EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100258/2021

Final Hearing held at Inverness on 22 and 23 February 2022 and 21 March 2022

Employment Judge A Kemp

Mr J Hamilton	**Claimant** **In person**
Cleanevent Services Ltd	**Respondent** **Represented by:** **Mr T Muirhead** **Tribunal Advocate** **Instructed by:** **Mr C Bennison,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The claimant was unfairly dismissed by the respondent and he is awarded the sum of TWENTY NINE THOUSAND SEVEN HUNDRED AND SIX POUNDS SEVENTY FOUR PENCE (£29,706.74) in compensation, payable by the respondent.**

2. **For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996:**
   (i) The monetary award is TWENTY NINE THOUSAND SEVEN HUNDRED AND SIX POUNDS SEVENTY FOUR PENCE (£29,706.74)

(ii) The prescribed element is TWENTY TWO THOUSAND TWO HUNDRED AND EIGHTEEN POUNDS FIFTY SIX PENCE (£22,218.56).

(iii) The date to which the prescribed element relates is 23 September 2021, and the prescribed period is the period from 23 September 2020 to 23 September 2021.

(iv) The amount by which the monetary award exceeds the prescribed element is SEVEN THOUSAND FOUR HUNDRED AND EIGHTY EIGHT POUNDS FOURTEEN PENCE (£7,488.14)

REASONS

Introduction

1. This was a Final Hearing arranged to take place in person following the earlier Final Hearing which was adjourned by Note dated 13 October 2021.

2. The claim is solely for unfair dismissal. The respondent admits that there was a dismissal but contends that it was not unfair, and raises ancillary points.

3. Prior to the hearing I explained to the claimant, who is a party litigant, how it would be conducted. I explained about cross examination, and re-examination, that documents would require to be referred to in oral evidence if they were to be considered, and that once a party's case was closed additional documents would be permitted only in the most exceptional of circumstances. I explained about submissions, and that a Judgment would be issued in writing afterwards, which would in due course appear on the online Register. The respondent was represented by Mr Muirhead who is an experienced representative of parties at the Employment Tribunal.

4. As set out in the said Note the Final Hearing took place in person, with two witnesses appearing remotely such that it was a form of hybrid hearing following an application for that by the respondent. The evidence was not

concluded in the two days originally allocated and a further day of evidence was heard.

Issues

5. The Tribunal identified the following as the issues to determine, and the parties confirmed their agreement to them:

   (i) What was the reason or principal reason for the claimant's dismissal?

   (ii) If a potentially fair reason under section 98, was it fair or unfair under section 98(4) of the Employment Rights Act 1996?

   (iii) If the claimant succeeded to what remedy was he entitled?

Evidence

6. Evidence was given in person by Mr Rod Callender, and remotely by Cloud Video Platform by Mrs Sara Hinsley and Ms Kellie Spollin, for the respondent. The claimant then gave evidence himself on the third day. The parties spoke to a Bundle of Documents which had been prepared, not all of which was referred to. The evidence of Ms Spollin was commenced initially after that of Mr Callender, but she had great difficulty in hearing the questions asked, and there was then a break to attempt to resolve that. When that was not quickly achieved, the evidence of Mrs Hinsley was interposed, with agreement of the parties, in an attempt to conclude the hearing within the two days allotted. During the course of Mrs Hinsley's cross-examination by the claimant I asked a series of questions to elicit relevant facts, also to seek to conclude the hearing within the days allotted, after which the claimant continued his cross examination of her briefly. I also asked questions of Ms Spollin similarly. As it transpired the attempts to conclude the hearing in two days did not succeed. When the claimant commenced his evidence he indicated that he did not know how to address matters and I indicated to Mr Muirhead that he would ask questions to elicit the evidence but that Mr Muirhead could raise any objection to doing so. Mr Muirhead did not in the event object.

Facts

7. The Tribunal found the following facts, material to the issues before it, to have been established:

8. The claimant is Mr John Hamilton.

9. The respondent is Cleanevent Services Limited. It has about 1,000 employees. It provides security and cleaning services to various sites in the UK including shopping centres.

10. In late November 2006 the claimant received a letter from OCS Group Limited offering him employment. It referred to salary at £6.76 per hour, annual leave of 25 days plus statutory bank holidays and stakeholder pension. It was in similar terms to a version the claimant later found on a computer (referred to in paragraph 17).

11. On 15 January 2007 the claimant commenced employment with the OCS Group Limited. He worked at the Eastgate Shopping Centre in Inverness. His employment terms were set out in a single page document issued to him for that date. The claimant's role was as a Security Officer. The annual holiday entitlement was stated to be four weeks. There was no term as to sick pay. The document was signed by the claimant.

12. The claimant thereafter was promoted to a role as supervisor, on a date not given in evidence. (There was no document before the Tribunal sent to the claimant confirming his terms and conditions of employment from such promotion at that stage).

13. On 3 December 2008 Ms Diana Munden-Price the Divisional Operations Director of OCS Group Limited wrote to the payroll department with pay changes, and for the claimant that showed 20 days annual leave, together with public holidays and statutory sick pay not company sick pay.

14. On 1 April 2009 the claimant's employment transferred to a predecessor of the respondent under the terms of the Transfer of Undertakings

(Protection of Employment) Regulations 2006. At about that time the claimant partly completed a form titled "TUPE transfer due diligence form". He left blank details as to salary, holidays and sick leave entitlement as he had been asked to do so by the then HR Manager.

15. A statement of terms and conditions was issued to him stating a Job Title of Security Supervisor, and for wage, sick pay and holidays stated "as per TUPE information".

16. The TUPE information provided for the claimant was for four weeks' annual leave together with public holidays, and for three weeks of company sick pay.

17. On 13 October 2014 the claimant uploaded to a computer at the site used by others including Mr Steve Cooper and Ms Victoria Sanderson a letter from Mr Andy Wade of OCS offering him the post, dated 20 November 2006. He had found that on that computer when checking it for files that could be removed to improve its performance. He placed a printed copy in his personnel file in the office.

18. In or around October 2016 the claimant and his manager Mr Graham Drew, the Chief Operating Officer of the respondent, had discussions about an expanded role for the claimant, which would include assisting the Company in administration matters related to security which at that time were carried out by a third party. They had discussions as to salary initially, with the respondent first offering £28,000 per annum. At that time the claimant was an hourly paid employee. They had further discussions which led to agreement on a salary of £28,000.

19. Mr Drew emailed him on 4 October 2016

> "To confirm your new role as Security Administration Controller (title can be discussed/changed. Terms –
> Commences 1st October 2016
> Monthly salaried position; £32,000 pa (with 6 month review)
> 28 days annual holiday allowance (including bank holidays)
> Job Description to be review[ed] and agreed."

20. The email also referred to “a contract to be issued” over the next week.

21. In the period of about two weeks thereafter Mr Drew and the claimant had further discussions. The claimant sought to increase his annual leave entitlement to five weeks, as he believed that that was what he had at that stage. The claimant also sought to increase his entitlement to company sick pay from three to six weeks. Mr Drew indicated that he would consider those proposals.

22. On 4 November 2016 the claimant emailed Mr Drew (the email itself was not before the Tribunal) which in summary stated that he had not received the salary increase agreed for the change to his role, asking him to look into the issue and to ask Ms Dawn Wise the respondent’s then HR Manager to ensure that the amendments they had discussed were made and to include those in the contract. By that stage Mr Drew had agreed that the job title was to be Security Operations Manager.

23. By email dated 14 November 2016 Ms Wise sent him a contract in relation to the new role, apologising for the delay, adding “Please let me know if you have any issues”. It had as the Job Title “Security Administration Controller”. In Schedule 1 it provided for an annual salary of £32,000. In Schedule 2, under annual leave, it stated “For each year of service with Cleanevent Services, you will be entitled to 4 weeks (20 days) paid annual leave, in addition to the standard Bank Holidays in England.” Under “Sickness Absence” it stated “Cleanevent Services Ltd may, in its sole and absolute discretion make payment of salary while you are absent for sickness for a maximum of 10 days per annum. Your sickness entitlement is without prejudice to your entitlement to statutory sick pay (“SSP”) under the Social Security Contributions and Benefits Act 1992……” It was signed by Ms Wise digitally.

24. The claimant did not respond to that email by his own email, nor did he sign and return the contract sent to him in the terms sent to him. Ms Wise did not send an email to the claimant to enquire about the signed contract. She did not send to him at any stage a draft Job Description.

25. The claimant did not have prior experience of negotiations for a promoted position, or the documentation of new terms and conditions of employment.

26. The claimant had further discussions with Mr Drew and Ms Wise in the period to about December 2016 in relation to the terms of contract. He repeated that he sought five weeks annual leave, and six weeks company sick pay. Ms Wise told him to amend the contract sent to him, sign it, and send it back to her. The claimant believed from that comment and the indications from Mr Drew that his proposals would be considered that agreement on such changes had been reached.

27. The claimant made amendments to the contract sent to him, being to change the job title to Security Operations Manager, holidays to 25 days plus public holidays amended from 20 days, and sick pay of up to 30 days per annum amended from up to 10 days per annum. He printed it out twice. He sent one to Ms Wise at the respondent's Head Office by post. He put the other one in the personnel file maintained for him at the office where he worked, which was accessible by managers of the respondent including Mr Drew and Mr Callender.

28. The claimant uploaded to the K-drive of the respondent's computer system, to which others such as Mr Drew and Ms Wise had access, a copy of the contract he had been sent by Ms Wise with amendments he had made and with his own signature, on 18 May 2017.

29. The respondent operated a non-contractual bonus scheme whereby those working at the same site as the claimant could earn up to 1.5% of salary. That was dependent on whether or not there was a period of absence. If it was less than 2% there was no effect, if it was between 2 and 4% the bonus was reduced by 0.5% and if it was 5% or more a further 0.5% was deducted. If there was a disciplinary matter that could also reduce the bonus. Some members of staff took annual leave instead of sick pay to ensure that they did not have a reduced bonus, including the claimant.

30. In early May 2019 the claimant suffered a heart attack and was hospitalised. He had a period of absence from work of about three months.

The claimant was paid by the respondent full pay by way of company sick pay for a period of three weeks. Thereafter he was paid statutory sick pay.

31. When the claimant returned to work in around August 2019 he did so on a phased return to work. Some of his former duties were not returned to him at that stage because of that. He had been advised by his doctor to move more regularly as he suffered discomfort when sitting for lengthy periods, and that was permitted by the respondent. On one occasion the respondent's client asked that the claimant spend more time in the office as there was a shortage of staff.

32. On 17 December 2019 the claimant sought to arrange holidays for the period 2 – 21 January 2022 on an online system operated by the respondent called Atlas. When he did so it automatically generated a message that the holidays sought were higher than the entitlement, and that message was sent to Mr Drew and the claimant. The claimant added a message to Atlas about his holiday entitlement, which he believed to be 25 days. Mr Drew became aware from that message that the claimant considered that he had an entitlement to 25 days of annual leave exclusive of 8 days of public holidays, therefore a total of 33 days paid annual leave per annum. Mr Drew considered that his entitlement was to 28 days paid annual leave per annum inclusive of public holidays from the terms of the contract. The claimant and Mr Drew then exchanged emails that day in which the claimant attached what he said was the contract he had returned to Head Office when he had signed it. He said that there should be a matching copy of it in his file at Head Office. Mr Drew replied to note the differences which included the job title being different and suggested continuing the conversation when both returned from holiday.

33. In about mid-February 2020 Mr Rod Callender was appointed an investigating officer by Ms Belinda Stewart of HR. There was no matching copy of the contract the claimant had referred to at Head Office. The contract stored there was that sent by Ms Wise to the claimant, signed by her but not by him. By that stage Ms Wise had left the respondent's employment. The respondent had a concern over what they considered may have been an attempt to change contractual terms improperly that may have included falsifying the written contract of employment.

34. The claimant was invited to attend an investigatory meeting by letter dated 9 March 2020. The meeting with Mr Callender took place on 11 March 2020. A minute of that meeting is a reasonably accurate record of it. The claimant alleged that he had had a conversation with Ms Wise after receiving the contract from her, discussed with her the job title which he believed should be Security Operations Manager, that the annual leave entitlement was to be increased to a total of 5 weeks or 25 days per annum in addition to Bank Holidays, and that the sickness absence term was to be for paid leave for up to 30 days or 6 weeks, that she had agreed to these amended terms, told him to make the changes, and then told him to send the contract back to her. He alleged that he had done so, posting a signed copy with those changes, and keeping his own copy.

35. Following that meeting Mr Callender conducted further investigations, and requested that investigations be undertaken by others. He set them out in an email to Belinda Stewart of the respondent's HR department on 12 March 2020. He outlined matters he felt needed to be investigated. That included "May have to try and make contact with Dawn at some point to establish whether she did tell JH to make amendments to the contract and post a hard copy down, and any other relevant information."

36. Ms Stewart spoke to him with regard to that suggestion and said that it was not part of the respondent's normal policy to speak to those outwith the company, and as a result he did not attempt to speak to Ms Wise.

37. Following the meeting the claimant sent Mr Callender a letter dated 20 November 2006 he said had been sent to hm by OCS outlining some of the terms and conditions, one of which was 25 days annual leave plus statutory bank holidays.

38. Mr Callender met Mr Drew on 18 May 2020. A minute of that meeting is a reasonably accurate record of it. Mr Drew accepted that the claimant had wanted a change of job title when accepting the role, and that he had agreed to that, although no date for doing so was given. He said that he had not agreed to increases in annual leave or sick pay, that he would not have done so, that Ms Wise had not raised that with him and she did not have authority to agree to such a change, but would have required to have

sought his approval. She had not done so, he said. Mr Callender sent the minute of that meeting to Ms Stewart.

39. Mr Callender met Mr Andy Wade of OCS Group Limited on 19 May 2020. A minute of that meeting is a reasonably accurate record of it. Mr Wade did not believe that he had sent the offer letter to the claimant. He provided written materials including an email dated 3 December 2008 with details of pay changes, which for the claimant provided for 20 days annual leave, and public holidays and no company sick pay, solely SSP. He sent those to Ms Stewart on 29 May 2020

40. On 1 June 2020 Ms Stewart emailed the claimant to state that he had not reported for work or been in touch with the company since 23 March 2020. He replied on 4 June 2020 to apologise, and state that he was shielding with his partner.

41. Mr Callender obtained records for annual leave taken by the claimant from a computerised system used at the Eastgate shopping centre, but not part of the Atlas system. He sent that to Ms Stewart on 10 July 2020. It recorded the following in relation to the claimant:

> 2016 - 29 days holidays with 4 remaining
> 2017 – 30 days holidays which was 2 more than entitlement
> 2018 – 26 days holidays with 2 remaining
> 2019 – 33 days holidays with 0 remaining or more than entitlement

42. Mr Callender met Mr Wade on a second occasion on 30 July 2020. A minute of that meeting is a reasonably accurate record of it.

43. Mr Callender wrote to the claimant on 11 August 2020 to seek another meeting with him. That meeting took place on 13 August 2020. A minute of it is a reasonably accurate record.

44. Mr Callender prepared an Investigation Report with a summary of his findings. He sent that to Ms Stewart on a date not given in evidence. They then exchanged emails with regard to the circumstances on 17 August 2020 in which Mr Callender provided further comments and clarification.

45. The claimant was then invited to a disciplinary hearing by email from Ms Stewart dated 24 August 2020. The letter set out the following allegations

- "It is alleged that you have deliberately and/or wilfully contravened your contractual terms, specifically the term of trust and confidence, in that you have falsified your contract of employment dated 1st October 2016 with the company
- It is alleged that you have deliberately and/or wilfully contravened your contractual terms, specifically the term of trust and confidence in that you have been disingenuous to the Company over your contractual and/or discretionary terms for annual leave and sickness absence."

46. The email detailed the attachments sent to the claimant. Those attachments did not include Mr Callender's investigation report or his emails with Ms Stewart dated 17 August 2020.

47. The disciplinary hearing took place with Ms Kellie Spollin and a note taker by telephone on 26 August 2020, but was swiftly adjourned to enable the claimant to view the supporting documentation for it. The documentation referred to in the email was delivered to the claimant on 27 August 2020.

48. The disciplinary hearing was re-arranged for 2 September 2020 and took place on that date. A handwritten note of that meeting is a reasonably accurate record of it. No typed minute was prepared.

49. That meeting was also latterly adjourned to enable the claimant to review documentation further and to request documents from the respondent. It was re-arranged by email dated 4 September 2020. By email on 10 September 2020 further documents were provided to the claimant and a response to some of his requests provided.

50. The adjourned meeting took place on 16 September 2020. A minute of that meeting is a reasonably accurate record of it.

51. The respondent dismissed the claimant summarily by letter dated 23 September 2020 sent by Ms Spollin. It set out a finding that the

claimant had committed an act of gross misconduct, and that the penalty for that should be dismissal. It included a statement that the claimant's explanation had been found unsatisfactory in that, in summary:

1. There were only digital signatures on letters and the contract of employment, with no email trail or letter correspondence to support them
2. Over the period of employment the claimant stated that he had never taken over the 20 day entitlement but that was not plausible if he was aware of an enhanced entitlement or not raise that earlier than December 2019
3. He stated that he never received his full company sick pay when off with a heart attack, but it was paid to him at that time
4. Mr Wade denied sending the alleged letter of offer, and the claimant did not provide other documentation to support that
5. It was unlikely that there would be no written record of discussions with management or HR.

52. She found that the claimant had falsified documents to state that he had enhanced entitlements to sickness and holidays. She did not consider that there were any mitigating circumstances and concluded that the penalty ought to be dismissal. She referred to the list of gross misconduct matters in the company disciplinary policy. She confirmed her decision to dismiss the claimant with effect from 23 September 2020, and that he had a right of appeal.

53. The claimant appealed that decision by email dated 27 September 2020.

54. An appeal hearing was arranged for 5 October 2020. It took place by telephone on that date before Ms Sara Hinsley, HR Manager, and a minute of it is a reasonably accurate record.

55. The respondent dismissed the appeal by letter dated 12 October 2020. Ms Hinsley concluded that Ms Spollin had a reasonable belief that the contract and other documents had been altered and falsified by the claimant. She referred to a process in place that all contracts are sent out from HR at Head Office. She did not accept his arguments. She did not

consider plausible his argument that as he had not heard back from the company when he sent the contract the terms had been agreed. She confirmed that the decision to dismiss him stood.

56. The claimant commenced early conciliation on 10 December 2020. An Early Conciliation Certificate was issued on 7 January 2021. The present Claim Form was presented on 19 January 2021.

57. At the time of the dismissal the claimant's earnings with the respondent were £2,178.88 gross per month, the equivalent of £502.81 per week. He received £1,754.17 net per month, the equivalent of £416.01 per week. At that stage he was in receipt of "furlough" payment of salary under the Coronavirus Job Retention Scheme, amounting to 80% of his former pay. The respondent also paid pension contributions of about £48.53 per month the equivalent of £11.20 per week. Had he not been dismissed he would have returned to work in around October 2021, at which point his earnings would have been £32,000 gross per annum, the equivalent of £615.38 per week, and about £2,000 net per month, the equivalent of £461.54 per week. He would have had pension contributions of about £80 per month.

58. Following the claimant's dismissal he has not worked in other employment. He has not actively sought employment. He left the property he had been residing in, in Inverness. He withdrew from contact with other people, including his father and brother. He lived in a tent and in his car in a remote location in the North West Highlands. He was and remains of no fixed abode. He on occasion of bad weather resided for short periods at a hostel run by his former wife. He has consulted his General Practitioner who stated that he suffered from depression and anxiety. He has been told that he is currently unfit for work by his General Practitioner.

59. The claimant has received state benefits since the dismissal. Initially he received Job Seekers Allowance. Latterly he received Universal Credit (the dates on which he did so were not specified in evidence).

Respondent's submission

60. The following is a basic summary of Mr Muirhead's submission. The reason for dismissal was conduct. The respondent had met the

requirements of the ACAS Code of Practice. The respondent met the ***Burchell*** test. Mr Wade had given clear evidence to the investigation that the letter allegedly sent by him was not genuine. There was no reason for him not to tell the truth. There was no reason for the claimant to negotiate terms on annual leave and sick pay with Mr Drew in 2016 if he was already on them. The claimant had not referred Mr Drew to that letter at that stage. Mr Drew was clear that he had not agreed the amended annual leave or sick pay. There was a lack of a clear paper trail to support the claimant. It was unusual for an HR professional to say to the claimant make the amendments to the contract. She would do so herself and send it out. It was unusual for the claimant not to have replied by email. Documentation the claimant signed in 2007 showed four weeks annual leave and no enhanced company sick pay.

61. Questions had been asked about Diane Wise not being spoken to in the investigation. She was not at that stage an employee and the respondent thought it not appropriate to contact her. It was not for her to decide the issue, that was Mr Drew as the claimant accepted. It would not have made any difference.

62. The claimant did not seek what he said was his sickness absence entitlement in 2019 when he had the heart attack. He was paid for three weeks, not six. These were all matters the respondent had before it. It had sufficient grounds to believe that the claimant was guilty of gross misconduct, and dismissal was in the range of reasonable responses. The respondent did not trust the claimant.

63. If the Tribunal was against him, he argued that the claimant had not mitigated his loss. He had been vague about receipt of Job-Seekers Allowance, and then Universal Credit. There was a responsibility for those on the former benefit to look for a job. There was no medical evidence. There were driving jobs the claimant could have undertaken.

Claimant's submission

64. The following is a basic summary of the claimant's submission. He had covered his position in his evidence. He believed that the terms had been

agreed. He worked on the basis of the contract he had sent to Ms Wise. Whilst he should have followed its receipt up with her, she should have followed matters up with him. She did not do that, or send a Job Description. Nothing was finalised over pension. He had said from day one that he had made the amendments. The respondent could have come back to him about it. If the terms had not been agreed he would have stepped down from the job. He believed that after his heart attack the respondent did not want him back to work. His role seemed to be diminishing. He did not check about pay after his heart attack as other things were going on. He could not recall the detail of 2006 as it was so long ago. He had discussions with Mr Drew and Ms Wise, and believed that all was agreed. It then did not cross his mind as an issue until booking his holidays in December 2019. He then stated what he thought was in the contract.

The law

(i) The reason

65. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Conduct is a potentially fair reason for dismissal.

(ii) Fairness

66. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

67. That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the

Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

68. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?
(ii) Was that belief reasonable?
(ii) Was it based on a reasonable investigation?

69. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer…….the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

70. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***.

71. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

> "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."

72. The requirement of a fair investigation may include a requirement to be even-handed, taking fully into account evidence that could be in the employee's favour: ***A v B [2003] IRLR 405, EAT, Leach v OFCOM [2012] IRLR 839).***

73. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett 1988 IRLR 497***, that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase."

74. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

> "It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

75. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

76. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

77. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it, and it does not follow that any breach of the Code means that the dismissal is unfair – ***Buzolli v Food Partners Ltd UKEAT/0317/12***. The provisions include:

> "5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing…..
>
> 23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence…."

78. The Code of Practice is supplemented by a Guide on Discipline and Grievances at Work, which is not a document that the Tribunal is required to take into account but which gives some further assistance in considering the terms of the Code of Practice. Under the heading "Investigating Cases" the following is stated

> "When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. It is not always necessary to hold an investigatory meeting….."

79. Whether or not a matter might be regarded as one of gross misconduct has been the subject of authority. It must be an act which is repudiatory conduct ***Wilson v Racher [1974] ICR 428***. The question is whether it was reasonable for the employer to have regarded the acts as amounting to

gross misconduct – ***Eastman Homes Partnership Ltd v Cunningham EAT/0272/13***. If the employer's view was that the conduct was serious enough to be regarded as gross misconduct, and if that was objectively justifiable, that was a circumstance to consider in assessing whether or not it was reasonable for the employer to have treated the conduct as a sufficient reason to dismiss.

80. In ***Sandwell v West Birmingham Hospitals NHS Trust UKEAT/0039/09*** the following was stated:

> "It is not clear to us what the breach of Trust policy actually was. The conduct complained of was taking the patient outside. Assuming that is a breach of Trust policy, it still remains to be asked – how serious a breach is that? Is it so serious that it amounts to gross misconduct? In our judgment that is not a question always confined simply to the reasonableness of the employer's belief. We think two things need to be distinguished. Firstly the conduct alleged must be capable of amounting to gross misconduct. Secondly the employer must have a reasonable belief that the employee has committed such misconduct. In many cases the first will not arise. For example, many misconduct cases involve the theft of goods or money. That gives rise to no issue so far as the character of the misconduct is concerned. Stealing is gross misconduct. What is usually in issue in such cases is the reasonableness of the belief that the employee has committed the theft."

81. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record.

82. An appeal is a part of the process for considering the fairness of dismissal – ***West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in

which it was held that employers must act fairly in relation to the whole of the dismissal procedures. The importance of an appeal in the context of fairness was referred to in ***Taylor v OCS Group [2006] ICR 1602*** in which it was held that a fairly conducted appeal can cure defects at the stage of dismissal such as to render the dismissal fair overall. That case also emphasised that procedure is not looked at in a vacuum, but that the fairness of a dismissal is looked at in the round having regard to all the circumstances, as was reiterated in ***Sharkey v Lloyds Bank plc UKEAT/005/15.***

(iii) Remedy

83. In the event of a finding of unfair dismissal, the tribunal requires to consider whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116.

84. The tribunal requires also to consider a basic and compensatory award which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. In respect of the latter it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed.

85. The amount of the compensatory award is determined under section 123 and is “such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer”. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it

was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.)*** A Tribunal should consider whether there is an overlap between the ***Polkey*** principle and the issue of contribution (***Lenlyn UK Ltd v Kular UKEAT/0108/16).***

86. There is a duty to mitigate, being to take reasonable steps to keep losses to a reasonable minimum. The onus of proof in that regard falls on the employer - ***Fyfe v Scientific Furnishings Ltd [1989] IRLR 331*** reaffirmed in ***Ministry of Defence v Hunt [1996] IRLR 139*****,** (which was upheld on other grounds at the Court of Appeal, reported as ***Ministry of Defence v Wheeler [1998] IRLR 23***).

Observations on the evidence

Mr R Callender

87. Mr Callender gave evidence in a straightforward and clear manner and the Tribunal considered him to be a credible and reliable witness. He is no longer an employee of the respondent. He had been friendly with the claimant prior to the investigation, and during it, as he spoke to during evidence, hoped to find material that would support the claimant's position, but did not such that he was driven to conclude that there had been falsification of documents. There were two issues with his evidence, that are worthy of comment. The first was that he informed Ms Stewart that it may be necessary to speak to Ms Wise, and he was right to say that. It was an obvious step to take given what the claimant had said happened. He did not when Ms Stewart told him that it was not normal practice to do so for those outwith the company. But he spoke to Mr Wade twice, and he

was not an employee of the respondent, nor did he challenge Ms Stewart about what the normal process was, why there was such a process or why it might be applied in the present case. It meant that he did not have evidence from the very person who could say whether or not what the claimant alleged was true. The second is that when the holiday records kept on site were examined, they did not say what he said they did, in that the records showed firstly that the claimant had on occasion taken more than a total of 28 days per annum, and secondly that the entitlements recorded in them changed from 28 to 33 days, back to 28 and then to 33 again. That was not investigated as it was not noticed.

Miss Spollin

88. The Tribunal was entirely satisfied that Miss Spollin was a credible witness. She gave her evidence in a most candid manner, which was greatly to her credit. She made a decision on the basis of what was before her at the time, and did so genuinely believing that to have been the correct decision. She accepted however that matters could have been handled differently, particularly by seeking to obtain the evidence of Ms Wise who she accepted was the best witness to matters in dispute. Her doing so was refreshingly candid, and she should be commended for doing so. She also accepted that the claimant had not been sent the Investigation Report or related emails between Ms Stewart and Mr Callender. She further accepted the criticisms in relation to the email she sent with reasons for the decision when asked about that in cross-examination. The assessment of her decision is addressed more fully below.

Mrs Hinsley

89. The Tribunal was entirely satisfied that Mrs Hinsley was a credible witness. She too made a decision on the basis of what was before her at the time, and did so genuinely believing that to have been the correct decision. She also accepted that matters could have been handled differently in respect of seeking the evidence of Ms Wise. She accepted that the said documents should have been sent to the claimant. She did

not support the suggestion of a normal practice of not interviewing those not current employees, and again her candour is to be commended.

The claimant

90. The claimant was I considered both credible and generally reliable. There were some details on which he was either vague, or could not remember. That included the discussions in 2016 with Mr Drew and Ms Wise, on which he could not recall precisely who said what, and when, as well as whether that was at a meeting or by phone so far as Mr Drew was concerned. But I considered that his evidence on such points should be accepted. He referred to it when the issue was investigated, and has generally been consistent in doing so. His position also has some support from an email Mr Drew referred to in the investigation meeting with him, dated 4 November 2016, although that was not in the investigation report nor before the Tribunal. It did however, from Mr Drew's comments, refer to "amendments" and "variations". These were in the plural, and I considered were more likely to be references to the discussions as to annual leave and sick pay. Whilst there were concerns over the letter which on the face of it was from Mr Wade, referred to below, and Mr Drew denied agreeing to make changes on holiday pay or sick pay which was not what the claimant stated, I consider that there were likely to have been discussions over them, and that the claimant genuinely believed that agreement had been reached. Despite therefore the fact that there was some evidence against him, on material points I accepted the claimant's evidence. That does not mean that his claim succeeds, as the issue is one dependent on the band of reasonable responses as addressed further below.

Other comments

91. None of Ms Wise, Mr Drew or Ms Stewart gave evidence. The position of Ms Wise is commented on further below. There was no evidence of an attempt to contact Ms Wise for the purpose of these proceedings. I do not therefore have evidence as to what she would have said if contacted successfully, or that she would not have been contacted successfully during the investigation and disciplinary hearing. In so far as Mr Drew is

concerned, he gave evidence in the investigation but not before me. In so far as Ms Stewart is concerned, no evidence was given by her as to why the normal practice was as Mr Callender was told by her it was, why it had been applied to the claimant's case, and what was meant by "normal practice".

Discussion

(i) Reason

92. I was satisfied that the reason for dismissal was the respondent's belief in the conduct of the claimant, particularly the belief that he had falsified documents relating to his employment. Whilst the claimant suggested that there had been attempts to reduce his work or move him out following his heart attack, I did not consider that that was likely to be the principal or sole reason for the decision. He had been off work after a heart attack, returned on a phased basis, and not having full duties was entirely understandable in such a situation. The client did request him to spend more time in the office on one occasion, but his heart attack was in 2019 and I did not consider that that was a trigger for a move to remove him, nor was this a ruse to avoid paying redundancy. Conduct is a potentially fair reason for dismissal

(ii) Fairness

93. The issue turns on the terms of section 98(4) of the Act. That requires a consideration of the issue of fairness having regard to the issues of belief, the reasonableness of that belief, the reasonableness of the investigation, the procedures followed, and the penalty imposed. The standard is not perfection, or good practice, nor is it what the Tribunal itself might have done. The standard is that of the reasonable employer, judged against the band of reasonable responses.

94. There are arguments both ways. For the claimant the strongest point is that the respondent did not interview the one person who he said had told him to act as he did, Ms Wise. That was, it appeared to me, an obvious thing to have followed up on. The reason that was not done was what Ms Stewart said to Mr Callender about company policy, but she did not

give evidence. No explanation for that supposed normal policy was provided, and in any event it is not consistent with Mr Callender speaking twice with Mr Wade, being someone not employed by the respondent, and Mrs Hinsley did not agree that that was policy in any event. When questioned about that latterly Mr Callender said that the policy was not to speak to those who had left the company, but that is not what had originally been said, which was that Ms Stewart had told him that the normal policy was not to speak to those "outwith the company". Even if that was the normal policy, it was not committed to writing within the Bundle, it was not spoken to in evidence, and it is hard to see that it is consistent with the ACAS Guidance at least. That Guidance is not binding, nor of the same relevance as the Code of Practice which is to be taken into account, but its terms are of some assistance. The second strong point for him is that the investigation report by Mr Callender with his commentary on what he had found was not sent to the claimant with the documentation sent to him for the disciplinary hearing. The claimant's position has some further support from his records of taking holidays over the total of 28, and that appearing to be accepted by the records of that on site, even if not those of the respondent directly, which the respondent itself does not appear to have recognised. It also has some support in that best practice was not followed by Ms Wise in that there was a delay of about five weeks before she sent a contract, when she did she did not include the amended Job Title, she did not send a Job Description which Mrs Hinsley said should have been sent, the contract was one for a new start and not an existing employee, and thereafter she did not send any follow up communication or reminder about it if she did not receive any reply or a signed version of it from the claimant, such that all Head Office of the respondent had on file was a contract not signed by the claimant. The claimant's position also has a degree of support from his receiving three weeks of sick pay after his heart attack, which is less than the up to 30 days he thought he was entitled to, but more than the ten days the contract the respondent sent stated. That difference of five days did not accord with the terms of that contract, albeit that it did not also accord with the contract the claimant sent with his amendments.

95. For the respondent there is a large body of other evidence before them at the disciplinary hearing that is harmful to the claimant's position. That includes firstly the evidence of Mr Drew that he did not authorise additional holidays or sick leave and that Ms Wise did not have authority for that, secondly that of Mr Wade saying that the letter purportedly from him did not appear to him to be valid and the claimant did not refer Mr Drew to it when having their discussions, thirdly that it is at least unusual for HR to ask an employee to change a contract and send that in, rather than send it out themselves, fourthly that the terms proposed for annual leave and sickness were not the norm and would have been unique, fifthly that the claimant did not follow up on the letter he said he sent HR with the signed contract, to ensure that it had been received, and was agreed, which is contrary to normal practice if not common sense, sixthly that the claimant alleged that there had been discussions with Mr Callender himself on issues which Mr Callender denied, and finally there was some vagueness in his evidence as to his discovery of the letter purportedly from Mr Wade.

96. These competing arguments and positions are not simple to determine. I remind myself that I must not substitute my decision for that of the employer. I judge matters on the basis of the band of reasonable responses.

97. On the one hand there is a lack of direct evidence from Ms Wise, albeit a former employee, together with the claimant's explanations and the surrounding circumstances and evidence, and on the other a body of what might be termed circumstantial evidence which raises suspicions about what was done and why. The evidence as to the letter purportedly from Mr Wade was particularly concerning, both for what Mr Wade told the investigation but also the failure by the claimant to refer Mr Drew to it during their discussions, which one would have thought he would have. Nevertheless that letter had been found on a computer, and was not hidden but uploaded to the claimant's file, and it is a very large stretch to suggest that what was done was to set up a later false claim for holidays and sick pay. Mr Drew also said that he had not agreed to the increased holidays or sick pay.

98. I have concluded that the failure even to attempt to secure a statement from Ms Wise, who was the best witness to what had or had not happened in the discussions with the claimant as he alleged took place, was outside the band of reasonable responses. It appears to me that the evidence of Ms Wise was of such obvious materiality to the allegation that he had falsified a document or documents that not seeking it at all was not in the band of reasonable responses. I consider that all reasonable employers in the position of the respondent would have attempted to contact Ms Wise and seek a statement from her, regardless of the fact that she had by then left employment. If that had been attempted but failed for any reason, then proceeding to decide matters in the absence of it would have been reasonable, but that attempt was not made.

99. It may well be unusual for HR to have told the claimant to act as he alleged, but that is far from determinative, or a reasonable basis for belief that could be held by a reasonable employer that there had been falsification of documents, and Mrs Hinsley accepted that she could not be certain that what the claimant alleged, or something similar to it, had not occurred. It is also I consider not determinative, or a reasonable basis for belief that could be held by a reasonable employer in this context, that it was not HR's decision on what terms were agreed. There was evidence from the email of 4 November 2016 referred to by Mr Drew of there having been discussions between him and the claimant as to amendments and variations. The claimant said that he had discussed matters with both Mr Drew and Ms Wise. The claimant said that Ms Wise had told him to amend the contract, print it and send it to her. If that was so, that may well have been not good practice or usual practice, and may or may not have been contractually effective as she did not have actual authority to agree terms (although it is possible that she had ostensible authority), but this is not a contractual issue. The allegation was of falsification of documents. It is I consider a good answer to the allegations to say that the claimant was not falsifying the document, but acting on his understanding of what Ms Wise told him to do. Asking her about the discussions, if any, held between them was a step all reasonable employers would, in my judgment, have sought to do.

100. It was claimed that Ms Wise was a highly competent HR person who would not have said that, but there was evidence to show that on this occasion she did not handle matters competently, which was firstly her delay in providing the contract, secondly its terms being inappropriate in various respects including the Job Title not being the amended one Mr Drew had agreed to, and using terms for a new starter not an existing employee, thirdly failing to follow up the lack of any reply from the claimant (at least the absence of a signed copy of the contract she sent out, as the claimant alleged that he had returned the amended version signed) and finally the lack of any Job Description being sent. That is not a sufficient basis for not seeking her evidence in the investigation. Nor is the argument as to "normal policy", which was not explained in evidence at all.

101. This was all in the context where the existing terms of the contract, which were being replaced by new terms, were not clear. That was so as the document issued after one of several transfers referred to TUPE information for terms such as annual leave and sick pay, but what precisely that was intended to refer to was itself not clear. Internal documents from a predecessor of the respondent were not determinative.

102. There was a sense in the respondent's evidence that it was for the respondent to state the terms of contract, such that what Ms Wise sent out were the terms that applied. The respondent had offered a new position and was entitled to offer it on the terms it thought appropriate, including a series of new provisions as to intellectual property, confidentiality and a restrictive covenant for example, but equally the claimant was entitled to negotiate amended terms, as he said that he sought to do. Whether he had four or five weeks' annual leave at that time is not the only material point in the context of the allegation made against him– he sought five weeks, and whether that was his existing entitlement or not did not prevent him from arguing for five weeks at that point. Whether he had no company sick pay, or three weeks as the TUPE documentation indicated, is also not the point – he was seeking up to 30 days albeit whether 10 or 30 it was at company discretion. Discussions as to amended terms are entirely to be expected in the situation of a promotion, and that applies to both parties. Whilst it may often be the case that an employee may accept the terms

offered, one regularly sees negotiation over some of the terms before agreement is reached. One would normally expect that to be clearly documented on both sides, but the lack of written documentation does not mean that discussion did not take place, and there is at least some support for the claimant's position from the email of 4 November 2016 and his ater uploading his version of the contract he amended, signed and returned, on his evidence, to the respondent in its own systems both in electronic form and by hard copy.. Whilst he was naïve in considering that the absence of a reply meant that matters were agreed, that too is not evidence of falsification.

103. The allegation was a very serious one indeed, of falsification of documents and therefore going to an issue of dishonesty. That required a reasonably full investigation of all material facts, seeking evidence from Ms Wise as a part of doing so. That was not done. The investigation was in my judgment not within the band of reasonable responses.

104. I also considered that the reasons that Miss Spollin gave in an email to colleagues on 21 September 2020 giving reasons for her decision did not stand scrutiny against the test of the band of reasonable responses. They were –

- "There is only digital signatures on the letter and no emails to back them up" That is not addressing all the evidence in this context. The claimant alleged that he had sent back, by post, the contract as amended with his actual signature. He had also uploaded the contract to the K-drive in May 2017, and placed a copy of it in his personnel file in the office. These matters were relevant but not taken account of.
- "Never took his full holiday entitlement, if I was entitled to more than 20 days holiday I would take them". But the Tracker document which was part of the documentation sent to the claimant for the disciplinary hearing and to Ms Spollin shows the claimant taking in two of the four years more than a total of 28 days. It was a document accessible to Mr Callender, who was the claimant's line manager. In the last year all 33 days of the claimed holiday had been taken by the claimant. What was stated by Ms Spollin in this

respect was simply wrong. The claimant had taken over the 28 days the respondent believed was his holiday entitlement in a number of the years covered by the Tracker documentation, and the documents for 2016 and 2019 supported an entitlement to 33 days, although those for 2017 and 2018 supported 28. This was support for the claimant's position, at least in respect of what he believed his entitlement had been and why he sought to maintain that, and indicated a lack of clarity on the part of the respondent over what the annual leave entitlement had been and how that was managed. That further supported the claimant's position.

- "Never questioned why he never got paid his full sick pay……." That is true to an extent, but ignores two points, the first that what was paid as full pay by the respondent was five days more than the Head Office version of the contract, of up to ten days, provided, as referred to above. He was paid for three weeks, or fifteen days. The company did not itself follow the contract it alleged was the applicable one. The second is that whilst it is true that he did not question why he did not receive up to thirty days, but the contractual term was one of discretion up to that number of days, not a straightforward entitlement to thirty days. There was no simple entitlement to "his full sick pay" of thirty days. It is also hard to see on what basis a reasonable employer could conclude that failing to pursue sick pay at that time meant that the document had been falsified.
- "Very unlikely that HR are going to double your holiday entitlement and sick pay without formal correspondence." But HR did not double the holiday entitlement and sick pay. The claimant sought an increase from the terms offered from 20 to 25 days, which is a 25% increase not a 200% one. His position was that he sought to maintain what he thought he had at that time. That may or may not be accurate as to the entitlement in contract, but the allegation by Ms Spollin is not factually accurate. It also ignores the Tracker evidence that the holidays of more than 28 days had in some years been taken, and that this was an issue that could be negotiated as the email of 4 November 2016 supported. The claimant did seek

materially higher days for company sick pay, 30 against the 10 offered in the contract, but his entitlement had been three weeks or 15 days according to the TUPE form at least, and it was not to be a straight entitlement but payable at company discretion up to a maximum. The documentation again indicated at least a lack of clarity as to what the entitlement had been, and that this issue was one apt for negotiation over the new terms.

- "Very odd that all everything between DW, GD and John is all just conversations and no actual emails or any other paperwork to back any of this up (there would be something even to confirm a conversation took place)." There was however at least an element of back-up – the email of 4 November 2016 Mr Drew referred to in his statement to the investigation, and the electronic and hard copy versions of the contract the claimant said he sent back in the respondent's rescords. In any event something being odd does not mean that there was falsification of documents. There was no email from Ms Wise to chase up the contract she had sent out, but that does not appear to have been considered, that being also something that might be described as odd.
- "No other employee of CBRE TC are the same as what John has in the 2 years". The claimant did not claim to be a CBRE employee, and there appears to have been a degree of confusion around that issue. The claimant did refer to CBRE employees and their entitlements, but did not directly claim to be one of them.

105. Those reasons were not then exactly repeated as the reasons for dismissal in the decision letter, which are set out in paragraph 51. A new reason for the decision was given, in relation to the letter purportedly from Mr Wade, and the absence of documentation as to that. That there was no other documentation is true, but the claimant had stated that he had moved house on at least two occasions, and did not have the letter he received. He said that the letter had been on a computer used by the respondent and which he had found, thinking it was similar to the one h had received at the time. It had been retained electronically from 2014. That was in the nature of electronic documentation at least to that extent. It is an issue that all reasonable employers would consider in the context

of all other evidence that a reasonable investigation would have produced, which includes whatever evidence can be obtained from Ms Wise.

106. That letter found that the claimant had "falsified company contractual documents to state that he had enhanced entitlements regarding sickness and holiday entitlement". That was the belief, genuinely held by Ms Spollin, but I do not consider that any reasonable employer could have concluded that there were reasonable grounds for such a belief given what is said in the analysis above. I do not consider that the belief was based on the form of reasonable investigation that a reasonable employer could have conducted.

107. The point of the lack of evidence from Ms Wise, or any attempt to obtain it, and then assess it against all the other evidence in the investigation was not addressed or "corrected" at the appeal stage. The same failure to investigate that issue remained. I did not consider that looking at the process as a whole the dismissal was fair.

108. That conclusion was also fortified by the fact that the investigation report with Mr Callender's commentary was not provided to the claimant by the respondent with the documents provided for the disciplinary hearing. That was also I consider an important omission, not corrected on appeal. The report was seen and considered by the dismissing officer Ms Spollin, and then by the appeal officer Mrs Hinsley. It was obviously material to the decisions. The claimant had not seen it until these proceedings. Mrs Hinsley accepted that it ought to have been provided to the claimant at the time of the disciplinary hearing. She was right to do so, and that candid evidence was to her credit. In my judgment no reasonable employer would have failed to send such a material document to the employee prior to the disciplinary hearing considering his dismissal.

109. I concluded from all the evidence that the dismissal was unfair having regard to the terms of section 98(4) of the Employment Rights Act 1996.

(iii) Remedy

110. I turn to address the issue of remedy. That is also not simple. I require to assess a number of matters.

(i) Basic Award

111. The calculation of a week's pay for the purposes of this claim is made under sections 221 – 224 of the Employment Rights Act 1996. The claimant had pay that did not vary to a material extent. He was in receipt of payments under the furlough scheme at the time leading up to his dismissal. I consider that, as those sums were then payable to him under what amounted to a variation of his contract of employment, that is the basis for the calculation of the sums due under that statutory provision.. At the time of the claimant's dismissal his gross earnings in the period of twelve weeks prior to dismissal, being the period of time for calculation as required by those provisions, was the equivalent of £502.81 per week, the net was the equivalent of £404.81 per week, and the pension contributions were the equivalent of £11.20 per week. The total sums paid to the claimant £416.01. The claimant has 13 years' continuous service, and was aged 51 at date of dismissal. Ten years are over the age of 41, and attract one and a half weeks' pay. The remaining three years attract a week of pay. The basic award I calculate under section 119 to be £7,488.18

(ii) Compensatory Award

112. The claimant did not seek re-instatement or re-engagement. He sought compensation only. I addressed the compensatory award accordingly. Firstly on the issue of losses sustained the claimant was on furlough payments whilst suspended, but had there not been a dismissal would have returned to work and full pay shortly thereafter. He has not applied for any job since the dismissal. He did not put before the Tribunal any medical evidence, but said that he was not fit for work due to depression and anxiety. He stated that he received Job-Seekers' Allowance when not in fact seeking a job because of depression and anxiety. He said that his GP had signed him as unfit for work, although no certificate or report was produced, nor was produced any correspondence from the Benefits Agency about the position.

113. I noted that during these proceedings the claimant was able to conduct cross examination of witnesses, and give his own evidence. He did so

clearly, competently and effectively. He was noticeably anxious on the first day of evidence, but appreciably less so on the third day of evidence. I consider from the manner in which he conducted the case, and his demeanour, that he may be presently fit for some work at least, such as driving work. I also however accepted his evidence that his GP has advised him that he is not fit for work because of his mental health issues, and that is a matter I take into account. Securing work, even if fit, is not straightforward for someone without a home address, although it is possible. I do separately accept his evidence that following the dismissal he withdrew from his family and others, and was living remotely in a tent and his car such that he is of no fixed address and has been in that position for a material period of time. He gave evidence in cross examination of on occasion living in the hostel run by his former wife for a short period, and was vague over periods and dates, but I accepted his explanation that the periods were short and when the weather was bad.

114. He has not worked in fact since the dismissal in September 2020. The period to the date of the hearing is therefore about 18 months. There is an absence of independent evidence as to why he did not seek employment for at least some of the period, and that evidence could have been put before the Tribunal by the claimant in the form of a report or letter from his GP, or an acknowledgement from the Benefits Agency that he was not fit for work and did not require to seek work notwithstanding his receipt of Job-Seekers' Allowance, or latterly Universal Credit. The respondent pointed to the number of driving jobs available particularly following the pandemic as within judicial knowledge, although they are liable to have been at a lesser pay than that enjoyed by the claimant with the respondent. The claimant is acting for himself, and I accept has had and continues to have mental health issues including depression and anxiety. Against that background it is not simple to reach a decision as to mitigation.

115. The onus of proof of lack of mitigation lies with the respondent. No evidence was placed before me of what driving jobs were available for the claimant who at the material time was living in his car or a tent in the North West Highlands, how likely it was he could have secured such a position,

and what pay would have been received for such positions. How to address mitigation issues was addressed in ***Cooper Contracting Ltd v Lindsey UKEAT/0184/15.*** As was there stated, not too exacting a standard must be applied to the claimant.

116. I have concluded on reviewing all the evidence before me that it has not been shown that the claimant has failed to mitigate his loss. Whilst the evidence he presented could have been more clear, and better documented, I have decided to accept what the claimant said about his position following the termination of his employment. I accept that his failure to seek employment was not unreasonable given all the circumstances, including his mental health, and his having no fixed place of abode at a time when he withdrew from his family and others. I do not consider that the simple fact that he received Job Seekers' Allowance means that his failure to work during the period of loss was unreasonable and that that has been proved by the respondent. There was no evidence placed before me in relation to that matter, and although the title of the benefit was referred to by the respondent I do not consider that it is sufficient of itself. The claimant's records with regard to that Benefit were not before me, for example.

117. I assess the period of loss at eighteen months. The pay for that period I assess to be £2,000 per month net on the basis that I accept the claimant's evidence that but for the dismissal the furlough period would have ended quickly and he would have returned to his full pay. He was not cross-examined on that point. There was very little evidence as to pension, but it appears from the payslips provided to be a scheme under auto-enrolment, and I take the employer contributions to be £80 per month on such a salary. The total losses are therefore £2,080 per month for a period of 18 months, which I calculate to be £37,440.

118. That those losses are therefore in excess of the maximum compensatory award that I can make under section 124(IZA) of the Employment Rights Act 1996, which is of "52 multiplied by a week's pay" and thus that that maximum is applicable. I consider that I require to apply the week's pay of £427.28 set out above. For 52 weeks that is the sum of £22,218.58.

119. Subject to consideration of the issues below, the total of the basic and compensatory awards is £29,706.74..

120. The next issue is that the respondent pled that there would or could have been a fair dismissal had there been a different procedure, usually referred to as a ***Polkey*** argument, although not part of the oral submission. Ms Wise did not give evidence, nor was there any evidence to the effect that an attempt had been made to obtain her evidence which had failed. In the absence of knowing what she might have said had she been asked, or evidence that securing a statement from her was impossible either for example because her whereabouts were not known or because she had left the country, had not replied to requests for assistance, or otherwise, it appears to me that the respondent has not proved on the balance of probabilities that a fair dismissal was likely to have taken place. In light of the evidence before me I do not consider that there was any material possibility of a fair dismissal. Putting matters simply I did not consider from the evidence I heard that the claimant had attempted to falsify a document as alleged but sought to revise it to accord with his understanding of discussions, as he was entitled to do.

121. It was also pled but again not argued in oral submission that the claimant contributed to his dismissal. That requires proof on the balance of probabilities of conduct on his part that was in some way blameworthy. He was somewhat naïve in how he dealt with matters, and did not follow up with the respondent on the receipt of the letter he sent with the amended contract. But neither did Ms Wise and I do not consider that the claimant's actions are properly described as blameworthy in this context. He was not dishonest as has been alleged, in that he did not falsify a document in my assessment.

122. I considered whether the ACAS Code of Practice had been breached. Its basic terms were not, although the investigation was not as full as it required. Having regard to all the circumstances it appeared to me not appropriate to make any increase in the award for that reason.

123. I considered the total sum not to require reduction on the ground of it just and equitable to do so, and the award is not therefore subject to any variation for these factors.

(iii) Recoupment

124. The claimant received benefits after the dismissal. The Employment Protection (Recoupment of Benefits) Regulations 1996 therefore apply to the award. The effect of the Regulations is that it is possible that the amount of the benefits paid to the claimant during the period covered by the compensatory award is deducted from the sum awarded and paid to the Department for Work and Pensions, with the balance then paid to the claimant. For the purposes of those Regulations:

(i) The monetary award is £29,706.74
(ii) The prescribed element is £22,218.58
(iii) The date to which the prescribed element relates is 23 September 2021, and the prescribed period is from 23 September 2020 to 23 September 2021
(iv) The amount by which the monetary award exceeds prescribed element is £7,488.14

125. The sum of £7,488.14 is now payable. There is a period of 21 days after this Judgment is sent to the parties for the service on the parties of a Recoupment Notice, which sets out the amount if any that must be deducted from the prescribed element and paid to the Department for Work and Pensions. The balance of the prescribed element is then payable to the claimant. If there is no Recoupment Notice served within that time, the full amount of the prescribed element is payable to the claimant save where there are sufficient reasons for any delay in serving such a Notice.

Conclusion

126. The claimant was unfairly dismissed and is awarded the compensation set out above. Both the claimant and Mr Muirhead are to be commended for the helpful and considerate manner in which the hearing was conducted.

Employment Judge: A Kemp

Date of Judgment: 25 March 2022

Date Sent to Parties: 25 March 2022