



EMPLOYMENT TRIBUNALS

Claimant: Mr Robert Kleina
Respondent: Polish Village Bread Limited
Heard at: Watford Hearing Centre
On: 28 & 29 July 2022
Before: Employment Judge Tobin (sitting alone)

Representation

Claimant: Ms I Caller (solicitor)
Respondent: Mr L Werenowski (counsel)

JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The claimant was unfairly dismissed in breach of s94 Employment Rights Act 1996.
2. The Tribunal adds a 20% uplift to any compensatory award, pursuant to s207A Trade Union & Labour Relations (Consolidation) Act 1992 for the respondent's failure to follow the ACAS Code of Practice in dismissing the claimant.
3. The Tribunal orders a deduction from the claimant's unfair dismissal basic award and compensatory award of 20% pursuant to s122(2) and s123(1) Employment Rights Act 1996.
4. The claimant was wrongfully dismissed, i.e. dismissed with his notice pay.
5. The claimant was paid his 17 days accrued annual leave entitlement on 5 February 2021.

REASONS

The Case

1. This was a remote hearing which had been consented to by the claimant and the respondent. The form of remote hearing was a video hearing Through HM Courts & Tribunal Service Cloud Video Platform. All of the participants were remote (i.e., no one was physically at the hearing centre). A face-to-face hearing was not held because the issues to be determined could be determined in this video hearing.

The claim

2. The claimant issued proceedings on 8 April 2021 after a short period of ACAS Early Conciliation between 22 February 2021 and 9 March 2021. The claimant said that he was employed by the respondent from 4 January 2013 to 3 January 2021, latterly as a Transport Manager. He claimed unfair dismissal, wrongful dismissal (i.e. breach of contract for non-payment of his notice pay) and outstanding unpaid holiday pay.
3. The Grounds of Claim are detailed. By way of background, the claimant referred to a dispute between the 2 owners of the respondent's company: Mr Robert Ziola and Mr Piotr Tomicki. The claimant contends that he was caught up in that dispute and stepped down from his role as Sales Manager in November 2018. The claimant said that he was bullied and undermined by Mr Tomicki. The claimant contended that in July 2021 Mr Tomicki took over the respondent's business completely and then sought to remove or freeze out any remaining staff members (such as the claimant) that he perceived to be loyal to Mr Ziola.
4. The claimant contended that the respondent falsely alleged that in July 2020 the claimant cancelled a contract between the respondent and BKW Transportation Limited (hereinafter referred to as "BKW") without Mr Tomicki's consent, authorisation or knowledge. The claimant contended that this allegation was false because Mr Tomicki was not satisfied with the outsourced transport arrangement as he was determined to bring transport in-house and, furthermore, Mr Tomicki had ignored outstanding BKW invoices. The claimant contends that Mr Tomicki expressly instructed him to cancel the contract immediately on 15 July 2020 citing BKW's inability to fulfil a delivery due to the driver being in a road accident. The claimant contends that he implemented Mr Tomicki's instructions in a timely manner despite short notice. The claimant said that BKW ceased their delivery service on 18 July 2020 and on 20 July 2020 Mr Tomicki met the BKW owner and told him BKW was incapable of meeting of respondent's transportation needs and that the respondent would only contract with it for a single recurring delivery to Bristol. The claimant contends Mr Tomicki said he would deal with BKW himself, bypassing the claimant, who was the transport manager, as a point of contact. The claimant said that in any event the Bristol route did not continue, and Mr Tomicki confirmed that BKW transport services were no longer used.

5. The claimant said that he suffered debilitating cardiac issues and as a result he was on sick leave for 5 months from 22 July 2020. The claimant contended that he returned to work in January 2021 and was immediately dismissed. The claimant said that he did not commit gross misconduct offence, so he contended the was substantively unfairly dismissed. The claimant contended:
 - a. there was no evidence of any wrongdoing;
 - b. there were no minutes taken at the dismissal meeting;
 - c. there was no evidence of any investigation;
 - d. the claimant was not given the opportunity to invite a trade union representative or work colleague; and
 - e. he was not given any opportunity to respond to the allegations.
6. The claimant contended that the appeal was not held by an impartial manager.
7. As well as unfair dismissal and wrongful dismissal, the claimant said that he was owed 17 days accrued and untaken holiday pay and he claimed an uplift in respect of failing to follow appropriate [disciplinary and dismissal] procedures.

The Response

8. The Response was received by the Tribunal on 20 May 2021. The Response denied all of the claimant's claims. It did not dispute the claimant's dates of employment. The Grounds of Resistance state that many of the allegations made by the claimant were irrelevant and that at no stage did the claimant complain or raise any grievance. The respondent denied the claimant's background allegations and [previous] knowledge of them.
9. The respondent contended that without agreement, or prior consultation, the claimant unilaterally cancelled a pre-existing contract between the respondent and BKW by email dated 20 July 2020 at 10:18am. The claimant contended that the email was stated to have been signed by Mr Tomicki and that Mr Tomicki did not instruct, authorise, compose or permit his name to be attached to an email. The respondent contended that the claimant fabricated Mr Tomicki's signature/name and email when it had emanated from the claimant. The respondent contended that it had investigated and reasonably believed that the claimant had started working for BKW whilst at the same time alleging to be too sick to work for the respondent; the claimant providing sick notes initially from his GP and then from a private Polish medical clinic. The respondent contended that it treated such sick notes as genuine until investigating the claimant's conduct and that such investigations revealed that the claimant had been working for BKW.
10. The respondent contended that the claimant's dismissal was both procedurally and substantively fair and that the claimant was dismissed for gross misconduct, its reasons for dismissal were set out in paragraph 6 of its Grounds of Resistance, i.e. sending the unauthorised email to cancel the BKW contract, fabricating Mr Tomicki's name/signature and then working for BKW when the claimant purported to be too ill to work for the respondent.

11. The respondent contended it was fair to call the claimant to a disciplinary hearing without holding an investigatory hearing first because the respondent had all the information it needed without any further investigation. The respondent contended that the appeal considered the matter afresh. In contrast to the claimant's assertion, the respondent said the claimant was permitted to attend both the initial disciplinary hearing and the appeal hearing with a trade union representative and that he was given every opportunity to explain and defend himself. The respondent contended it was entirely fair for the appeal to be heard by Mr Tomicki and 2 other senior employees of the respondent as the respondent was a small business and this would not have prejudiced the claimant.
12. The respondent denied that any ACAS uplift was justified and contended that if the claimant was unfairly dismissed then he would have been dismissed in any event for gross misconduct and that the claimant had contributed 100% or substantially to his dismissal. The respondent said the claimant had been paid his holiday pay but gave no further details.

The law in respect of unfair dismissal

13. The claimant claims that he was unfairly dismissed, in contravention of section 94 Employment Rights Act 1996 ("ERA").
14. Section 98 ERA sets out how the Employment Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

Where the employer has fulfilled the requirements of subsection (1), the determination of the question of 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.
15. The s98(4) test can be broken down to two key questions:
 - a. Did the employer utilise a fair procedure?
 - b. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?
 16. The respondent said that it dismissed the claimant for a conduct-related reason, pursuant to s98(2)(b) ERA. Although the claimant denied the misconduct in question, there was no dispute that if the employer had fabricated important contract documents then that was a conduct-related matter. For misconduct dismissals, the employer needs to show:

- a. an honest belief that the employee was guilty of the offence;
- b. that there were reasonable grounds for holding that belief; and
- c. that these came from a reasonable investigation of the incident.

These principles were laid down in *British Home Stores v Burchell [1980] ICR 303*. The principles were initially developed to deal with dismissals involving alleged dishonesty. However, the *Burchell principles* are so relevant that they have been extended to provide for all conduct-related dismissals. Conclusive proof of guilt is not necessary, what is necessary is an honest belief based upon a reasonable investigatory process.

17. Accordingly, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. in relation to his purported misconduct.
18. ACAS has issued a Code of Practice under s199 Trade Union and Labour Relations (Consolidation) Act 1992. Although the Code of Practice is not legally binding in itself, Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to:
 - Deal with the issues promptly and consistently;
 - Established the facts before taking action;
 - Make sure the employee was informed clearly of the allegation;
 - Ensure that the nature and extent of the investigation reflect the seriousness of the matter, i.e. the more serious the matter then the more thorough the investigation should be;
 - Allow the employee to be accompanied to any disciplinary interview or hearing and to state their case;
 - Keep an open mind and look for evidence which supports the employee's case as well as evidence against;
 - Make sure that the disciplinary action is appropriate to the misconduct alleged;
 - Provide the employee with an opportunity to appeal the decision.
19. In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeal procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can appropriately reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.
20. In judging the reasonableness of the employer's decision to dismiss an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did, in fact, chose. Consequently, the question for the Tribunal to

determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden* 2000 ICR 1283. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision was reached: *J Sainsbury plc v Hitt* 2003 ICR 111 CA and *Whitbread plc (t/a Whitbread Medway Inns) v Hall* 2001 ICR 669 CA.

21. S3(2) Employment Act 2008 inserted the provision of S207A Trade Union & Labour Relations (Consolidation) Act 1992 which provided that an Employment Tribunal may increase an award by up to 25% where the employer fails to comply with the relevant ACAS Code of Practice – which in this instance the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) – and that failure was unreasonable. Under s124A ERA such an adjustment will only apply to the compensatory award. Following *Lawless v Print Plus EAT 0333/2009* the relevant circumstances to be taken into account when considering an uplift will vary from case to case but the Employment Tribunal should always take into account: (a) whether the procedures were applied to some extent or were ignored altogether; (b) whether the failure to comply with the procedures was deliberate or inadvertent; and (c) whether there were circumstances that mitigated the blameworthiness of the failure to comply. The size and resources of the employer may be a relevant factor although this has limited application if the Tribunal assesses that the employer's motives for disregarding the ACAS guidance were deliberate or blameworthy.
22. In this case, the respondent asserted that, if the claimant succeeded in his complaint of unfair dismissal, then he should be subject to a possible reduction of any compensation payable (to nil) under the principles set out in the leading case of *Polkey v A E Dayton Services [1988] ICR 142*. Where a Tribunal finds that the dismissal was unfair it still may reduce the award payable by any amount if it is persuaded that, had the employer followed the correct procedures then, it was likely that the employee's dismissal would have been fair. So if a Tribunal thinks it was only a matter of time before the employee would have been dismissed (usually for a different and fair reason) or, alternatively, where there was only a minor defect in the procedures applied and had this been corrected the employee would have been dismissed fairly then the Tribunal could make a finding of unfair dismissal but only award compensation to reflect this "lost time" or the minor defect.
23. S123(6) ERA states that "[W]here the Tribunal finds that the dismissal was to an extent caused or contributed to by the action of the complainant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding". This ground for making a reduction is commonly referred to as "contributory conduct" or "contributory fault". Three factors must be satisfied if the Tribunal is to find contributory conduct: (a) the relevant action must be culpable or blameworthy; (b) it must have actually caused or contributed to the dismissal; and (c) it must be just and equitable to reduce the award by the proportion specified.

24. Where there has been pre-dismissal misconduct discovered after the dismissal, the Tribunal may take this into account. There is a wide discretion under s122(2) ERA to possibly reduce the basic award on the grounds of *any* kind of conduct on the employee's part that occurred prior to his dismissal. There is a similar just and equitable discretion to reduce the compensatory award under s123(1) ERA.

Witness evidence

25. The hearing bundle consisted of 166 pages. At the outset of the hearing, I emphasised to the parties that, as a matter of course, I would not read all of the documents contained in a hearing bundle. I stated I would read documents referred to me and I may read additional documents that have not been cross-referenced in any statement; however, if a party or representative thought that a document was relevant and important, then he or she needed to bring that document to my attention.
26. Prior to the hearing I was presented with statements from the claimant, Mr Robert Kleina. The respondent presented statements from Mr Piotr Tomicki (the Managing Director and effectively the owner of the respondent's business), Mr Pawel Stajewski (the General Manager who said that he dismissed the claimant), Mr Grzegorz Grubarek (Human Resources Manager and appeal officer) and Mr Mateusz Iliniec (a director of BKW who gave evidence in respect of the termination of the delivery contract and the claimant working for or with BKW).
27. We were assisted by a Polish interpreter, Ms Kinga Kazak.
28. I heard evidence from the claimant. The claimant, like all other witnesses, confirmed the truth of his statement and was cross examined by the other party's representative. As all of the statements were quite brief, I asked some questions of all of the witnesses to help clarify matters. In his statement the claimant referred to working for BKW during his sickness absence, so irrespective of any wrongdoing, he was frank about this at an early stage (when witness statements were disclosed) and he did not attempt to mislead the Tribunal in this regard. Mr Kleina was a broadly accurate and reliable witness. Where his evidence conflicted with that of Mr Tomicki and Mr Grubarek, I preferred the evidence of the claimant.
29. Mr Tomicki confirmed that he met with representatives from BKW in July 2020. His statement said that BKW did not provide the refrigeration vans that he wanted so there was some discussion about this but that it was clearly never his intention to cancel the delivery contract. He said that he did not authorise the claimant to cancel the contract. I do not believe him for the reasons stated below. I could not get a straight answer from Mr Tomicki as to whether he spoke to his HR manager prior to the dismissal; nor was I provided with a satisfactory explanation as to why the respondent did not write to the claimant raising concerns about cancellation email in the 5 months that the claimant was off work. Mr Tomicki was wholly disingenuous about the termination of the contract with BTW, such that, I find, he attempted to mislead the Tribunal.

30. Mr Grubarek was vague in his evidence. He wanted to speak in generalities, which I determine was an attempt to avoid answering straightforward questions. Throughout his evidence he was reluctant to answer questions and challenged why such questions were relevant. I was satisfied he understood the questions he was asked, and I warned him that he was not answering questions particularly about his contended investigation and he proceeded to avoid answering questions. He said he could not remember if he saw or played a part in drafting the claimant's dismissal letter, which is not credible. I regard Mr Grubarek as an unreliable witness. Despite contending that he investigated the claimant's dismissal, Mr Grubarek took no steps to investigate matters for the appeal.
31. Mr Stajewski did not give evidence at the hearing, yet his statement was also very questionable. He said he undertook an investigation following the email of 20 July 2020 being sent, yet there was no shred of corroborative documentation in this regard; no investigatory statements, no interview notes, no emails to any possible witnesses or to BTW. I do not believe he took a note of the dismissal meeting because this was never sent to the claimant (or anyone else) at any relevant time nor was it referred to in the appeal hearing. Mr Stajewski contended that at that time he knew the claimant had been working for BKW, but this is not feasible for the reasons I state in paragraph 56 below.
32. Mr Iliniec was a witness for the respondent. In his statement, Mr Iliniec said the claimant seemed to be in good health when he retained or engaged the claimant. However, I treat that aspect of his evidence with caution because he does not purport to have any medical experience or qualifications. I do note that the claimant did not share any health issues with Mr Iliniec, but I would not necessarily expect a contractor to do so with his principal. In his evidence at the hearing, Mr Iliniec account of events around July 2020 were consistent with and supported the claimant's version of events.

Findings of fact

33. I (i.e. the Employment Tribunal) made the following findings of fact. I did not resolve all of the disputes between the claimant and the respondent, I merely concentrated on those disputes that would assist me in determining the matters that follow. I have set out how I have arrived at such findings of fact where this is not obvious or where, I determine, this requires further explanation. When resolving disputes about contested fact, I place most reliance upon contemporaneous documents and correspondence unless there were especially strong reasons not to do so. I also placed some emphasis upon the lack of contemporaneous documents or correspondence where I expected to see contemporaneous documents and correspondence and such material had not been produced. I approached the witness evidence of both sides with a degree of caution. The statements are written through the prism of either advancing or defending the claims in question and may reflect a degree of after-the-event justifications or the recasting or reinterpretation of events following professional advice. Memories fade and contemporaneous sources tend to provide a more

accurate picture of what occurred

34. At the end of July 2020 Mr Iliniec and his father (Mr Miroslaw Iliniec), on behalf of BKW, met with Mr Tomicki to discuss the delivery contract. Mr Iliniec said that there were a number of meetings, but the claimant did not attend all of these. He could not remember how many meetings the claimant attended or when these were. Mr Iliniec said that Mr Tomicki talked about ending the contract and said that if BTW was able to provide refrigerated vans then he might not. Mr Iliniec said that the contract required 30 days or 1-months' notice to terminate.
35. On Wednesday 15 July 2020 Mr Tomicki said to the claimant "I don't care how, but by Monday all deliveries will be done in house". Monday was 20 July 2020. The claimant's evidence in this regard is consistent with what, in fact, happened. BTW's last delivery was on Saturday 18 July 2020. The claimant's account was also consistent with Mr Grubarek's account that following the cancellation of the transport contract with BTW the respondent did not recruit any additional drivers as they had enough drivers already.
36. So Mr Tomicki instructed the claimant to terminate the contract with BKW and on Monday 20 July 2020 the claimant sent an email to BKW terminating their contract with the respondent [Hearing Bundle page 75]. The email said as follows:

Cancellation of Contract

17.07.2020

Piotr Tomicki
Polish Village Bread LTD
[address]

BKW Transportation LTD
[address]

Dear BKW Transportation LTD

I am writing you today to cancel our contract that is dated 06.05.2020 for the transportation services.

Cancellation of the above referenced contract is effective immediately. Please call me at the phone number found below if you have any questions regarding this contract cancellation.

Best regards

Piotr Tomicki

CEO

[mobile number]

37. The claimant also attended work on Tuesday 21 July 2020 but needed medical treatment later in the day [HB165]. He was subsequently referred to a clinic for heart problems [HB166].
38. The claimant was thereafter on protracted sick leave. He provided his employer with regular sick notes, 6 in total as follows [HB64-74]:
- (i) 22 July 2020 to 30 July 2020 Feeling stressed
 - (ii) 29 July 2020 to 6 August 2020 Feeling stressed
 - (iii) 7 August 2020 to 5 September 2020 Depressive reaction – work stress reactive problem
 - (iv) 6 September 2020 to 5 October 2020 Depressive reaction – work

- stress reacting problem
- (v) 6 October 2020 to 4 November 2020 Depressive reaction – work stress reacting problem
- (vi) 5 November 2020 to 4 December 2020 Depressive reaction – work stress reacting problem
39. Notwithstanding he had no history of sickness absence, at no stage did the respondent query the claimant's sick leave. There was no engagement from the respondent with this absent employee, which is which is particularly surprising as 4 of the 6 sick notes cited work-related illness. The claimant said, and I accept, that the respondent blocked the claimant's company phone and email when he went off sick.
40. If the respondent had any concerns about the claimant's role in the email sent 20 July 2020, then it undertook no investigations into such purported gross misconduct.
41. On 4 January 2021 the claimant returned to work on the expiry of his last sick note. He went in for 9am and was told to come back later. Upon return he was met by Mr Tomicki, Mr Stajewski and Mr Grubarek. The meeting was very short, and Mr Stajewski handed the claimant a pre-prepared summary dismissal letter. The respondent's note of this meeting [HB144] is rejected.
42. The dismissal letter from the "General Manager" (i.e. Mr Stajewski) said as follows:
- I am writing to confirm that following the incident of 20th July 2020 the Company has decided to terminate your employment.
On 20th July 2020 without director's authorisation, knowledge and permission you have sent Cancellation of Contract with transportation company.
In view of the above and seriousness of the matter your employment is terminated for gross misconduct (falsification of records). I regretfully confirm that your employment with us will terminate with effect from 4th of January 2021.
43. The claimant was not dismissed for purportedly working for BKW as contended in the Response.
44. The dismissal letter said that the claimant's final salary will be paid on 10 February 2021 and that he was not entitled to any notice pay. The letter also identified the claimant's pro-rata holiday entitlement at 17 days. The letter said that the claimant had the right of appeal, and this was to be directed to Mr Grubarek within 3 working days stating the grounds of appeal in full.
45. The claimant appealed his dismissal the next day, i.e. 5 January 2021 [HB54]. He complained that he was immediately dismissed upon his return to work. He said that this was in breach of the ACAS Code of Practice, and he asked for a copy of the company staff handbook and a disciplinary policy.
46. The appeal was heard 2-months later, on 5 March 2021. No investigations have taken place so therefore the claimant was provided with no additional documents

in respect of his dismissal. At this point the respondent suspected that the claimant had been working for BKW but did not investigate this because the requisite evidence did not emerge until the Tribunal hearing as Mr Iliniec said that because of his previous dispute over the contract, he was not minded to cooperate with the respondent.

47. At the Tribunal hearing, Mr Grubarek said that he was aware of both the ACAS procedures and the ACAS Code of Practice at the time of the claimant's dismissal and his appeal.

48. Mr Grubarek dismissed the claimant's appeal [HB55-56].

Determination

Unfair dismissal

49. The contract with the respondent and BKW was not cancelled in any covert or surreptitious way. It entirely accords with the claimant's evidence that he was instructed to terminate the delivery contract by Mr Tomicki. The email emanated from the claimant's work email address, so Mr Grubarek was wrong in contending that this came from a private email account. The email cancellation quoted each party's address in full for ease of reference in further correspondence. There was no falsification because the claimant was quite clear in the email that the instructions came from Mr Tomicki. So transparent was the claimant that he inserted Mr Tomicki's mobile telephone number and invited the recipient to contact Mr Tomicki direct. The claimant did nothing wrong and I do not believe Mr Tomicki's account. It is clear that Mr Tomicki wanted to get out of the contract with BKW. Mr Tomicki was also dishonest about when he discovered when the contract had ended. He said he first knew about the cancellation when he saw the claimant's email about one month after it was sent.

50. Mr Tomicki sent a letter to BKW's solicitors on 11 September 2020 [HB157], which I understand the claimant was shown for the first time (after witness had been finalised and exchanged [see HB155] i.e. it did not feature in the dismissal nor the appeal). This letter is consistent with Mr Tomicki argument that BKW's complained through their solicitors about the contract cancellation on 18 August 2020. In his response Mr Tomicki attributes the cancellation of the contract to an employee acting without authority but he does not attempt to re-instate the contract. So that confirms he intended to try to get out of the contract in July 2020.

51. Furthermore, when I asked Mr Tomicki, he confirmed that he noticed that the BKW trucks did not turn up on the Monday just before the contract was cancelled by the claimant email. Mt Tomicki did not contact BTW or ask someone else to contact the delivery company to ascertain where the vehicles were. This was because he knew then that the contract was cancelled. Instead, he gave a direction to use the respondent's own truck drivers to deliver the respondent's orders.

52. Mr Tomicki said that the email harmed the respondent company, yet the respondent produced no evidence of this; not at the dismissal stage, not at the appeal hearing or not at the Tribunal hearing. Indeed, Mr Grubarek's evidence was that the respondent's drivers undertook the deliveries, i.e. the work was brought in-house, with no apparent difficulties.
53. The claimant's case seems to share some similarities with the termination of BTW contract in that Mr Tomicki seemingly believes he could act in an arbitrary and unrestrained manner.
54. The claimant had no motive or financial interest in cancelling the BTW contract. He subsequently sought work from BTW so it was not in his interest to cause mischief between the 2 companies as this would make it harder to work with BTW
55. Mr Tomicki said he did not authorise the cancellation of the BKW contract. I must do justice to the case, and the parties, so I make the finding that this was a deliberate lie and that Mr Tomicki attempted to mislead the Employment Tribunal.
56. Mr Tomicki said in a statement that he knew that prior to 4 January 2021 that the claimant had been working as a contractor for BKW. Again, I do not believe him. I am in no doubt that if Mr Tomicki or Mr Stajewski or Mr Grubarek had known that the claimant had been working for someone else then this would have featured in his dismissal rather than the reliance upon the flimsy manufactured reason around the email.
57. There was no reason why the respondent needed to dismiss the claimant immediately and without warning upon his return to work. The claimant had been off sick for 5 months. His mobile phone and email had been blocked. If there was any risk to the business in allowing him back while a proper investigation and disciplinary process could have been undertaken, then such a risk could have been easily managed by suspending the claimant and following the respondent own disciplinary procedure and the ACAS guidance.
58. Mr Grubarek said in his statement that until the appeal was brought, he was unconnected with this matter. In evidence Mr Grubarek said that the dismissal took place without his knowledge, I do not believe him. He said at first that that he did not see the dismissal letter but when I pressed him on this point, he said that he may have seen it before it was given to the claimant, although he "did not remember precisely" if he had prepared the letter. This was a small employer that employed a dedicated HR Manager, it is inconceivable that he would not know about such a dismissal. Because Mr Grubarek was so unbelievable and inconsistent in his evidence over crucial matters, I also prefer the claimant's evidence that he was at the dismissal meeting.
59. On 12 January 2021 Mr Grubarek acknowledged the claimant's appeal [HB53-54]. He said:

You will be aware that the reason for your summary dismissal is because you sent an email to BKW Transportation Limited from your email address on 20 July 2020 at 10:18am, but using our director's name to sign the email thereby cancelling a transport contract without the permission or authority of such director, Piotr Tomicki.

Such a course of action involves fraud and misrepresenting the sole director of your employer. This is so serious a matter that the implied duty of mutual trust and confidence has been irreparably damaged between you and your employer.

60. Mr Grubarek was questioned about this because his email read as if he had made up his mind that the claimant was guilty of gross misconduct a long time before the appeal hearing. Mr Grubarek said, "yes because he had really committed a gross misconduct breach". When he was asked if he believed that the claimant had committed gross misconduct on 12 January 2021, Mr Grubarek again said "yes" because he was informed by the "top director" that gross misconduct is what the claimant had done.
61. Mr Grubarek said that he had investigated matters before he came to this conclusion, which runs contrary to his original preceding answer as he said he sent an email and then spoke to both Mr Stajewski and Mr Tomicki about what had happened. When he asked whether there were any emails or other notes or documents corroborating this, Mr Grubarek said he did not send the emails or make notes.
62. Therefore, there was no record of any investigation. Mr Grubarek said that he had spoken to Mr Tomicki on the 5 or 6 January 2021 but he could not remember the precise date. He said he also discussed the dismissal with Mr Stajewski. Notwithstanding he was an experience human resources practitioner, Mr Grubarek said he did not know why he did not take any notes of these meetings or discussions. He said he heard the version from "the boss", and he accepted that version although he was asked twice what Mr Tomicki had said in the interview and Mr Tomicki said he could not recall. In the 2 months between the claimant's appeal and the appeal hearing Mr Grubarek did not tell the claimant at any stage that he had spoken to Mr Tomicki. Mr Grubarek did not give the claimant any information that might resemble some form of investigation made either before or after his dismissal.
63. The claimant clearly had little confidence in the appeal, which is demonstrated by the fact that he applied to ACAS for an Early Conciliation certificate before the appeal was heard.
64. Mr Tomicki participated in the on-line appeal hearing. He said that he did not say anything during the appeal hearing and he was not asked any questions by Mr Grubarek. Mr Tomicki said he could not remember whether he saw Mr Grubarek's appeal outcome letter before it went out.
65. The parties accepted that the reason for the claimant's dismissal was in respect of his purported (mis)conduct, i.e., under s98(2)(b) ERA. The claimant did not commit the gross misconduct offence, nor did he do what he was dismissed for. In respect of the *Burchell* test, the respondents clearly did not have an honest belief that the claimant was guilty of the offence day because the reason was

entirely manufactured. The claimant was not guilty of the wrongdoing he was dismissed for. There were no reasonable grounds for holding that belief. There was no investigation of the incident, reasonable or otherwise. The dismissal was substantively unfair.

66. It is difficult to envisage a more unfair dismissal procedure. The index incident occurred 5 months before the dismissal and the appeal was another 2 months later, so the respondent did not deal with the issue promptly. There was no attempt to establish the facts before taking action. The claimant was not informed of the allegation before he was dismissed. Gross misconduct allegations and dismissal are serious and because an employee's job, career and livelihood are on the line; therefore, the investigation should be thorough. There was no investigation, thorough or otherwise. There was no investigation because the respondent was resolved to dismiss the claimant even though the claimant had acted in accordance with Mr Tomicki's instructions.
67. In respect of the decision to dismiss and the procedure adopted, I determine that both the decision to dismiss and the procedure adopted were far removed from statutory test, i.e. not within the range of reasonable responses open to a reasonable employer in the circumstances of this case.

ACAS Uplift

68. As stated above, I may increase an award by up to 25% where the employer fails to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is clear from above that, with the exception of allowing for an appeal, the central features of the ACAS Code of Practice were ignored despite the respondent's Human Resources Manager being familiar with these requirements. I am clear that the appeal merely went through the motions and was not going to change anything because Mr Gubarek had already made up his mind, he did not bother to undertake any investigations and he was not going to go against the wishes of Mr Tomicki (variously described as the "top director" or "the boss"). The failures were deliberate and unreasonable. The respondent business was small but not so small as to have a dedicated human resources manager.
69. The respondent's breached the ACAS Code of Practice to come to a preordained conclusion of the claimant's supposed guilt. Notwithstanding, this is a fundamental breach of process, the ACAS guidelines are there to ensure that a correct process is followed in order to try to make a substantially fair decision. The respondent's behaviour was such that it was always going to make an unfair decision, however, the process did allow for an appeal, which is integral to the process. Where there is a complete disregard for the ACAS procedures, I apply a 25% uplift. But here there was at least an appeal hearing. Under the circumstances I provide an uplift of 20% to show my disapproval of the respondent's behaviour in this matter.

Deduction from the basic award and compensatory award

70. In respect of a *Polkey deduction*, I have taken into account the claimant's service going back 8 years and his clean disciplinary record. I cannot see that the claimant's conduct or behaviour prior to his sick leave absence meant that he was *living on borrowed time* to any extent.
71. There was no minor defect in the respondent's application of its dismissal procedures, its defects were fundamental and profound. Some processes adopted by the employer are so unfair and so fundamentally flawed that it is impossible to formulate the hypothetical question of what would be the percentage chance the employee had of still been dismissed even if the correct procedure had been followed: see *Davidson v Industrial & Marine Engineering Services Ltd EATS/0071/2003*. If the claimant's dismissal had some limited merit to it, then I may have accepted the applicability of a *Polkey* deduction. However, the circumstance of this case was that the respondent wanted rid of this employee and lied about a reason to dismiss him. No reasonable employer would have adopted this approach. Consequently, I make no *Polkey* deduction.
72. That said, the claimant had a signed contract of employment with the respondent dated 1 September 2016 [HB42-48]. This contract provided at clause 2.4:
- You shall not work for anyone else while you are employed by the Company.
73. The claimant probably saw the writing on the wall which is why he sought out alternative job opportunities with BTW. He worked with BTW on a casual basis trying to develop business according to Mr Iliniec. He did not work under a contract of employment. So, whilst the claimant was blameless in respect of the issue he was dismissed for, he did work for himself and engaged in work for BTW whilst still an employee of the respondent on sick leave.
74. The appeal was not a rehearing and Mr Grubarek only took the claimant's engagement with BTW into account to a limited extent in his appeal outcome:
6. In addition, subsequent to your dismissal we have discovered that you falsely claim to be sick after sending that email, and whilst claiming to be sick you worked for BKW Transportation limited.
7. Although this course of action did not result in your dismissal it has a bearing on the discretion we exercise at the appeal and you were therefore given an opportunity to explain yourself.
75. On 18 October 2021 (after the dismissal and the appeal) Mr Iliniec confirmed to the respondent that the claimant started working for BTW around August 2020.
76. The claimant was on sick leave for work-related stress. His sickness absence was certified by a General Practitioner or medic 6 times, and the respondent has adduced no evidence to say that these medical assessments were false or incorrect. He may well have been not fit enough to work for the respondent and there is no basis upon which I find that he claimed to be falsely sick, which was the respondent's speculation. However, irrespective of his sickness certification, the claimant worked for BTW when his contract prohibited this and he also claimed SSP for the period that he worked for BTW. Accordingly, it is appropriate to make a deduction to any compensation due to the claimant

because of his working for BYW when this was precluded by his contract of employment.

77. This is to a large extent an arbitrary assessment. I need to arrive at a decision which I think is fair in the circumstances. The claimant's wrongdoing did not cause his dismissal nor was the appeal a rehearing of any case against the claimant. The appeal took some account of Mr Grubarek's (correct) suspicion that the claimant might be working for BTW but did not make a big deal about it. I accept that the respondent cut off the claimant's communication and that the behaviour of Mr Tomicki and others may have caused his stress-related illness. I also accept that the claimant needed income to live on and could not face returning to work. However, I determine that having balanced all of the relevant factors, it is just and equitable to reduce the claimant's basic award and compensatory award by 20%. This is a significant deduction which is of the same magnitude as the respondent's breach of the ACAS guideline and cancels the uplift for the compensatory award. The reduction to the basic award also signifies my particular disapproval in what I regard as a proportionate and fair manner.

Damages for wrongful dismissal and compensation for the claimant's notice period

78. Wrongful dismissal is a claim for breach of contract in respect of the claimant's notice period. The claimant was summarily dismissed, i.e., dismissed without notice in circumstances, which for the reasons above, also amounted to a breach of contract because it did not amount to gross misconduct.
79. The claimant is not entitled to double recovery, and he may be compensated for his wrongful dismissal in his loss of earnings calculation for unfair dismissal. A further hearing will take place to assess his compensation.

Assessment of total compensation

80. This case will now be listed for a remedy hearing to consider the claimant's financial loss in respect of his unfair dismissal. I will write to the parties separately to set out case management orders. As these preparatory steps or orders will arise from the exercise of my case management functions, such orders should be made privately.

Employment Judge Tobin

Date: 20 February 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

20 February 2023

FOR THE TRIBUNAL OFFICE