



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: S/4100948/20**

**Held on 2 & 3 November 2020**

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**Employment Judge N M Hosie**

**Mr M McInnes**

**Claimant  
In Person**

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**Saipem UK Limited**

**Respondent  
Represented by  
Mr M Khoshdell,  
Counsel**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Tribunal is that: -

1. the unfair dismissal complaint is dismissed;
2. the respondent was in breach of contract by failing to give the claimant notice of termination of employment; and
3. the respondent shall pay the claimant the sum of Eight Thousand and Forty-Nine Pounds and Eighteen Pence (£8,049.18) as damages for that breach.

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**REASONS**

**E.T. Z4 (WR)**

**Introduction**

1. The claimant, Mark McInnes, claimed that he was unfairly dismissed by the  
5 respondent Company (“Saipem”) and that Saipem was in breach of contract  
in respect of its failure to give him notice of the termination of his employment.  
The respondent admitted the dismissal but claimed that the reason was  
conduct, gross misconduct, and that it was fair. It also claimed that as the  
10 claimant was guilty of gross misconduct it was entitled to dismiss him without  
notice.

**The evidence**

2. On behalf of the respondent I heard evidence from: -
- 15 • Richard Prothero, Site Manager, who took the decision to dismiss.
  - Julie Miller, HR Manager.

I then heard evidence from the claimant who represented himself at the  
Hearing.

- 20 3. A joint inventory of documentary productions was lodged by the parties (“P”).

**The facts**

4. Having heard the evidence and considered the documentary productions, I  
was able to make the following material findings in fact. By and large, these  
25 were either agreed or not disputed.

5. The respondent is a business which operates in the oil and gas sector  
supporting offshore energy projects with technical equipment and expertise.  
The respondent has two sites in the UK, one in London and the other in  
30 Aberdeen. The respondent’s organisational chart was one of the  
documentary productions (P. 60).

6. The claimant started working for the respondent on 29 August 2000. At the time of his dismissal, he was employed as Warehouse Manager at the respondent's Potterton site. He had held that role from 1 May 2012, albeit  
5 this was only formally documented in September 2017. He was dismissed summarily, allegedly for gross misconduct, on 9 October 2019.

### **Timesheet approval**

- 10 7. As Warehouse Manager, the claimant had responsibility for all staff and contractors at the Potterton site, which included approving contractors' timesheets and reporting absences to HR.

- 15 8. Lewis Smith was a contractor who worked at the Potterton site. He was engaged by the respondent through an Agency. The claimant was responsible for signing off his timesheets for Saipem. Mr Smith also submitted timesheets to his Agency.

- 20 9. In September 2019, as a result of a review of Mr Smith's Saipem timesheets, the majority of which had been signed off by the claimant, discrepancies were discovered. It was established that timesheets had been approved for Mr Smith for a total of 5 days when he had not actually worked for Saipem. Four of these timesheets were approved by Mr McInnes. The remaining timesheet was approved by David Armstrong when the claimant was on holiday. Mr  
25 Armstrong also worked at the Potterton site under the claimant's management.

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### **Shipment of grabbers**

10. As Warehouse Manager, the claimant was responsible for ensuring that shipments of the respondent's equipment from the Potterton site were correctly loaded on to vehicles.
- 5 11. In late August 2019, shipments had gone out from the Potterton site which were not complete. As a consequence, Kevin Robb, the respondent's Logistics Manager, met the claimant and others at the site and it was agreed that, with a view to preventing such errors in future, amongst other measures, the loading process would be adjusted to a two person checking system.
- 10 12. On 27 August 2019, Mr Robb sent an e-mail to the claimant and others in this regard (P.88). The claimant replied by e-mail on 28 August (P.89). The following is an excerpt from his e-mail: -
- 15 *“Going fwd I believe the system we have in place for pulling spares has been working well for many years & it was just unfortunate on this occasion that two were flagged up very close to each other..... As stated & agreed with all a bit of complacency had indeed set in. However, we have all agreed to address this & look to get this back on track.*
- 20 *From this point today all spares to be pulled will be a 2 Man Job & will be checked thoroughly before being packed up & made ready for invoicing & Obtaining Freight Quotes.”*
- 25 13. Mr Robb replied by e-mail the following day (P.90). The following is an excerpt:- *“Hi all, Marc thank you for the below, I am delighted in the way in which the meeting was and has been received, the measures below should assist in improving the process we currently have in place.”*
- 30 14. Towards the end of August, the claimant was instructed in connection with the loading of Saipem equipment (a “loadout”) bound for Baku on 3 September 2019. On 29 August, Alex Campbell, Logistics Co-ordinator sent an e-mail to the claimant with details of the equipment which was to be loaded onto the delivery lorry (P.91-93). The load included two “grabbers” which
- 35 were approximately 2 metres x 2 metres in size.

15. On 2 September, Mr Campbell met the claimant at the Potterton site and checked with him that all the equipment was there and ready to be loaded the following day.

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### 3 September 2019

16. The lorry duly arrived at the Potterton site. The claimant gave David Armstrong and Marc Costello the list of the equipment and instructed them to ensure that it was loaded onto the lorry.

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17. A difficulty was experienced initially with the lorry driver who was concerned that there was insufficient room on his vehicle to load all the equipment. This was reported to the claimant. He went outside from his office to check and it was agreed that the items (including the two grabbers) which had been loaded onto the lorry should be removed and reloaded with the remainder of the equipment.

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18. Later that day, the claimant was advised by Messrs. Costello and Armstrong that the vehicle had been fully loaded and had left. They confirmed that the items detailed on the Invoice had been loaded and showed him photographs of the fully loaded vehicle (P.159-163). Accordingly, the claimant telephoned Alex Campbell, the Logistics Co-ordinator, confirmed that all the equipment had been loaded and that the lorry had left the Potterton site.

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19. However, some 10 days later it was discovered that the grabbers, scheduled for delivery to Baku, had not been loaded onto the vehicle but had been left behind in Aberdeen. They were discovered at the side of the warehouse at Potterton, obscured by 4 large buoyancy crates. It was uncertain when these crates had been delivered.

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### Investigation

20. As a result of the failure to load the grabbers and the inaccurate timesheets submitted for Mr Smith, the claimant was informed by letter dated 17 September 2019 (P.109 -110) that he was suspended from work pending an investigation into the following allegations:-

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“

- *The timesheets for Lewis Smith were incorrectly approved by you;*
- *That 2 Grabbers were not loaded out on an urgent shipment on 3 September 2019 when you confirmed that they had been.”*

10 **Investigatory meeting**

21. An investigatory meeting was conducted by Kevin Robb, Logistics Manager, on 20 September 2019. Minutes of the meeting were produced (P.116-118). I was satisfied that they were reasonably accurate. The following are excerpts: -

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*“MM said that Lewis (Smith) had put his timesheets on MM’s desk every Monday for approval and that they would have been put there along with lots of other paperwork. MM said that he was too trusting and when he signed paperwork on his desk including HSE Forklift Check Sheets that he didn’t look at them. MM said that he did this for the boys. MM said that he hadn’t intentionally signed off the timesheets knowing they weren’t right.....*

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*MM agreed that he was responsible for the management of the warehouse at Potterton and that there had been meetings in August about loading out procedures.....*

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*KR asked MM whether he agreed that it had been his responsibility to check that everything had been loaded and MM agreed that it was. MM confirmed that he had not done so on this occasion but said that once they believed that everything had been loaded, they then took pictures of the truck with the load as normal. MM confirmed that he had phoned AC on 03/09/2019 to confirm that everything had been loaded.*

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*KR referred to MM’s e-mail of 16/09/2019 (P.101) which was his explanation of what had gone wrong with the Grabbers not being loaded where he indicated that he would now start to check every load. KR asked MM didn’t he already do that? MM indicated that he did. MM said that yes that does happen but, on this load, there had been a lot of equipment and that the truck had been at full capacity with almost every inch of space used.*

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*KR asked MM was it correct that the Grabbers were not noticed in the yard at Potterton until 13/09/2019? MM confirmed that this was correct and that they had been obscured by 4 large buoyancy crates. KR asked MM who had*

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*loaded the truck that the Grabbers should have been on and MM confirmed it was David Armstrong and Mark Costello. KR had asked who had unloaded the buoyancy crates into the yard and MM said that he did not know who had stacked them.”*

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22. The claimant’s e-mail of 16 September to Kevin Robb which was referred to at the investigatory meeting was in the following terms (P.101): -

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*“To be perfectly honest I am at a loss as to why these Grabbers were not loaded. On the day of the load we had the items mostly grouped together apart from the items in the yard. The Driver was foreign and we showed him the items to be loaded. He was a typical foreign driver & was trying to communicate what items he would like placed on his truck. Whilst loading the truck he indicated a few times that he would like things swapped about. All I can say is that these items have been lost in translation in the middle of the load.*

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*I have attached pictures of the load & as you can see every foot of the truck was used up. So in the end I very much doubt the truck would have been able to take all the items which is by no means an excuse but an observation. Alex has done his job properly & was out on numerous occasions co-ordinating this loadout.*

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*I can only apologise to Projects for this oversight & will ensure that I myself check the load with the Invoice prior to the loads departing for future Projects.”*

23. It was established subsequently that the extra costs of sending the grabbers to Baku would be of the order of £6,000 (P.123).

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### **Disciplinary**

24. On 24 September 2019, the claimant was invited to attend a disciplinary hearing (P.122): *“to discuss allegations made against you as follows:*

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- *the matter of timesheets being approved as working time for Lewis Smith, contractor, when he did not work and;*

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- *because you are the accountable person at Potterton and therefore are responsible for the proper management of the warehouse and you confirmed that grabbers had been loaded on to a truck on 3rd September 2019 when they had not.”*

25. The disciplinary hearing was conducted by Richard Prothero (ROV Aberdeen Site Manager) on 2 October 2019. Minutes of the meeting were produced (P. 124-129). I was satisfied that they were reasonably accurate. The following are excerpts: -

**“Timesheets**

.....  
10 *RP asked MM if he could explain why he signed off Lewis Smith’s timesheets without questioning his days of absence?*

15 *MM explained that when Lewis Smith was off sick, he said he had notified his agency and on return to work had left his timesheets on MM’s desk to be signed off.*

*JM (Julie Miller), HR Manager, asked MM if he signs off the agency timesheet.*

20 *MM confirmed this had only happened only once.*

*JM asked MM if it was always GHRS timesheets he was given to sign.*

*MM said yes.*

25 *RP asked MM to confirm that there was a cross check between the agency and GHRS timesheets.*

30 *MM said no there was not a cross check as he was never asked to sign agency timesheets.*

35 *RP referred to the issue of trust with regards to expecting Lewis Smith’s timesheets to be correct. MM did not check or cross check these documents that affect the business and that were also the consequences of paying for services not received. It was very concerning that, this has happened on a few occasions.....*

**Grabbers**

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*RP asked MM to explain why he had given Kevin Robb assurances that the process was being looked at and then 5 days later the next shipment went out without 2 items.*

45 *MM explained that this was a large shipment going to Baku and that most of Monday MM and Alex Campbell, Logistics Co-ordinator, prepped for*



5 *Tuesday's collection and that they both stayed back until 4.45/5pm. MM said everything was accounted for on the invoice including the 2 grabbers in the yard. MM had already run through the plan of action for loading up with Marc Costello. When Marc Costello, Storekeeper, arrived on the Tuesday morning the truck was already there. Marc Costello spoke to the driver, grabbers were eye-balled, kit, pallets etc. all eye-balled. During loading operations, the driver was not happy with the secured load which resulted in items coming off the truck followed by the process of re-loading. MM asked for pictures to be taken. Pictures were taken, documents signed, and the driver left.*

10 *RP stated that the grabbers were not on board and that nothing had been brought to MM's attention. He asked MM if there was a checklist to complete.*

15 *MM confirmed that there was not a checklist and that the shipment was checked against the invoice and that the number of pieces were checked against the items in the truck. MM admitted that the process had fallen through."*

## 20 **Dismissal**

26. On 9 October 2019, Mr Prothero wrote to the claimant to advise him that he had decided to dismiss him summarily for gross misconduct (P.135-138).

25 27. So far as the timesheets were concerned Mr Prothero said this:-

30 *"In your reply to this issue, you consider that you were too trusting regarding the timesheets submitted by Lewis Smith. It is my opinion that in your role as Warehouse Manager the checking and approval of personnel timesheets and other documentation is a primary responsibility of the role, as per Reference Document 6, "Tasks", and relying on the originator of a document to ensure accuracy without yourself questioning it, is a major management failure on your part. In not correcting the timesheets from the outset and allowing the practice to continue the originator would have a continued expectation that working days would be missed, claimed for and still be paid. You stated that you did not intentionally sign incorrect timesheets, however your failure to check, question and correct the timesheets in question, in my view, amounts to falsification of records, which subject to Para.4.2.7 of the Disciplinary Work Instruction (P.51) is a matter that the Company views as gross misconduct."*

40 28. So far as the grabbers were concerned, Mr Prothero said this: -

*"In your response you have stated that an agitated non-English speaking lorry driver dictated what was to be loaded and where, that the trailer was full, with*

5           no space for the grabbers and in the “confusion” the grabbers were missed and not loaded. Irrespective of this the grabbers remained on the manifest and no notification was made to the Logistics Coordinator regarding the fact that the trailer did not have enough capacity, that the driver was dictating how and where the items were to be loaded and that the grabbers could not be, and were not, accommodated on the trailer, as per the manifest. You had direct management responsibility and I consider these failures to be a major management failing on your part.

10           Following the loading having been completed, photographs of the loaded trailer were sent to the Logistics Coordinator, and you have acknowledged by phone you have confirmed on the day, that the load was complete, which implied that the grabbers were included. This was completely false.

15           Since the shipping of incorrectly manifested goods was specifically drawn to your attention five days prior to this incident by your manager, following which you acknowledge your need to improve the management of the process and yet within a week a major incident had occurred, and the items remained unidentified for 10 days as not having been shipped. I consider this to be an act of gross negligence and under Para. 2.7 of the Disciplinary Work Instruction (P.51) the Company views gross negligence as an act of gross misconduct.”

29.       Finally, Mr Prothero said this in his letter: -

25           “Sanction

30           Both allegations have been proven. The next issue is the appropriate sanction for such misconduct. I have carefully considered this, taking into account you had no formal disciplinary warnings on your record and nineteen years’ service in different roles with the company. You have been promoted during this period and undergone training at the expense of the company. I consider that you have been properly trained and supported for the management role at Potterton but through your actions, you have shown a willful disregard of the responsibilities of the role. The role at Potterton which you hold, being remote from the main company site, brings with it the requirement for the Company to be confident that their business has been correctly managed. Given the circumstances of this disciplinary this is no longer the case, as the consequences of negligent management and the effect of the reputation of the company means that you cannot be allowed to continue in your current role. You created significant, financial and operational risks through your actions, which cannot be allowed to continue.

45           The company does not take decisions of summary dismissal lightly, however as Warehouse Manager you are responsible for the execution of day to day remote operations at Potterton and are entrusted with ensuring key documents, processes and shipments are complete and correct. Saipem rely on the integrity of the Warehouse Manager role to meet the agreed commitments to the wider group made by all the departments in Aberdeen

5 *and ensure Saipem operations are conducted to the highest standards. Willfully disregarding the responsibility, which has been entrusted to you, means that you cannot remain in your current role. You had been warned about the procedures on site and yet your reaction was to simply ignore this and create two situations of significant risk. The way in which you have behaved has led me to conclude that all trust in you has gone and the employment relationship cannot continue in this or any other role. Given the serious circumstances of these two incidents, my decision is to summarily dismiss you with effect from 9 October 2019 for two acts of gross misconduct.”*

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## Appeal

15 30. On 15 October 2019, the claimant sent an e-mail to the respondent to intimate that he wished to appeal against his dismissal (P.139).

31. On 6 November 2019, the respondent advised the claimant that his appeal hearing would be held at their premises in Kingston Upon Thames, Surrey on  
20 14 November (P.144/145).

32. On 12 November 2019, the claimant sent an e-mail to the respondent to advise that he had decided to withdraw his appeal for reasons which he gave in an attached letter (P.151-153). For a variety of reasons, he said that he  
25 was of the view that, *“there is very little chance of a fair hearing in Saipem”*.

33. On 19 November 2019, the respondent sent an e-mail to the claimant proposing alternative arrangements for the appeal hearing (P.156). The following are excerpts: -

30 *“We take onboard the points that you have raised and would like to make changes to the arrangements to facilitate your appeal.*

*In terms of the documents requested, we have provided what was available. We have stated in the letter the status of each document requested, e.g. available, not applicable (i.e. not available) or nothing new to provide (i.e. was already provided).*

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*In terms of the location of the meeting, we regularly hold appeals in London for Aberdeen employees (and vice-versa). We feel that it provides a greater*

level of objectivity and impartiality to the process. However, we take on board your concerns and can arrange your appeal meeting to take place in Aberdeen, either in our offices or an external office such as a local Hotel meeting room. We can also utilise video conferencing facilities.

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Richard Harrison is a Senior Manager with Saipem Ltd and has a very thorough approach. As he is not involved in the management of Aberdeen or Logistics, he will offer a very good degree of objectivity and impartiality to the process. However, as you object to a non-Logistic's manager chairing your appeal meeting we will look to assign a suitably senior manager from Logistic's.

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Please be assured that are (sic) not trying to make your appeal awkward, we just want to ensure that your appeal has been conducted in an impartial and thorough way.

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If you are happy/unhappy with the alternatives suggested please let me know. In the meantime, I will prepare the amended appeal letter."

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34. On 20 November, the claimant sent an e-mail to the respondent in the following terms (P.157): -

"It is my first time in the disciplinary process. If what you say is true, it would have been very easy for someone to share options with me ahead of time and I can see no reason why no-one would get back to me before now.

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The bottom line is that there is still a major trust issue. As I do not think that I can face going back to an employer who would treat me this way my decision stands. My appeal is withdrawn. There are other options to make sure my case is heard in an impartial and thorough way."

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## Discussion and decision

### 35 Unfair dismissal

35. In every unfair dismissal case where dismissal is admitted s.98(1) of the Employment Rights Act 1996 ("the 1996 Act") requires the employer to show the reason for the dismissal and that it is an admissible reason in terms of s.98(2), or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. An admissible reason is a reason for which an employee may be fairly dismissed

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and among them is conduct. That was the reason which the respondent claimed was the reason for the claimant's dismissal. I was satisfied that he was dismissed for that reason. That was not an issue between the parties.

5 36. The remaining question which I had to determine, therefore, under s.98(4) of  
the 1996 Act, was whether the respondent had acted reasonably in treating  
that reason for dismissing the claimant as a sufficient reason and that  
question had to be determined in accordance with equity and the substantial  
10 merits of the case. Under paragraph (a) of this sub-section the question of  
whether the employer acted reasonably, particularly where the reason for  
dismissal was related to the conduct of an employee, frequently involves  
consideration of the adequacy of the employer's investigation into some  
alleged wrong doing and thus whether a reasonable employer could have  
concluded that he was guilty (i.e. the test in ***British Home Stores Ltd v.***  
15 ***Burchell*** [1978] IRLR 379). The respondent could have interviewed and  
taken statements from Lewis Smith about the timesheets and Mark Costello  
and David Armstrong about the failure to load the grabbers. However, this  
was a case where the position was clear as to what happened. By and large,  
the material facts were either agreed or not disputed. Having regard to the  
20 information which the respondent had obtained about the timesheets and the  
grabbers, the claimant's admissions and the fact that the claimant was  
interviewed and afforded a reasonable opportunity of giving an explanation, I  
was satisfied that the investigation carried out by the respondent was  
appropriate to the circumstances and was within the band of reasonable  
25 responses.

### The procedure

30 37. Another frequent issue for an Employment Tribunal is whether the employer  
had adopted a fair procedure throughout the disciplinary process. In my view  
the manner in which the respondent went about things could not be faulted;  
the respondent followed its Disciplinary Policy (P.43-52); the ACAS Code was

observed; the claimant was made fully aware of the allegations against him; he was afforded a reasonable opportunity of responding to the allegations and giving an explanation; he was allowed representation, at the disciplinary hearing in particular.

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38. The claimant was critical of the original arrangements for the appeal. However, it was the respondent's normal practice to conduct appeals at its Head Office in London, one of the reasons being that this would ensure objectivity. The respondent took on board the claimant's criticisms and was prepared to conduct the appeal hearing in Aberdeen and arrange for a Senior Manager from Logistics to conduct the appeal (P.156). Their response was within the band of reasonable responses open to a reasonable employer. I did not consider that the claimant's refusal to engage in the appeal process, once the respondent was prepared to make alternative arrangements to address his concerns, was justified.

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39. The real focus of the unfair dismissal complaint, therefore, was the substantive one of whether the claimant's conduct in itself could reasonably have been considered by a reasonable employer to be "sufficient" for dismissal. S.98 is concerned with the sufficiency of the conduct reason for dismissal. It is not concerned with "wrongful dismissal" and the common law concept of gross misconduct, which is conduct by the employee amounting to a repudiatory breach of the employment entitling the employer to terminate the contract without notice or pay in lieu of notice.

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40. Where conduct is put forward by a respondent as the reason for the dismissal, the primary focus as to whether that is reasonable has to be on the character of that conduct. In this case the respondent expressed labelled that conduct as "gross misconduct". As far as that is concerned, I refer to my comments below on the proper place for that concept, i.e. in the law relating to breach of contract. The point is that whether a question of dismissal was fair or unfair under s.98(4) is not answered by deciding whether or not the employee has

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been guilty of gross misconduct. As Phillips J said in **Redbridge London Borough v. Fishman** 1978 ICR 569: -

5           *“The jurisdiction based on [what is now s.98(4)] has not got much to do with contractual rights and duties. Many dismissals are unfair although the employer is contractually entitled to dismiss the employee. Contrary-wise some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee. Although the contractual rights and duties are not irrelevant to the question posed by [s.98(4)], they are not of the first importance. The question which the Industrial Tribunal had to answer in this case was whether the employer could satisfy them that in the circumstances having regard to equity and the substantial merits of the case they acted reasonably in treating the employee’s conduct as a sufficient reason for dismissal.”*

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15    41.    That opinion was confirmed by the EAT in **Weston Recovery Services v. Fisher** [EAT0062/10] i.e. when considering the fairness or otherwise of a dismissal the only relevant question is whether the conduct was “sufficient for dismissal”, according to the standards of a reasonable employer and whether dismissal accorded with equity and the substantial merits of the case

20           (sections 98(4)(a) and (b)).

42.    Accordingly, in the present case, I was required to consider the nature, character and effect of the claimant’s conduct. It was significant, of course, that the claimant was a long-standing employee, well versed in the

25           respondent’s procedures and as Warehouse Manager he was ultimately responsible for the work at Potterton.

### Timesheets

30    43.    So far as the timesheets were concerned, the claimant gave a different explanation at the Tribunal hearing from that which he had given during the disciplinary process. At the hearing he claimed that he had detected that Mr Smith had claimed for days that he had not worked, that he had specifically drawn this to his attention and that he had been assured by Mr Smith that he

35           had made the Agency aware of this and that he had taken these days as

5 holidays. However, at the investigatory and disciplinary hearings the gist of his explanation for signing off the inaccurate timesheets was that he had a great deal of paperwork, that he was too trusting of Mr Smith and he did not check his Saipem timesheets before signing them off and nor did he cross-check them against Mr Smith's Agency timesheets.

10 44. It appeared to me that the account the claimant gave at the Tribunal hearing was something of an afterthought. In any event, as I recorded above, I was satisfied that the respondent had followed a reasonable procedure and that the claimant had been afforded a reasonable opportunity of responding to the allegations. The duty of an Employment Tribunal is to review the decision making of the employer on the information that was available, following completion, in a conduct case, of the stages in **Burchell**, and then to decide if the dismissal fell within the band of responses of a reasonable employer. It was claimant's responses during the disciplinary process and the explanations he gave then, therefore, with which I was concerned.

15 45. It was not disputed that the claimant had signed off four of the five timesheets for Mr Smith in respect of days which he had not worked. This meant that he was paid for four days when he had not worked.

### Grabbers

25 46. It was not disputed that the two grabbers had not been loaded onto the vehicle as they should have been and that as Warehouse Manager the claimant was responsible for ensuring that all the equipment was properly loaded.

30 47. What was significant in this case, of course, was that only a few days before concerns had been expressed to the claimant by the Logistics Manager, Kevin Robb, about ensuring that vehicles were fully loaded and the claimant had given an assurance that this would be done. Also, on the day before the vehicle was due to be loaded Alex Campbell, the Logistics Co-ordinator,



came out to Potterton and, along with the claimant, checked that all the items of equipment were there and ready to be loaded.

5 48. I had no difficulty, therefore, arriving at the view that the three-fold test in **Burchell** had been satisfied: the respondent had a genuine and reasonable belief in the claimant's guilt, reasonably tested.

10 49. I then went on to consider, therefore, with reference to s. 98(4) of the 1996 Act, whether, in all the circumstances, dismissal was a reasonable sanction. Given that, by and large, the material facts were not in dispute this was the principal issue in the case.

15 50. In this regard I was mindful of the guidance given in such well-known cases as **Iceland Frozen Foods Ltd v. Jones** [1982] IRLR 439 that there is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another could quite reasonably keep him on. It depends entirely upon the circumstances of the case whether dismissal is one of the penalties which a reasonable employer would impose. If no reasonable  
20 employer would have dismissed, then the dismissal is unfair, but if a reasonable employer might reasonably have dismissed, then the dismissal is fair.

25 51. Mr Justice Browne-Wilkinson summarised the law in **Iceland**. I had regard to this guidance in arriving at my view: -

30 *"24. Since the present state of the law can only be found by going through a number of different authorities it may be convenient if we should seek to summarise the present law. We consider that the authorities established that the correct approach is for the Employment Tribunal to adopt in answering the questions posed by [s.98(4)] is as follows:*

35 *(1) the starting point should always be the words of [s.98(4)] themselves;*  
*(2) in applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair;*

(3) *in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

5 (4) *in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

10 (5) *the function of the Employment Tribunal as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."*

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52. The claimant, of course, had some 19 years' unblemished service. I was satisfied that Mr Prothero had regard to this when deciding on dismissal. As Warehouse Manager, the claimant was responsible for ensuring that timesheets he signed off were accurate and he was ultimately responsible for  
20 ensuring that vehicles were properly loaded; only a few days before he had been made aware of the respondent's concerns about ensuring vehicles were fully loaded which meant that he had to be especially vigilant about such matters and he had given an assurance that he would be; as a consequence of his failure to check the accuracy of timesheets before signing them off, the  
25 respondent had paid a contractor for 4 days when he had not worked for them; and extra transportation costs of the order of £6,000 had been incurred by the respondent as a consequence of the claimant's failure to ensure that a vehicle was properly loaded with designated equipment. In light of this and in all the circumstances, I had little difficulty in deciding that dismissal in this  
30 case fell within the band of reasonable responses which a reasonable employer might have adopted.

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53. The respondent satisfied the **Burchell** test, followed a fair procedure and imposed a sanction, dismissal, which fell within the range of reasonable responses.

54. Accordingly, the dismissal was fair, and the unfair dismissal complaint falls to be dismissed.

**Breach of contract**

55. This was the second complaint in this case, the alleged breach being the failure by the respondent to give notice of termination of employment and instead to dismiss summarily. The remedy sought was damages, measured by the amount of net salary which the claimant would have received during the appropriate notice period.

56. It is a condition of every contract of employment that in order to terminate lawfully an employer requires to give notice of his intention to do so, the relevant period being in accordance with any relevant term of the contract or otherwise in accordance with the statutory minima. If he fails to do so, he will be in breach. The only exception to that requirement is when a decision to terminate arises from conduct on the part of the employee which amounts to what is usually referred to as “gross misconduct”. Accordingly, I required to consider whether the claimant’s conduct could properly fall into that category.

57. Many employers have a tendency to declare: “it was gross misconduct”, but ultimately such an assertion is not determinative. The issue was one which featured in the Judgment of the EAT in **Sandwell & West Birmingham Hospitals NHS Trust v. Westwood** [UKEAT/0032/09/LA, a case where, as here, the conduct of the employee was not in dispute. The EAT said this:

*“110.....there is no dispute as to commission of the act alleged to constitute misconduct. What is at issue is the character of the act. The character of the misconduct should not be determined solely by or confined to, the employer’s own analysis, subject only to reasonableness. In our Judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so in the question that falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract. What then is the direction as to law that the employer should give itself and the Employment Tribunal apply when considering the employer’s decision making?”*

*111. Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee: see **Wilson v. Ratcher** [1974] ICR 428, CA per Edmund Davies LJ at page 432 (citing Harman LJ in **Pepper v. Webb** [1969] 1WLR514 at 517): ‘Now what will justify an instant dismissal?’*

– *Something done by the employer which is impliedly or expressly is a repudiation of their fundamental terms of contract*

5 And at page 433 where he cites Russell LJ in **Pepper** (page 518) that the conduct ‘must be taken as conduct repudiatory of the contract justifying summary dismissal’ in the disobedience case of **Laws v. London Chronicle (Indicator Newspapers)** [1959] 1WLR698 at page 710, Evershed MR said:

10 ‘The disobedience must at least have the quality that it is ‘wilful’: it does (in other words) connote a deliberate flouting of the essential contractual conditions’

**So the conduct must be a deliberate and wilful contradiction of the contractual terms.** (The Tribunal’s emphasis)

15 112. Alternatively, it must amount to very considerable negligence, historically summarised as ‘gross negligence’. A relatively modern example of ‘gross negligence’ as considered in relation to ‘gross misconduct’ is to be found in **Dietman v. LB Brent** [1987] ICR 737 at page 759.

20 113.....having given a correct self-direction in terms of law, thereafter it fell to the Employment Tribunals to consider both the character of the conduct and whether it was reasonable for the Trust to regard the conduct as having the character of gross misconduct on the facts. The decision reached in that paragraph, whilst accepting that her conduct was ‘a failure of professional judgment’ and a ‘serious one’ and ‘fell short of the high standards demanded of a nurse’, concluded that it could not be reasonably characterised as a deliberate wrong doing or gross negligence. In our judgment this was a decision open to the Employment Tribunal to make on the facts.”

25 30 58. So, it depends on the *character* of the conduct and whether it was reasonable for the employer to regard it in that light. So far as the present case was concerned, at the time of the dismissal Mr Prothero took the view so far as the timesheets were concerned that there had been “falsification”. However, at the Tribunal hearing he conceded that the claimant’s conduct would be better described as “gross negligence”.

35 40 59. Five erroneous timesheets, four had been signed off by the claimant and one had been signed off by his colleague Mr Armstrong. There was a suggestion at least by Mr Prothero that the claimant was also responsible for the timesheet signed off by Mr Armstrong. I was not persuaded that that was so. The timesheet was signed off by Mr Armstrong when the claimant was on

holiday and there was no evidence to suggest that in delegating this task to Mr Armstrong the claimant had been at fault in any way.

- 5 60. No disciplinary action was taken against Mr Armstrong, despite Mr Prothero maintaining at the time that the timesheets had been “falsified” which suggested intent.
- 10 61. So far as the Grabbers were concerned, there was no suggestion that it had not been appropriate to delegate the task of ensuring that the vehicle was fully loaded to Messrs. Costello and Armstrong. They reported back to the claimant that the vehicle had been fully loaded and provided him with photographs. The claimant could perhaps have been faulted for not personally checking that the vehicle was fully loaded and simply relying on the word of Messrs. Costello and Armstrong and the photographs which  
15 showed the vehicle was fully loaded, particularly as the claimant had been advised by the respondent’s concern about ensuring that vehicles were fully loaded long before.
- 20 62. While mindful of what is said to constitute gross misconduct in the respondent’s Disciplinary Policy (P.51-52), I was not persuaded that it was reasonable for the claimant to conclude that what the claimant had done so far as both the timesheets and the grabbers were concerned, was “*a deliberate and wilful contradiction of the contractual terms*”. Nor was I persuaded that the claimant’s conduct, “*amounted to very considerable negligence*”. In my view, his conduct could not be reasonably characterised as either, “*deliberate wrongdoing or gross negligence*”. It was not gross  
25 misconduct.
- 30 63. I arrived at the view, therefore, that in dismissing the claimant summarily, without notice, the respondent was in breach of contract. The claimant was wrongfully dismissed. In order to terminate lawfully, the respondent should have given the claimant notice.

**Damages**

64. The claimant should have received three months' notice. It was agreed that his monthly net salary figure was £2,683.06. Accordingly, he is entitled to an award of damages in respect of the respondent's breach of contract **£8,049.18.**

	<b>Employment Judge</b>	<b>Nick Hosie</b>
10	<b>Date of Judgement</b>	<b>17 November 2020</b>
	<b>Date sent to parties</b>	<b>17 November 2020</b>