural fairness, the (then) House of Lords in ***Polkey v AE Dayton Services Ltd*** 1988 ICR 142 firmly establishes that procedural fairness is highly relevant to the reasonableness test under section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

84. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in ***British Home Stores v Burchell*** 1980 ICR 303 the employer must show: 1. It believed the employee guilty of misconduct, 2. It had in mind reasonable grounds upon which to sustain that belief, 3. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances and 4. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case

85. In some limited cases it may be permissible for Tribunals to "look behind" the stated reason for dismissal. In ***Jhuti v Royal Mail*** 2020 ICR 731 the Supreme Court held that in general Tribunals should focus upon the reason given by the decision maker, subject to exceptions, such as where someone in the hierarchy of responsibility above the employee determines that for one reason the employer should be dismissed but that reason is hidden behind an invented reason which the decision maker adopts. In those exceptional cases it is the Tribunal's duty to look beyond the invented reason. The Supreme Court noted that instances of decisions to dismiss in good faith, not just for a wrong reason, but for a reason which the employee's line manager has dishonestly constructed will not be common.

86. In ***Ilea v Gravett*** 1988 IRLR 487 the Employment Appeal Tribunal considered the ***Burchell*** principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a reasonable employer could have reached the conclusion on the available relevant evidence.

87. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

88. The amount of investigation needed will vary from case to case. In ***Gray Dunn v Edwards*** EAT/324/79 Lord McDonald stated that "it is now well settled that common sense places limits upon the degree of investigation required of an employer who is seized of information which points strongly towards the commission of a disciplinary offence which merits dismissal." In that case the Court found that further evidence would not have altered the outcome as the employer had shown that they would have taken the same course even if they had heard further evidence. That was a case which relied upon the now superseded ***British Labour Pump v Byrne*** 1979 IRLR 94 principle but emphasises that the amount of investigation needed will vary in each case. Thus in ***RSPB v Croucher*** 1984 IRLR 425 the Employment Appeal Tribunal held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

89. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. In ***Ulsterbus v Henderson*** 1989 IRLR 251 the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and crossexamination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "most meticulous review of all the evidence" and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

90. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in ***Fuller v Lloyds Bank*** 1991 IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure

amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see ***Sainsburys v Hitt*** 2003 IRLR 23).

91. The Court in ***Babapulle v Ealing*** 2013 IRLR 854 emphasised that a finding of gross misconduct does not automatically justify dismissal as a matter of law since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (***Strouthous v London Underground*** 2004 IRLR 636).

92. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal. Where a grievance has been raised during the process, it may be appropriate to pause the process and deal with the grievance or to deal with matter concurrently.

93. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (***West Midland v Tipton*** 1986 ICR 192). This was confirmed in ***Taylor v OCS*** 2006 IRLR 613 where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

Employer's Counterclaim

94. The **Employment Tribunal Extension of Jurisdiction (Scotland) Order 1994** provides that an employer may make a claim for the recovery of damages if the claim arises or is outstanding on the date of termination of an employee's employment and a claim has been brought by the employee.

Submissions

95. The claimant lodged written submissions and supplemented these with oral submissions.

96. He submitted that the respondent had not followed a full and fair process in the investigatory and disciplinary hearings. The basis for this was RG's involvement in the investigatory and disciplinary process. The claimant maintained she was a witness and should not have been involved as this was a conflict of interest. RG had also been involved in contacting AC for updated reports.

97. He submitted that the respondent had been unable to clarify exactly what was said to AC during any conversations between the respondent and AC. This was not open and transparent. Whatever had been said had influenced AC's reports.

98. The respondent had given no consideration with regard to the impact the process would have on the claimant's mental health.

99. The Disciplinary Hearing was intimidatory and aggressive.

100. AS had been intimidatory and aggressive during the Disciplinary Hearing. She was supposed to be there as support but was actually leading the hearing.

101. The respondent should have investigated further by speaking to other witnesses such as his son.

102. The respondent accussed the claimant of lying about his medication despite having provided evidence of this.

103. The respondent had no physical evidence of the claimant working and fraudulently claiming sick pay.

104. The claimant has admitted to being a director of the two companies and his breach of clause 18 of his contract of employment but this did not justify dismissal.

105. He had a clean record and always went above and beyond for the respondent.

106. He had not applied for other jobs as he felt there was no point. Any prospective employer would see that he had been dismissed for dishonesty and would not recruit him.

107. The respondent lodged Written Submissions and supplemented these with oral submissions.

Observations on the Evidence

Respondent's Witnesses

108. The Tribunal accepted the evidence of the respondent's witnesses as both credible and reliable. Each of the witnesses had little knowledge of the claimant and were advised on the part of the process they undertook by HR professionals. They were all experienced in disciplinary and investigative processes.

109. They were relatively senior and experienced managers within the respondent's business.

110. The claimant did not attack the respondent's witness's credibility or reliability. Rather, he challenged the process and the sanctions.

The Claimant

111. The Tribunal did not find the claimant to be a credible or reliable witness. His evidence regarding the businesses and his involvement was inconsistent and contradictory. On the one hand he stated that he was a

silent partner and simply an investor. On the other he was the sole Director and majority shareholder in both companies. This was beyond belief.

112. Further, he claimed that his son was lying about his involvement in the garage business. His explanation for this lie was that his son was simply trying to get business for the garage as people would come on a regular basis and ask for the claimant. Custom was obtained through knowledge of the claimant and his association with the garage. This was entirely contradictory and, of anything, suggested significant involvement in the business.

113. His evidence that the Webuyaberdeencars Limited business was not trading or operational when asked about this at the Appeal Hearing was contradicted by the documentary evidence obtained by the respondent confirming an advert on social media for business which predated the hearing and commercially signed business premises for the company.

114. His criticism of AC was equally unreliable. AC is an independent OH Physician who clearly made reference to information provided to her by the claimant which the claimant now denies.

115. The claimant accepted that he had ample opportunity to be heard and put forward his case at each step of the investigatory and disciplinary procedure yet he did not provide any witnesses, statements or other evidence to support his contention that he was not working in either business or that his son was lying. He also accepted that the invite letters to each hearing stated he could provide such information.

116. For all of these reasons the Tribunal preferred and accepted the evidence of the respondents where there was any conflict.

117. The Tribunal then considered the various claims advanced.

Unfair Dismissal

Reason for dismissal

118. The Tribunal considered the evidence in order to determine the reason, or principal reason for dismissal, at the point when the claimant was dismissed.

119. The reason given by the respondent was conduct. On the basis of the evidence before it the Tribunal accepted and found that the reason, or principal reason, for the termination of his employment was the claimant's conduct. This is a potentially fair reason. The Tribunal went on to consider the fairness of the dismissal under Section 98(4).

120. The Tribunal examined the facts known to the respondent at the time of the dismissal. The onus of proof is on the respondent.

121. The Tribunal then asked whether in all the circumstances the respondent acted reasonably in treating that reason as a sufficient reason for dismissing the claimant. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).

122. The Tribunal followed the guidance of the Employment Appeal Tribunal in ***British Home Stores v Burchell*** 1980 ICR 303 the employer must show: 1. It believed the employee guilty of misconduct 2. It had in mind reasonable grounds upon which to sustain that belief 3. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances. 4. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case

Reasonable Grounds to sustain belief of misconduct

123. The Tribunal considered the available evidence. It was clear upon what evidence the respondent had relied to form the belief of misconduct. FC, NW and DH had all detailed the evidence upon which they relied in reaching their

respective conclusions in the investigation report, disciplinary outcome letter and appeal outcome letter.

124. At the stage of the disciplinary hearing the claimant faced 2 allegations of misconduct.

125. NW had the investigation report prepared by FC. The claimant accepted he had breached Clause 18 of his contract of employment and that he was sole director/majoritycshareholder in both companies. The respondent had the witness evidence of GN confirming that the claimant worked most days in the business.

126. The respondent also had the evidence of AC who confirmed the impact his onshore commitments were having on the claimant's health and ability to work offshore. Details of his onshore commitments had come from the claimant himself to AC.

127. AC confirmed that he was fit to work offshore in her various reports all of which were shared with the claimant.

128. There was no dispute as to the fact the claimant had received payment of sick pay for the period from 30 January 2024 until the date of termination of his employment. He continued to submit sick lines over that period.

129. The Tribunal concluded that NW had had reasonable grounds upon which to sustain the belief of misconduct at the Disciplinary Hearing and to find both allegations established.

130. By the time of the Appeal Hearing there was additional evidence available to DH in the form of documentary evidence from social media and from photographs taken of commercial premises that the claimant's statement regarding Webuyaberdeencars Limited not trading was simply untrue. Furthermore, the claimant produced his GP records which confirmed that he had described having opened a garage and feeling stressed. DH also had the updated report from AC of 5 August 2024 which confirmed that the claimant had told AC that he has had to sink everything that he has into the garage and that he had been able to regularly attend the garage on a daily basis.

131. The Tribunal concluded that the respondent, at all stages in the disciplinary process, had reasonable grounds upon which to sustain the belief of misconduct.

Reasonable investigation

132. The claimant had been interviewed and an investigation statement taken. The respondent had investigated and a detailed report was prepared by FC. The report was shared with the claimant.

133. The Tribunal do not accept that the investigation by the respondent was deficient or that there should have been any further investigation. The suggestion by the claimant that his son and other witnesses at the garage business should have been spoken to is rejected. The obligation on the respondent was to undertake a reasonable investigation. The Tribunal consider that obligation was fulfilled. The claimant had every opportunity to present evidence he said was available, such as a statement from his son, payroll and bank statements if he felt these would have supported his case. He was asked at each step of the process if he had any documentation to produce for consideration and he did not do so.

134. Any information provided by the claimant that did require further investigation was looked into by the respondent. The respondent investigated the claimant's assertion that his medication had been doubled, considered the GP records that he produced and obtained updated reports from their OH physician.

135. The Tribunal concluded there had been reasonable investigation in all the circumstances of the case.

Genuine and Reasonable Belief of Misconduct

136. The Tribunal concluded that the respondent did have a genuine and reasonable belief of misconduct on the basis of the evidence available to it. The only contrary evidence was from the claimant to the effect that he wasn't working in the garage business, was genuinely unfit for work and the other business was a non-trading company.

137. In the Tribunal's view the respondent had more than ample evidence from different sources (including the claimant's own admissions) to make the findings it did and to reject the claimant's contrary evidence.

138. NW set out a detailed and careful analyses of the evidence considered by him in respect of each of the allegations in his outcome letter following the Disciplinary Meeting.

139. DH did the same in relation to his outcome letter following the Appeal Hearing.

Was dismissal fair and reasonable in all the circumstances

140. The Tribunal reminded itself that the reasonableness of the decision to dismiss is to be scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (***West Midland v Tipton*** 1986 ICR 192). This was confirmed in ***Taylor v OCS*** 2006 IRLR 613. The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

141. The respondent considered and found established 2 allegations of misconduct against the claimant as set out in the Disciplinary Hearing outcome letter from NW.

142. The first allegation is and of itself was considered by NW to be sufficient to amount to gross misconduct and merit summary dismissal.

143. The claimant accepted that he had breached Clause 18 of his employment contract and that he was the sole director and majority shareholder in the two businesses. He suggested that he had not thoroughly read his contract and was unaware of the clause.

144. The respondent had this restriction in their employment contract to exercise a degree of control to prevent any conflict of interest and also to ensure that their employees were fit and able to come to work and perform their duties.

145. The second allegation involved acts of dishonesty on the claimant's part which were found to have been established. The respondent's Disciplinary Policy detailed dishonesty as an act of gross misconduct.

146. The respondent's witnesses all confirmed the seriousness of the allegations.

147. NW considered both allegations and determined that the acts constituted gross misconduct. NW took into account the impact that the claimant's breach of Clause 18 had on his ability to work for the respondent.

148. NW reasonably concluded the claimant had acted dishonestly. The respondent's Disciplinary Procedure and the claimant's contract of employment makes clear that acts of gross misconduct will justify summary dismissal.

149. The respondent submitted that both allegations were issues that went to the heart of the employment relationship and the relationship of trust and confidence between employee and employer. The Tribunal find that the evidence supported that submission.

150. The Tribunal concluded that dismissal was within the band of reasonable responses in the circumstances.

Fair Procedure

151. The Tribunal considered the claimant's assertions that the disciplinary process was flawed.

152. In so far as the investigation was concerned the Tribunal have already dealt with this in the context of the discussion above as to whether or not the respondent conducted a reasonable investigation. The Tribunal have concluded that the investigation was reasonable in the circumstances.

153. The Tribunal do not consider that the fact RG witnessed the claimant's son making the statement at the garage and subsequently was involved in the

process in her capacity as an HR professional was a conflict of interest. The Tribunal do not consider her involvement rendered the process unfair.

154. The Tribunal accept the respondent's explanation that the Disciplinary Hearing had been adjourned to enable inquiry to be made regarding the claimant's current state of health. The claimant did provide additional medical information and the respondent obtained an updated report from AC. The claimant was afforded the opportunity to comment on AC's report.

155. The Tribunal consider that there was nothing for the Disciplinary Hearing to reconvene to consider and that NW was entitled to reach a decision on the evidence available to him. In any event the claimant had the opportunity to raise this matter at appeal and it was dealt with by DH at the Appeal Hearing.

156. The Tribunal do not find that the conduct of AS during the Disciplinary Hearing impinged upon the fairness of the hearing.

157. The Tribunal do not accept the claimant's assertion that the conduct of the Disciplinary Hearing was intimidatory or aggressive as asserted by him. The Tribunal prefer and accept the evidence of NW in this respect.

158. The Tribunal consider that the claimant was afforded a fair hearing at each stage of the procedure and was given the opportunity to put his case across. His own evidence before the Tribunal confirmed this.

159. The Tribunal consider that the decision to dismiss and the process was substantively and procedurally fair in the circumstances.

Wrongful Dismissal/Notice Pay

160. The Tribunal find that the respondent was entitled to summarily dismiss the claimant for gross misconduct due to his acts of dishonesty and repudiatory breach of his contract of employment. The claimant is not entitled to contractual notice pay in the circumstances.

Employer's Counterclaim

161. The respondents submitted that the claimant had fraudulently and dishonestly claimed contractual sick pay during his absence from 30 January 2024 until the termination of his employment. Doing so was in breach of his contract of employment.

162. The relevant provision in the contract of employment was clause 9. The claimant accepted that Clause 9 had to be read on the basis of any claim for sick pay being genuine.

163. The claimant accepted that he had been paid the sum of £10,919.91 in respect of sick pay by the responent.

164. The Tribunal considered whether or not, on the balance of probabilities, it had been established that the claimant had been claiming sick pay when fit for work for the period 30 January 2024 until the date of termination of his employment.

165. The evidence of AC was material to this point. Her evidence as an independent and professional Occupational Health Physician was that the claimant was fit to work for the respondent. The earliest report from AC is 4 March 2024 and her subsequent reports cover the period from then until the date of termination of employment.

166. The Tribunal accept and prefer her documentary evidence to the effect that the claimant was fit for work for the period from 4 March 2024 until the date of termination of his employment.

167. The Tribunal did not accept the claimant's evidence that he was genuinely unfit for work.

168. The Tribunal considered the evidence relied upon by the respondents to establish that the claimant was working in his garage business during his

absence on sick leave and establishes that it was more likely than not the claimant was working in this business from 30 January 2024 until the termination of his employment.

169. The documentation from Companies House confirmed his appointment as a Director in this company with effect from 30 January 2024. The claimant accepted in his evidence that he was the sole Director and majority shareholder in this business and Webuyaberdeencars Limited.

170. The Tribunal considered and found that it was more likely than not the claimant was working in the Webuyaberdeencars Limited business with effect from the date of his appointment as a Director on 29 March 2024 until the termination of his employment. This business was actively trading as was confirmed by the advert on social media dated 10 June 2024 and referred to by the respondents in the appeal process and also the branded commercial property.

171. The Tribunal considered that as it had been established the claimant was working from 30 January 2024 it was more likely than not that he was fit for work for the period from 30 January 2024.

172. As such, his claim for sick pay was dishonest. His unfitness for work was not genuine.

173. The Tribunal find that to have claimed sick pay in such circumstances amounted to a breach of Clause 9. The claimant was in breach of his contract of employment.

174. The claim for breach of contract arose and was outstanding on the date of termination of the claimant's employment.

175. The respondent is entitled to damages for the claimant's breach in the sum of the Sick Pay claimed and paid to him.

176. The Tribunal accordingly order the claimant to pay the respondent the sum of £10,919.91.

Employment Judge: A Strain

Date of Judgment: 9 April 2025

Date Sent to Parties: 23 April 2025