



EMPLOYMENT TRIBUNALS

Claimant: Mr Robert Ellis

Respondent: Dynamometer World Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal (by CVP)

On: 10 & 11 December 2020 and 12 January 2021 and in chambers on 18
January 2021

Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: In person

For the respondent: Mr Godfrey of counsel

JUDGMENT

The Judgment of the Tribunal is that:

The claimant's claim for unfair dismissal is dismissed.

REASONS

1. By a claim presented on 16 March 2020, after a period of early conciliation, the claimant claimed unfair dismissal.
2. This has been a remote hearing by CVP. Prior to the hearing, the claimant objected to the hearing being by CVP on the basis that he wished to 'look the respondent in the eye' and would feel more comfortable putting his case across in person. The response made to him by the tribunal was that it was unlikely to be practical to hear the case in person. The claimant did not object further and we were unaware of this

correspondence until it was provided to us by the tribunal administration at the start of the third day of the hearing, by which point, the hearing had already been dealt with by CVP for two days and it was not practical to change that format.

3. This was a hearing plagued by difficulties with IT and delivery of documents to the tribunal which slowed down proceedings. There were also challenges in the process of giving hearing evidence because the claimant struggled to answer the question put to him and often anticipated the question, and the respondent's representative tended to talk over the claimant (and also the tribunal); and the claimant struggled to ask questions in cross examining, tending instead to give evidence, so that the tribunal frequently had to intervene to frame the question for the respondent's witnesses.
4. References to page numbers below are to pages in the hearing bundle.
5. At the start of the hearing, there having been no case management discussion, we set out to establish from the claimant why he said the dismissal was unfair. As the claimant was not represented, we assisted the claimant to frame his case as follows, on the basis of the information in the claim form and our reading of the respondent's witness statements:
 - a. Although the respondent asserted that the reason for the dismissal was the claimant's misconduct, the claimant asserted that this was not the reason.
 - b. The claimant asserted that the evidence which the respondent relied on was not sufficient for the respondent to reasonably conclude that the claimant was guilty of misconduct.
 - c. It was alleged that the respondent relied on the claimant locking his company laptop and mobile when making the decision to dismiss the claimant, which had not been communicated to the claimant to allow him to respond in the disciplinary process.
6. The respondent objected to our assisting the claimant in framing his case in this way. We consider the question of assisting an unrepresented party below.
7. The following issues were identified as relevant to remedy if the tribunal decided that the claimant had been unfairly dismissed:
 - d. The respondent alleged that the claimant contributed to his dismissal and, therefore, any compensatory and basic award should be reduced on a just and equitable basis.
 - e. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway, as per Polkey v AE Dayton Services Ltd [1987] UKHL 8.
 - f. The respondent asserted that the claimant had failed properly to mitigate his loss.
8. During the course of the hearing, and after hearing part of the respondent's evidence, the tribunal also identified as an issue that the respondent had failed, after hearing the claimant's explanation of events, to ask its key witness, MH, for further information on this. The respondent objected to the tribunal identifying a further issue which it accurately stated was not raised by the claimant in the disciplinary proceedings nor the

claim form. The respondent cited the case of *Birmingham City Council v Laws* [2006] UKEAT/0360/06 as authority for the proposition that, where it has been agreed that the hearing will proceed on the basis of identified specific issues, it is not for the tribunal to rise additional issues during the hearing.

9. We have considered this case. It quotes from the decision in *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531 as follows:

I too would strongly encourage Industrial Tribunals to be as helpful as possible to litigants who, formulating and presenting their cases, particularly if appearing in person. There must, however, be a limit to the indulgence that the litigants can reasonably expect. The desirability in principle of giving such assistance must always be balanced against the need to avoid injustice or hardship to another party on the particular facts of each case. This, in my judgment, is a very good reason for holding that the manner and extent of such a system should generally be treated as a matter for the judgment of the tribunal and not a subject of rigid rules of law. In the present case the Trust was, in my judgment, reasonably entitled to expect that the tribunal would, in its decision, be dealing with only those issues which had been covered by the directions of 29 June 2004 and Mrs Mensah's oral submissions and evidence.

10. We note from this that employment tribunals are encouraged to be as helpful as possible to unrepresented parties in formulating their case and that the question of how much indulgence to show the unrepresented party is at the discretion of the tribunal, balancing the need to avoid injustice or hardship to the other party. We consider that the case before us is materially different from the case of *Laws* in that:

- a. There had been no previous case management discussions at which the claimant's case had been framed. This process had to take place in this hearing.
- b. Unlike in the *Laws* case, the tribunal did not seek to add an issue during closing submissions. The new issue was raised in the morning of the second day of the hearing during ZH's evidence, after the conclusion of DH's evidence and prior to the claimant's evidence. The respondent still had chance to re-examine ZH's evidence and could have applied to the tribunal to recall DH to give further evidence had it wished to do so, but no such application was made. As ZH was effectively the investigating officer, it was a matter which he could deal with, and he had opportunity to do so. The respondent had ample opportunity to deal with the new issue in its closing submissions.

11. Therefore, we consider that it was appropriate for the tribunal to be helpful to the claimant as an unrepresented party in this way, and that it did not cause hardship or injustice to the respondent beyond the respondent facing a further issue in the case. The new issue identified will remain for consideration by us.

12. We heard evidence from the claimant. The claimant relied on the statement which was called his final statement, as opposed to his 'previous' statement which was also provided. For the respondent, we heard evidence from David Humphries (DH), MD of the respondent, and his son, Zak Humphries (ZH), CEO of the respondent.

What happened

13. We find the following as the primary facts in this case.
14. The respondent is in business as predominantly as a supplier and servicer of engine dynamometers. It also supplied other power unit test equipment and system integration. It is a small business with seven employees and no HR function. The claimant began employment with the respondent on 10 May 2010 as 'sales/engineer' and ran the business day to day. He was also in charge of the business IT.
15. On 20 Nov 2019, there was a call to the respondent from MH of a German company enquiring about the delivery by the respondent to him of a Toyota engine. The supply of engines was not part of the respondent's business unless part of a far bigger project involving an engine test system. Neither DH or ZH knew anything about this order. The respondent informed MH that it could not supply the engine and MH expressed his great annoyance over this in an email of 20 Nov 2019 (p126). There followed emails between ZH and MH (p123-127):
 - a. MH forwarded to ZH an email he had sent to the email address 'davidhumphries@dynamometer-world.com', on 14 Oct 2019. This email address was not one use by DH. The email was headed 'Toyota engine'. It began 'Hi David, Thanks for your time on Saturday'. It continued with Plan A and Plan B. Plan A was 'to get an engine with test stand equipment to make it run on a test stand. This may be difficult as we have no access to the testbed specific ECM or the testbed wiring harness'. Plan B was 'to get just a cylinder head incl the cam/tappet valve train in order to construct a motored rig with those components'. There was no suggestion that Plan B related to the supply of a test stand.
 - b. MH informed ZH that he had scribbled on a note pad 'Robert@dynamometer-world.com' (IE the claimant's email address). He said that he had had calls with the respondent. Initially he called on 11 Oct 2019 and he had a return call on Saturday 12 Oct in the morning and then subsequent calls. He said 'the only issue was the ECU and I offered to buy the complete vehicle'. An ECU is an engine control unit and we assume that the reference to 'ECM' above should be to 'ECU'.
 - c. MH notified ZH of a call log with the respondent. Further to the two calls mentioned above, he made a call out to the respondent on 14 Oct 2019 for 6 minutes and a call out on 21 Oct 2019 for 15 minutes. He said that he expressed his requirements and time line, namely that 'd-day' was mid-November. He reported that 'I was told that there was not an issue with the engine, but the ECU and harness were to be sourced. In fact, I noted that the sourced engine had done less than 30k... This guy had me convinced that all was ready to go and there would be no issues'.
 - d. MH said that, when the respondent called him on 12 Oct 2019, he asked if he was talking to David. 'The guy said no and I am sure he said he was his son'.
16. Test stand equipment is an ECU and loom. The loom is otherwise known as a harness. The respondent would not have supplied test stand equipment in its normal course of business. Test stand equipment is different to the test stand itself and was an order which the respondent would certainly take on. If the respondent were being asked to supply a complete test stand, the order would be worth £50,000 to £100,000, a very significant order for the respondent.

17. DH looked in the claimant's day note book on the claimant's desk. He found an entry giving MH's name and number with the note 'wants Toyota engine with ECU and working loom.' (p128).
18. DH investigated phone records and confirmed that there had been a call from the respondent to Germany on 12 Oct 2019 at 8.38 am. He also found records of a call from the claimant to DH later that day.
19. The respondent had no experience of handling disciplinary matters and contacted ACAS for advice.
20. The claimant returned from holiday on 27 Nov 2019. The respondent presented him with a letter of suspension of that date saying the respondent was undertaking an internal investigation into the following matters:
 - a. Impersonation of the respondent's managing director and CEO;
 - b. 'Attempt to supply equipment outside of [the respondent's] standard supply, without authorisation from the MD or CEO';
 - c. Additional complaint from external organization.'
21. The letter stated that the respondent required the claimant's work laptop and mobile for the purposes of evidence. It invited the claimant to a disciplinary hearing on 28 Nov 2019.
22. In the meeting (minutes at p 46), the claimant handed over his work laptop and mobile phone. He first deleted his personal files from the laptop. The claimant removed a notebook which he said was his personal book and left a copy of a page with MH's details on it. He removed a writing pad and said he would use it in evidence. The respondent gave the claimant a copy of the emails referred to above.
23. After the meeting, the claimant emailed the respondent saying that it had not provided enough evidence of the allegations, including that there was no evidence to show that he had intended to sell the items for his financial advantage as verbally suggested. He also complained he did not have time to make his own enquiries. In fact, by the point of the appeal meeting referred to below, the claimant was to have almost two months to make his own enquiries.
24. The first disciplinary hearing took place on 28 Nov 2018 (minutes at p51). The claimant was accompanied by a companion called Daryl. DH and ZH attended. Their role was not explained, but DH was the decision maker. The purpose of this first meeting was primarily to inform the claimant about the evidence.
25. DH and ZH ran through what had happened verbally IE how they had taken a call from MH when the claimant was on holiday, whom they were unaware of, who was asking where his engine was. MH was convinced he was buying an engine which had done less than 30,000 miles from the respondent for £750. The respondent did not sell engines. MH said he thought he spoke to DH on the Saturday, when neither DH nor ZH were in the office. MH had raised a complaint. The email address which MH used to communicate with the respondent, 'davidhumphries@dynamometer-world.com' did not exist. ZH then investigated where that email would have come into the respondent and found that the claimant's company email address received all emails with a 'dynamometer-world.com' email address. The claimant said this had been the process for years. ZH also found that the claimant's email inbox and sent box had been deleted up to a very recent date. He said the trash email box showed selective

deleting of emails, not deleting all the emails. He did not understand why the claimant would have to have deleted emails because his mailbox was of an infinite size.

26. ZH continued that he had relevant phone records and had a list of phone calls with MH. The claimant was in the office on the Saturday in question and so there was no doubt that the claimant made the first call to MH. They had looked at the claimant's laptop the previous day and found the email from MH in his trash folder. The proposed engine sale was not entered into the estimate book.
27. The respondent took a copy of its further evidence file and gave it to the claimant.
28. The claimant started to deny the allegations but was stopped by his companion. The respondent explained that the purpose of the meeting was to give the claimant the evidence. It pressed the claimant to come back with his comments that afternoon, but the claimant refused.
29. The claimant expressed his unhappiness that the respondent had his mobile phone when there were banking apps etc on it and asked to remove personal details from his phone. DH refused his request until the respondent had reached a conclusion.
30. On 4 Dec 2019, the claimant sent to the respondent his reply to the allegations in writing and stated he had taken legal advice on it (p58). The points made by the claimant were as follows:
 - a. On the Saturday morning, he checked for messages on the work phone and returned a call to MH. He would have given the name of the company not his personal name. Why would he return a call to an unknown person and introduce himself as DH? MH said he wanted a complete test stand complete with a Toyota engine. He noted this in his notebook. While the respondent did not usually supply engines, it would look at custom projects. He asked MH for more information about the engine required. MH said he would supply it and said he would also need an Engine Control Unit and full engine wiring harness.
 - b. The following day MH emailed to 'davidhumphries@dynamometer-world.com'. The claimant said he had not given him that email address or the name of DH. He realised that MH had thought he was talking to DH. The claimant's interpretation of the content of the email was that MH wanted a complete test stand. However, there was no detailed information on what MH wanted. DH and ZH knew how many enquiries like this the respondent received and they were largely ignored and the details of every call were not passed on or it would waste a lot of time.
 - c. The claimant denied he said he had an engine in stock. He said he may have been able to source one but only if part of a wider project. He said he may have quoted a price of £750 for the engine which would be a realistic figure. He did not raise a quotation because the enquiry was so vague. He would not have bought an engine without an official order and unless it were part of a bigger project. The enquiry then seemed to fade away. He deleted the email which was his usual practice to keep dead enquiries out of his inbox.
 - d. The claimant pointed out that DH's name was easily available in the public domain and suggested that MH must have had prior knowledge of DH or found his name on line. He pointed out that MH's email stated that he asked the person he spoke to if he was DH, the person denied this and MH said 'I am sure he said he was his son'. MH also stated that he had noted

'Robert@dynamometer-world.com', from which he must have realised he was speaking to the claimant. Therefore, MH's information was inconsistent and wrong.

- e. He denied trying to supply equipment outside the respondent's standard supply.
 - f. He assumed the complaint on which the respondent relied was referred to in an email from ZH to MH saying they were investigating his complaint, but that he could see no evidence of an official complaint.
 - g. He said MH's emails were contradictory when he referred to calls between 11 October and 12 October when there were no calls then. He said the emails from MH of 20 Nov 2019 and 21 Nov 2019 were inconsistent. How could MH really believe that he had placed an order when he had no purchase order or order confirmation and he had made no payment? He concluded that MH was trying to find a scapegoat. He asked how an unknown person could make accusations against a trusted employee of ten years, resulting in disciplinary action.
31. There was a further disciplinary hearing on 18 Dec 2019 (p67) with DH and ZH. The claimant was again accompanied by Daryl. These were the main points covered:
- a. The claimant said he did not want to talk though his written statement. He had nothing to add.
 - b. ZH asked why the claimant would make a business call on a Saturday morning. The claimant said he quite often came in on a Saturday morning, either to work for the respondent or to work on his own car, and he would pick up any messages on the answer machine. He said he had responded to calls he discovered on a Saturday a thousand times before. Daryl told the claimant not to elaborate further.
 - c. ZH asked the claimant about his evidence that he would have told MH he was calling from the respondent and not given his name. The claimant reiterated he would not give his name when answering the phone if it was a cold number. Daryl cut the claimant off again. Daryl said that it should be put in writing to give the claimant chance to respond. The claimant said he would decide whether he was willing to answer the questions orally or whether he wanted to put it in writing.
 - d. ZH asked why MH would have the email address 'davidhumphries@dynamometer-world.com' to use. Daryl responded that he could get DH's name by googling. The claimant added that MH stated himself that he had asked the claimant for his email address and the claimant had provided it.
 - e. ZH pointed out that the email from MH did not ask for 'an engine test stand complete with Toyota engine'. The claimant protested that that was what the email said. ZH said the email asked for an engine test stand, not a complete test stand. The claimant said that MH asked for a complete engine test stand. ZH noted that this was not what the claimant recorded in his notebook, which referred to MH requiring a Toyota engine, ECU, wiring harness and nothing else. Daryl said the claimant would respond in writing.

- f. ZH asked why MH would thank DH for his time on Saturday; why would he think he was talking to DH? Daryl stopped the claimant replying. ZH asked why MH was chasing the engine if he wasn't convinced it was being sourced. There was no response and ZH was asked to put the question in writing.
 - g. ZH asked why the claimant would delete the email from MH if it was addressed to DH, and when did the claimant delete the email? The claimant said he did not know and referred ZH to his email account.
 - h. The claimant asked for questions to be put in writing to him. The respondent said it seemed pointless having another meeting when the claimant was insisting on having all questions put in writing.
32. On 19 Dec 2019, the respondent wrote to the claimant with various questions (p78).
33. On 19 Dec 2019, the respondent discovered that the claimant had remotely locked his company laptop, now in the respondent's possession, and the respondent could not access it. It needed access to send a very large invoice out. The respondent wrote to the claimant requiring him to give it immediate access to the laptop by supplying the pincode (p80) and informing him that his inability to access the laptop was having a detrimental impact. The claimant responded he would unlock it if he could access it to delete his personal apps and asked if DH was available the next day. The claimant did not say that they were banking apps. (He only said this in relation to his mobile phone).
34. On 20 Dec 2019, the respondent found that the claimant had also remotely locked his company phone. It lost confidence in the claimant's actions. DH considered it very suspicious that the claimant had locked devices without forewarning him. He replied that the respondent would get an IT expert to unlock the device in the claimant's presence. The claimant said that respondent should be able to access emails on a back up of his desktop, but the respondent was unable to do so.
35. In his witness statement, the claimant explained that he locked the devices after discovering that someone had been attempting to access various online accounts. However, the claimant did not inform the respondent of this during the disciplinary process.
36. On 20 Dec 2019, the claimant sent the respondent replies to its written questions, although some of the questions were incorrectly transcribed. The only ones raising any new points were as follows:
- a. Q3: When did MH state he was looking for a complete engine test stand system? A: On the Saturday morning.
 - b. Q4: Why did the Claimant's notebook only refer to MH wanting a Toyota engine with ECU and wiring loom? A: Until the claimant knew what engine MH wanted, it would be difficult to spec a test stand.
 - c. Q5: why did the claimant give MH a price and mileage for the engine if the respondent was not supplying this equipment? (The claimant's answers left out the reference in the question to the mileage). A: The claimant discussed a test stand with MH who asked him how much the engine would cost and he estimated it at £750, but it would require more information. The claimant did not attempt to source such an engine.

- d. Q6: Why didn't the claimant send MH's email addressed to 'davidhumphries@dynamometer-world.com' to DH? A: The claimant did not notice it was addressed to DH. As nothing was happening on the enquiry, the claimant saw little point in forwarding the email. DH did not get informed of every sales enquiry received.
 - e. Q7: Why did you delete the email from MH? A: The claimant was not initially aware he had deleted the email. He cleared out his working mail box regularly. His system deleted items 30 days after deletion from the working inbox. If he had anything to hide, he would have emptied the deleted items folder.
37. The respondent arranged for an IT expert to attend on 8 Jan 2020 and the claimant agreed to attend. The claimant arrived but did not go to the respondent's office because he was taken ill. On 10 Jan 2020, the respondent received a medical certificate certifying the claimant off work with work related stress. The respondent was unable to unlock the devices. The claimant never attempted to rearrange the device unlocking meeting which he had not attended.
38. By letter of 13 Jan 2020 (p 90), the respondent dismissed the claimant. The decision was taken by DH. The letter set out the allegations from the suspension letter. The letter stated, among other points:
- a. The claimant led MH to believe the respondent could supply him with a product it did not sell, potentially to sell it to MH for his own financial benefit. He had calls with MH about the product and used the email address 'davidhumphries@dynamometer-world.com' to interact with MH who was under the impression he was dealing with DH. This email address was not used by DH and the claimant had access to emails sent to it. MH was unhappy when told the respondent could not supply the product, which reflected negatively on the business.
 - b. The letter referred to the claimant having locked his company laptop and phone and set out the history of interactions over this.
 - c. The claimant had not provided an adequate explanation for the points raised in the suspension letter. Therefore, it was reasonable to conclude, at the least, that the claimant was using a suppliers channel outside the normal arrangements and he was likely to supply the product for his own potential financial benefit.
 - d. Therefore, the respondent concluded that the claimant had committed an act of gross misconduct and dismissed the claimant without notice, giving a right of appeal.
39. By letter of 21 Jan 2021 (p95), the claimant wrote to the respondent to appeal the dismissal. He refuted the allegations and referred to his previous correspondence about the events. He did not set out any grounds of appeal.
40. The respondent proposed that the appeal was heard by ZH. The claimant said that he thought that ZH had instigated the proceedings and asked for DH to be present. Therefore, DH said that he would chair the appeal and ZH would take notes.
41. The appeal meeting took place on 29 Jan 2021 (notes at page 99). The claimant did not bring a companion. The claimant confirmed that he was happy for DH to make the decision. The claimant did not give his grounds of appeal, but said he was disputing

everything the respondent had 'thrown at him'. He said he thought it had been orchestrated. He said he had to go through the appeal process, so that was what he was doing. He said the allegations did not make sense, in particular, that he would sell someone an engine to make £50 or £150. The claimant asked if the respondent had taken a photocopy of every page of his notebook and said there was something in it which would 'blow your accusation that I was working outside my remit', but did not say what it was. The respondent said it had shared all the evidence with the claimant. Then the claimant said it had nothing to do with this case.

42. On 3 Feb 2021, the claimant sent to DH an email which he said showed that the respondent did supply goods apparently outside its remit, this referring to supplying a machine tool. DH decided it had no bearing on the appeal.
43. On 5 Feb 2020, DH wrote to the claimant saying that, as he had not raised any relevant points, the appeal was unsuccessful.
44. At the start of the hearing, the claimant said he understood the reason for dismissal, as per the dismissal letter, was dishonesty in that he tried to arrange the sale of an engine for personal financial gain.
45. Under cross examination, the claimant conceded that he knew the respondent had taken into account the claimant locking his company laptop and mobile when making the decision to dismiss the claimant because it was referred to in the dismissal letter.
46. Although the claim form predominantly gave an account suggesting that misconduct was not the real reason for the dismissal, the claimant did not give any evidence on this in his witness statement. Nor did he advance the argument that the misconduct was not the reason for the disciplinary proceedings or dismissal in the disciplinary process. At the start of the hearing when discussing the issues, he chose not to advance an argument as to what he believed the real reason for dismissal to be.

The law

47. Under section 94(1) Employment Rights Act 1996 (ERA), an employee has the right not to be unfairly dismissed by his employer.
48. Under section 98(1) ERA, in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within sub-section (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.
49. Under section 98(4) ERA, where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.
50. It was confirmed by the Court of Appeal in *Foley v Post Office; HSBA Bank plc v Madden* 2000 ICR 1283, that the tribunal must not substitute its decision as to what the right course of action was for the employer to have followed and, in many cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another employer quite reasonably take

another. It is the function of the tribunal to determine whether in the circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.

51. In *British Home Stores v Burchell 1980 ICR 303*, the EAT stated that, in dismissals for misconduct, the employer must show that it believed the employee guilty of misconduct, that it had in mind reasonable grounds upon which to sustain that belief and that, at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.
52. It is not the role of an employment tribunal in unfair dismissal cases to decide whether or not the employee was guilty of the misconduct alleged or to impute to the employer knowledge of explanations and facts which only became apparent after the end of the disciplinary process.

Conclusions

53. We will deal first with issues on liability at paras 5a and 5c above which are straightforward, before considering the remaining issues on liability.

Issue para 5a: Although the respondent asserted that the reason for the dismissal was the claimant's misconduct, the claimant asserted that this was not the reason.

54. For the reasons set out in para 46 above, we find that the claimant did not advance a case that there was some reason other than alleged misconduct for the disciplinary action and dismissal.
55. We consider that the reason for the dismissal was the claimant's misconduct. The respondent identified alleged misconduct, invited the claimant to participate in a disciplinary process, and dismissed him by reference to it. As we discuss below, there was real substance behind the allegations.

Issue para 5c: It was alleged that the respondent relied on the claimant locking his company laptop and mobile when making the decision to dismiss the claimant, which had not been communicated to the claimant to allow him to respond in the disciplinary process.

56. The claimant was not informed prior to his dismissal that his locking of his company laptop and mobile phone would be added to the disciplinary allegations against him. However, under cross examination, the claimant admitted that he knew that this was an issue in his dismissal from the dismissal letter. Nevertheless, he did not take the opportunity of his appeal to defend himself against the matter. We do not therefore consider that the claimant can say that the dismissal was unfair because of this.
57. We will consider the issues set out in paras 5b and 8 above because the issue in para 8 relates to issue para 5b, being a question of the evidence relied on.

Issue para 5b: The claimant asserted that the evidence which the respondent relied on was not sufficient for the respondent to reasonably conclude that the claimant was guilty of misconduct. Issue para 8: The respondent failed, after hearing the claimant's explanation of events, to ask its key witness, MH, for further information on this.

58. The respondent received information that the claimant had agreed to supply a potential customer, MH, with an engine which the respondent did not supply in the usual course of business. According to the information from MH, the claimant had priced and described a mileage for the engine, indicating that he had sourced a specific engine. MH thought that he had been dealing with DH. The claimant had not informed the

respondent of the approach, even though MH's email was addressed to DH and not the claimant, it related to a potential major order for the respondent and the claimant had spoken to DH later on the day of his first call with MH. The claimant had deleted MH's email from his inbox. This led the respondent to suspect that the claimant was likely to supply the engine to MH personally for a profit.

59. The claimant's defence to this in the disciplinary process was as follows:

- a. He understood that MH was asking for the engine in the context of wishing to buy a complete test stand. The respondent would exceptionally supply an engine in these circumstances.
 - i. We consider it reasonable for the respondent to conclude from the evidence before it that MH was not asking for a complete test stand, but only the equipment for a test stand, and so the claimant was talking about supplying something outside the respondent's usual product range:
 1. MH's email of 14 Oct 2019 referred to Plan A as 'to get an engine with test stand equipment to make it run on a test stand'. We consider that the ordinary reading of this language is that MH wanted an engine and test stand equipment, but that MH was going to supply the actual test stand.
 2. The entry in the claimant's note book stated that MH wanted an engine with ECU and loom. It did not refer to a test stand. The claimant said this was because he could not specify the test stand until he knew what the engine would be, but this does not explain why the claimant would not note the test stand requirement in general terms in his note book.
- b. He did not introduce himself to MH as DH. He did not give MH the email address for DH. He said he realised that MH thought he was talking to DH. DH's name was available in the public domain and MH stated that he wrote down 'Robert@dynamometer-world.com'.
 - i. We consider that the evidence available to the respondent as to what information the claimant gave MH as to whom he was dealing with was unclear. On the one hand, MH's evidence was that he thought he was talking to DH or his son and he also sent an email to a DH email address. This suggests that the claimant gave MH DH's name. On the other hand, it seems very unlikely that the claimant gave MH his own email address because MH wrote it down. It seems unlikely that the claimant would have given MH his own email address to write down if he had been impersonating DH. In any event, the clear evidence given to the respondent by MH was that he believed he was dealing with DH.
 - ii. We do not consider the lack of clarity over this point to be an issue which had to be resolved in order for the respondent to assess whether or not the claimant was looking to supply a product it did not supply in the normal course of business for his financial benefit. The claimant could have been attempting to do this whether he passed himself off as DH or whether he gave his own name.

- c. The respondent received many enquiries and did not pass on all the details to DH.
 - i. We consider that the respondent would reasonably have expected the claimant to mention to DH that the respondent had had an enquiry for a complete test stand (this being the claimant's position) given that this would have been a very big order for the respondent and the claimant spoke to DH the same day after his first call with MH.
- d. The claimant denied he said there was an engine in stock.
 - i. Given that MH was able to quote both a price and mileage for the engine, it was reasonable for the respondent to have believed that the claimant did refer to a specific engine.
- e. The claimant said he deleted the email to declutter his inbox.
 - i. We consider it reasonable for the respondent to conclude that it was unlikely that the claimant would have deleted the email if, as per the claimant's evidence, MH really had expressed an interest in a very big order of a complete test stand.
 - ii. In the meeting on 18 Dec 2019, the claimant could not explain why he would delete an email addressed to DH and could not say when he deleted it. His later written evidence is contradictory and it is reasonable for the respondent to have preferred his immediate oral evidence as being more reliable.
 - iii. The claimant said he did not notice that MH's email was addressed to DH. However, his evidence was that he realised that MH thought he was talking to DH, which suggests he should have told DH about the enquiry without deleting it.
 - iv. For all these reasons, we consider it reasonable for the respondent to have found the claimant's deletion of MH's email suspicious.
- f. There was no official complaint.
 - i. This is correct to the extent that the only complaint was in MH's email to the respondent of 20 Nov 2019 expressing his great annoyance.
 - ii. However, the dismissal letter did not conclude that the complaint was the reason for the dismissal and, therefore, it is marginal to the issue of why the claimant was dismissed.
- g. MH's emails were contradictory referring to calls which did not take place and it was not reasonable for MH to think he had placed an order when there was no order confirmation or payment.
 - i. We consider it reasonable for the respondent to ignore non material discrepancies in evidence and to find that the absence of order document or payment was not relevant; the respondent's suspicion was that the claimant had been arranging an off the books sale for his own benefit so naturally, there would be no paperwork.
- h. He often responded to calls on Saturday mornings.

- i. We do not consider the question of when the claimant responded to MH's call to be central to the allegations against him or the evidence supporting the allegations.
 - i. (In the appeal), the respondent did on occasion supply product outside its remit.
 - i. We do not consider this of material relevance to the disciplinary allegation which had at its core, as recognised by the claimant, the dishonesty of supply for personal financial gain.
60. The claimant conducted himself in an uncooperative way in the disciplinary hearings, generally refusing (albeit through his companion) to answer questions and insisting on providing written replies. We consider such a lack of transparency and reluctance to answer reasonable questions would reasonably make an employer question an employee's truthfulness.
61. On the basis of the analysis above, we consider it to be within the range of reasonable responses for the respondent to have concluded from MH's evidence, the written evidence and from the claimant's explanations and lack of transparency that the claimant was guilty of the gross misconduct of being likely to supply product the respondent did not supply for his own potential financial benefit.
62. The respondent is a small business with no HR function and could not be expected to undertake an expert forensic analysis of the evidence.
63. We do not consider that there was any explanation given by the claimant in the proceedings which made it outside the range of reasonable responses for the respondent not to have attempted to clarify matters with MH. We identified above the issue at para 59b as being unclear. However, this issue was not determinative of the finding in relation to supplying products for his own financial benefit. The could have impersonated DH or given his own name and equally have been doing it for his personal financial gain.
64. The claimant did not add any material defence to be taken into account at the appeal stage. His suggestion that it would not make sense to try to supply an engine for a low profit was a subjective assessment.
65. We consider that the claimant locking his company laptop and failing to unlock it would reasonably be viewed as his employer as an act of gross misconduct:
- a. The respondent informed the claimant that it needed access to the laptop in order to send out a large invoice and the locking of the laptop was having a detrimental impact on the business. The claimant did not warn the respondent of what he intended to do or give any explanation to the respondent for his actions before doing so. After the respondent asked him to unlock the devices, he made his cooperation with the unlocking conditional on the respondent allowing him to remove personal apps first. However, he had already had the chance to remove personal information from the laptop when he handed it over on 27 November, and he had done so.
 - b. The claimant then, for health reasons, failed to make it to an appointment to unlock the laptop. However, he then failed to rectify this he had addressed the immediate health issue.
 - c. We consider it reasonable for an employer to consider that having unspecified personal apps on a work laptop is not a reasonable excuse for the employee

locking the employer out of access to the device. The claimant did not, in relation to the laptop, give the explanation to the respondent in the disciplinary process which he gave in his witness statement for his actions, that it had banking apps and someone had tried to access his bank account. The starting point for company equipment provided to employees in the course of their duties must be that that equipment must be made available to the employer to use on request, certainly when the employer has need to do so to avoid detriment to its business.

- d. We do not consider the locking of the company mobile to be gross misconduct because the claimant explained that it was due to banking apps on it and the respondent did not inform the claimant that it needed access to the phone for business reasons. (A failure to unlock the phone would turn into gross misconduct after a period of time because the respondent would not be able to make use of it, but we do not consider that this point had been reached at the date of the claimant's dismissal.)

66. Therefore, we conclude that it was within the range of reasonable responses for the respondent to dismiss the claimant for both the gross misconduct of being likely to supply product the respondent did not supply for his own potential financial benefit and for the gross misconduct of locking his company laptop so that the respondent could not access it.

67. As set out above, we find that the respondent believed the claimant guilty of both these misconducts, that it had in mind reasonable grounds upon which to sustain that belief and that, at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances. The requirements of a fair dismissal under *Burchell* are therefore met.

68. Accordingly, we dismiss the claimant's unfair dismissal claim.

69. In light of this finding, it is not necessary for us to consider the evidence as to whether the claimant actually committed the gross misconduct in relation to the supply of product for personal financial benefit and this Judgment makes no decision on that issue; nor does this Judgment consider the evidence given at the hearing relating to the respondent's further findings after the claimant's departure or the new arguments raised by the claimant in relation to the disciplinary allegations at the tribunal which were not raised during the disciplinary process.

Employment Judge Kelly

18 January 2021