



EMPLOYMENT TRIBUNALS

Claimant: Mr A Walker
Respondent: Mitie Limited
Heard at Newcastle by CVP **On:** Monday 30 September 2024
to Wednesday 2 October 2024

Before: Employment Judge Johnson
Members:

Representation

Claimant: In person (represented by his son Mr Martin Walker)
Respondent: Mr C Ilangaratne of Counsel

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

1. The claimant in this case is Mr Andrew Walker, aged 64. At no stage during these Employment Tribunal proceedings has Mr Walker had the benefit of legal representation. At today's hearing he was accompanied by his son Martin Walker, who indicated that he wished to represent his father throughout the proceedings. Mr Ilangaratne for the respondent had no objection to that. I carefully explained to Mr Martin Walker that if he was to represent his father, then only he would be allowed to address the Tribunal and ask questions of the respondent's witnesses. I considered it unfair to enable both the claimant and his son to put questions to those witnesses and/or to make representations to the

Tribunal. For ease of reference, hereafter Mr Andrew Walker will be referred to as the claimant and his son as Mr Martin Walker.

2. By a claim form presented on 10 February 2024, the claimant brought a single complaint of unfair dismissal, following ACAS early conciliation which began on 14 January 2024 and in respect of which the ACAS early conciliation certificate was issued on 29 January 2024. In its response form ET3 presented on 13 March 2024, the respondent defended the claim. Case Management Orders were made by the Employment Tribunal on 14 February 2024, copies of which were sent to both sides on that date, together with notification that the final hearing of the claim would take place on 6 June 2024. The claimant's application to postpone that hearing was refused, yet he failed to attend the hearing on that date. He subsequently provided medical evidence to justify his failure to attend. However, on that date, further case management orders were made by Employment Judge Sweeney, postponing the hearing to 30 September, 1 and 2 October and ordering that, in the absence of any witness statement from the claimant, his grounds of complaint contained in the claim form ET1 should stand as his witness statement. No challenge has been made by the claimant to any of those Orders and the claimant this morning confirmed through his son that he wished that claim form to stand as his witness statement. When the five witnesses for the respondent had concluded their evidence, Mr Martin Walker indicated that he did not intend to call the claimant to give evidence, even to confirm that the contents of the grounds of complaint on the claim form ET1 were accurate, true and correct. I then informed Mr Martin Walker that, if the claimant failed to give any evidence under oath, then the Employment Tribunal would attach little weight to the contents of the claim form and certainly far less weight than they would attach to the evidence given by the respondent's witnesses. Having been informed of that, the claimant agreed to give evidence under oath.
3. The respondent admits dismissing the claimant on 7 November 2023 for a reason which the respondent maintains related to his conduct. The alleged misconduct was "falsifying company documents, time records or expense claims." In simple terms it was alleged that the claimant had falsely recorded that a member of the respondent's cleaning staff had been present on site on a number of dates in September and October 2022, which had led to that employee being paid for those shifts, when in fact he had not been present on site.
4. Before any evidence was taken, I took some time to explain to the claimant the basic proposition in misconduct dismissals which is frequently so difficult for an ordinary working person or unrepresented litigant to understand or to accept, namely that the issue before the Employment Tribunal is not whether the member of cleaning staff was on site or indeed whether the claimant knew that the cleaner was not on site, but whether the respondent employer had reasonable grounds for believing so. I carefully explained to Martin Walker that I would be considering the following issues:-
 - (i) Did the respondent genuinely believe that the claimant had committed an act of misconduct?
 - (ii) Were there reasonable grounds for that belief?
 - (iii) Had the respondent carried out an investigation into the allegations which was reasonable in all the circumstances?

- (iv) Did the respondent follow a fair procedure throughout the disciplinary process?
 - (v) Finally, was the respondent's decision to dismiss the claimant one which fell within the range of reasonable responses open to a reasonable employer in all the circumstances?
5. I explained to Mr Martin Walker that the test is not "would most employers have dismissed the claimant" But, "might some reasonable employer have dismissed the claimant in all those circumstances."
6. I went on to explain to Mr Martin Walker that in civil proceedings the standard of proof is the balance of probabilities and thus there is no requirement on either side to prove any part of their case beyond reasonable doubt. I then explained that the law requires the respondent employer to satisfy the Employment Tribunal as to what was its reason (or if more than one the principal reason) for dismissing the employee and further that the reason proffered is one of the potentially fair reasons set out in section 98 of the Employment Rights Act 1996. Because that burden falls upon the respondent employer, it is normal for the respondent's witnesses to give their evidence first and be cross-examined by or on behalf of the claimant, following which the claimant employee and his witnesses would then give their evidence.
7. Mr Martin Walker acknowledged that he had accompanied his father (the claimant) to the disciplinary hearings, during which he had informed the respondent that he had prior experience of Employment Tribunal proceedings and fully understood the obligations of fairness which are imposed upon an employer. I was satisfied that Mr Martin Walker understood the explanation that I had given to him and that he would be able to properly challenge the respondent's witnesses on their evidence and thereafter to present the claimant's case to the Tribunal. At the end of the hearing, I thanked both Mr Ilangaratne for his patience and Mr Martin Walker for his valuable contribution to the conduct of the hearing and for his efforts on behalf of his father.

The Facts

8. I made the following findings of fact on a balance of probability, having heard from the claimant himself and from the respondent's witnesses Miss Helen Fythe (head of operations), Mr James Thomas (head of operations), Ms Debbie Langstaff (supervisor), Mr Andy White (head of operations) and Mr Stephen Dott (account director). There was an agreed bundle of documents marked R1 comprising an A4 ring binder containing 460 pages of document. At the start of the hearing, 3 further documents were added, namely the respondent's "Managing Investigations" documentation, their "Disciplinary procedure – a manager's guide" and "Managing grievance investigations".
9. The respondent is a substantial company which supplies cleaning services to a large number of substantial clients on various sites throughout the north-east. Two of those sites are at Wilton, Billingham and North Tees Sabic, some 14 miles away. The respondent has a substantial management structure with a dedicated, sizeable HR department. The cleaning team comprises the cleaners themselves, their supervisors, their managers and department heads. The claimant's role was a "Service Support Manager", a role which he had undertaken since 2015. The claimant's duties and responsibilities included checking that cleaning staff were on the relevant site and undertaking work for the relevant number of hours. The

Senior Service Manager would then confirm which staff had been at which site for which hours to his manager and that manager would then authorise payment to the cleaning staff via the respondent's payroll system. At the relevant time, the claimant acted as service support manager for both the Wilton site and the Sabic North Tees site.

10. Cleaning staff were obliged to record their arrival for work at the relevant site by one of two electronic methods. The first was the "In Touch App" and the second was the "Ezitacker" system. There were other methods of recording that staff were working on site, including a manual list displayed at a specific part of the client's premises and/or a specific diary kept by one the supervisors. It was acknowledged and accepted by the respondent that there were occasions when one or even both of the electronic systems was not functioning correctly, in which case it fell to the service support manager to manually record (or "log on") that the cleaner was present and thus entitled to be paid.
11. In September/October 2022 a cleaner by the name of Adam Cree was paid by the respondent for 12 shifts said to have been worked on the Sabic North Tees site. None of those shifts was recorded by Mr Cree on either the In Touch App or the Ezitracker system and all had been manually recorded on to the system by the claimant. The respondent accepted that Mr Darren Cunningham had expressed to his manager concerns about this discrepancy at the time, but thereafter heard nothing further about it. Mr Andy White became Mr Cunningham's manager in or about April 2023 and Mr Cunningham again reported his concerns to Mr White on 23 August 2023. The respondent was unable to provide any explanation to the Tribunal as to why the initial expression of concern had not been acted upon by the respondent or why it took a further 12 month before the second report to be made. All Mr White knew was that Mr Cunningham had allegedly informed Ms Erin Charlton, who had in turn informed her manager Terry Hollis, but that Mr Hollis had in the meantime left the respondent's organisation.
12. Mr White regarded the information he had received as potentially serious and decided to conduct an investigation. The electronic records were checked, and showed that Mr Cree had not been logged in by either of the electronic means. The supervisor's diary was checked and showed that Mr Cree was not recorded in the diary as having been in attendance on those dates. The payroll records were checked and showed that Mr Cree had been paid for those shifts.
13. The claimant was invited to attend an investigation meeting with Mr White, on 1 September 2023. Minutes appear at pages 246-251 in the bundle. The allegations put to the claimant were that between 8 September 2022 and 21 October 2022, Adam Cree had been paid for shifts that he did not work on the North Tees site. Understandably, Mr Walker stated that he could not remember processing payments during that period. The claimant was informed that there was no record of Mr Cree logging in by either of the electronic methods, no record of him being present in the supervisor's diary and that all of those shifts had been manually logged on by the claimant and as a result Mr Cree had been paid for those shifts. The claimant was asked if he had an explanation and replied "No". The claimant was asked, "So you deny doing this purposely" and the claimant replied "Yes, I didn't do it purposely. I need to check the dates."
14. The claimant was informed that he was being suspended pending further investigation. By letter dated 5 September (pages 254-255) the claimant was

informed that he had been suspended with effect from 1 September on full pay following allegations of gross misconduct:-

“Falsifying company documents, time records or expense claims. Specifically this relates to a previous employee Adam Cree allegedly being paid for work but with no evidence of working on these dates:-

September 8th, 9th, 13th, 16th, 22nd, 23rd, 26th, 27th, 28th, 29th and 30th 2022. October 7th, 20th and 21st 2022. This was on the Sabic North Tees site being managed by yourself at the time.”

15. The letter went on to confirm the respondent company had completed its investigation and the claimant would be required to attend a disciplinary hearing on Monday 11 September 2023. The letter states, *“at this hearing you will be given a full opportunity to state your case and respond to the allegations. If there are any adjustments that you believe need to be made so are able to attend this meeting, please let Helen Fythe know by Thursday 7 September 2023 so they can be considered. You are entitled if you wish to be accompanied at the hearing by a colleague, employee or trade union representative, who will act as your representative.”*
16. The letter goes on to state, *“Please be aware that if there is evidence to support the allegations outlined above, this could constitute gross misconduct which if confirmed will result in your summary dismissal from the company.”*
17. The invite letter listed a number of enclosures, some of which had not in fact been attached to the letter. When this was pointed out to the respondent, the date for the hearing was changed to Monday 18 September 2023 to enable the claimant to consider the documents and prepare for the hearing.
18. On 14 September the claimant wrote to Miss Fythe asking that he have a companion with him at the disciplinary hearing and that because he was not a member of the trade union and none of his work colleagues were available, he wished his son Martin Walker to accompany him. The claimant pointed out that his son Martin Walker was a former employee of the respondent. The respondent replied on 15 September, confirming its policy that external persons were not allowed to attend a disciplinary hearing but that Miss Fythe would be prepared to allow Martin Walker to bring the claimant to the hearing and to collect him from the hearing once it was finished. On 15 September the claimant wrote to Miss Fythe stating, *“I would like to point out that due to the serious nature of the allegations and the criminal element of the claim it has been ruled in multiple cases that I should be allowed legal counsel at any hearing that deals with such issues. On this it would be considered my legal right on precedent that I be allowed my legal counsel to both advise and represent me and enable me to fully take part in the disciplinary hearing as commenting on criminal matters is not something that should be done without legal counsel. Again this has been ruled in Employment Tribunals on multiple occasions. I would therefore request the ability to have my legal counsel as my acting companion for Monday’s hearing.”* Miss Fythe informed the claimant that he would not be permitted to bring anyone to the hearing who was not a work colleague or trade union representative. The claimant eventually attended the first disciplinary hearing on 18 September, unaccompanied.
19. The disciplinary hearing was conducted by Miss Helen Fythe, head of operations for Mitie Cleaning and Environmental Services. Miss Fythe appointed

Erin Charlton to be the note taker at the meeting. Minutes of the meeting appear at pages 278-297 in the bundle. On the claimant's best case, he was uncooperative throughout the disciplinary hearing. On the respondent's case, the claimant was confrontational and obstructive throughout the hearing. The claimant insisted that he would submit a prepared statement, but would not answer any questions put to him by Miss Fythe. The claimant maintained that he would not answer any questions because he had been refused the right to have legal counsel with him. The claimant was informed that if he refused to answer questions, then Miss Fythe would base her decision on the information before her, including whatever the claimant was prepared to provide. The claimant referred to an email which would show that Adam Cree's pin number was void, but when asked he refused to provide a copy of the email. The claimant stated, "*I don't want to provide you with anything*".

20. The claimant was referred to Debbie Langstaff's diary, which showed the names of the persons who were present on site on the relevant dates and showed that Adam Cree was not mentioned as being present on any date. The claimant challenged the diary stating, "*the source of the reliability I object to on the basis it is handwritten. It is also an unauthorised person's record which is kept by a single employee with no control measures in place.*" The only explanation given by the claimant to Miss Fythe was that Adam Cree had attended work on those dates "*to fill shifts for people off sick.*" The claimant maintained that Mr Cree's pin number was void on at least one occasion and that this may also explain the lack of records for the other occasions. At page 286 in the bundle the claimant states, "*I feel this is a malicious allegation against myself, I have evidence of him (Adam Cree) working August as part of Andy White's investigation contradicting false statements. All false statements are pre-complied and prepared by Andy White which is a contradiction to the investigation investigating the allegations impartially. I have been denied my right to have any witnesses called by Andy White. These employees should have been interviewed. If they knew what Adam Cree looked like, how many mighty employees do they come into contact with during the day and how competent they are about recording who was on site. That was over half a million minutes ago. The statements are carbon copies. These are not honesty and not in their own words. In regard to Debbie's statement (she confirms this is only to the best of her knowledge). If it is based on her diary its inaccurate. If she does not feel confident in her diary, why didn't she say that. Why would she not want to give the same statements. I don't feel these statements carry any weight, this is why I want to bring my own witnesses.*"
21. It was then put to the claimant by Miss Fythe that he had been given the opportunity to provide to Mr White during the investigation meeting, any questions which he wished to have put to any of the witnesses. The claimant confirmed that he had been provided with that opportunity, but had refused to accept it. The claimant then maintained that he had evidence of other dates when staff had carried out work for which they had been paid, but in respect of which they did not appear in the diary. Miss Fythe asked the claimant to provide those dates, but the claimant refused.
22. During the hearing the claimant stated that Darren Cunningham, John Baron, Terry Hollis and Andy White had all "pinned" staff and authorised payments without physically seeing those staff on site. The claimant alleged that Ms Erin Charlton (who was the note taker at the hearing) reported in September 2022 and October 2022 that there were vast numbers of issues regarding logging

in and out, due to failings within the system. The claimant alleged that within one week there had been 379 errors on the system. When asked by Miss Fythe if he had physically seen Adam Cree on site on any of those dates, the claimant replied, *"I'm not going to answer that question due to denial of legal counsel or representation in regards to the potentially criminal allegation."*

23. Miss Fythe referred to an incident on 20 October 2022 when Mr Cree had sent a text to the claimant saying that he was coming in to work to be logged on to the system. The claimant confirmed that he had physically seen Mr Cree at work on that date, and that Miss Jan Featherstone had also seen him. When asked whether he could explain why Mr Cree was able to pin in on 9 September but not on any other date, the claimant again refused to answer the question.
24. Following the hearing, which lasted some one hour and ten minutes, Miss Fythe decided to postpone the hearing and undertake further investigations based on the replies given to her by the claimant.
25. Miss Fythe undertook further investigations into the payroll record, further examples of the records kept in Miss Langstaff's diary and records as to how staff were first recorded as employees on the respondent's payroll system. Miss Fythe also obtained further statements from members of staff. Those were disclosed to the claimant in an email dated 16 October. Miss Fythe was satisfied from those further investigations that there remained nothing to confirm that Adam Cree had been present on site to undertake any work on the relevant dates, but had been paid for attending for work on those dates.
26. The second disciplinary hearing took place on 7 November 2023. Minutes appear at pages 351-364 in the bundle. The meeting lasted from 10.50 to 12.59. Erin Charlton attended as note taker and the claimant was allowed to be accompanied by his son Martin Walker, as the claimant had written in stating that his health was deteriorating because of the nature of the allegations and that it was necessary for his son to accompany him. At the beginning of the hearing Martin Walker was told, *"Your role is to support Andy from a health perspective and you are not to actively participate in the meeting. You are not here to act as a representative. You cannot summarise, talk to us or answer any questions on behalf of Andy."* Having initially agreed to that arrangement, unfortunately Mr Martin Walker proceeded to act in a completely contradictory manner during the hearing. Initially, he recited questions to his father, which were then repeated by his father. When he was informed he could no longer do so, he then began to write the questions down and hand them to his father, who would then ask them verbally. At one stage when referred to Debbie Langstaff's statement, Mr Martin Walker stated to his father, *"Do you not think whoever wrote this is mentally impaired?"* Mr Walker then proceeded to state, *"Every time you ask a question he will ask to adjourn the meeting and we will go away and chat then come back in and answer your questions."* Miss Fythe informed Mr Martin Walker that she was unwilling to adjourn the meeting after every question, to which Mr Martin Walker again objected, stating that his father may wish to have advice on questions before he answered them. Mr Martin Walker then went so far as to state, *"The structure of the meeting is that you don't ask lots of questions."*
27. Miss Fythe repeatedly put to the claimant the extent of the evidence which had been gathered by the respondent, which clearly showed that there was no record of Mr Cree ever attending for work on the relevant dates, but that Mr Cree had

been paid for all of those dates. The claimant through his son Martin Walker maintained their demand that any witnesses be called to the hearing to be asked questions by them, but that the claimant had the right not to answer questions put by Miss Fythe. That position was repeated by Mr Martin Walker at the Tribunal hearing, when he took Miss Fythe to that part of the respondent's disciplinary policy (page 77) which states, "*What happens at a disciplinary hearing?*" That particular paragraph states, "*The person holding the hearing will explain the allegations against you, present all the relevant facts/evidence and you will be able to ask questions about this and put your case across. He will also be able to share any evidence you have*". Mr Martin Walker's position was that, because this paragraph does not specifically state that the accused employee may be asked questions, then Mr Walker was not obliged to answer any.

28. At the end of the hearing, Mr Walker was asked whether he had anything he wished to add what had been said and stated, "*No not at this moment.*" Miss Fythe's summary was as follows:-

"To summarise Andy, looking at all the evidence in terms of witness statements, WP Plus data, pinning via In Touch or via the telephone, the ELF system and the integrity of Debbie's diary, having taken all that into account and the fact Debbie's diary is accurate 572 times with the exception of Adam Cree and Martin Walker. There is no evidence that Adam was on site here on those dates he was paid for in 2022. He has not pinned, there are no ELF records, no witness statements to say he has seen him and you have given me no evidence that he was here on any of those dates in this meeting or the previous meeting. There has been no substantial evidence that would let me believe he was here. So based on the balance of probability, I believe that this person has been paid fraudulently by yourself knowing that he has not been here working which is fraud and gross misconduct. The outcome is therefore dismissal and today will be your last working day. You will receive your outcome letter in 14 days and you will be given the opportunity to appeal my decision with the appeal manager's details within this letter."

Mr Walker's reply was, "*can I have you arrested?*"

29. The claimant's dismissal was confirmed in a letter dated 20 November 2023, a copy of which appears at pages 367-370 in the bundle. The claimant was provided with a copy of the notes taken at the disciplinary hearing and advised of his right to appeal. The letter confirmed that the claimant was "summarily dismissed for gross misconduct in line with Mitie disciplinary policy." The letter records that Adam Cree was paid for shifts worked on 8th, 9th, 13th, 16th, 22nd, 23rd, 27th, 28th, 29th and 30th September 2022 and 7th and 20th October 2022. The claimant knew Mr Cree was not working for Mitie and not attending North Tees Sabic for scheduled work on any of those dates. The letter records that the Workplace Plus report demonstrated that it was Mr Walker who had manually booked Mr Cree on to the system to be paid, without the pinning in and out information being recorded. Miss Fythe referred to the statement of Debbie Langstaff to which was attached copies of her diary which showed no mention of Adam Cree being on site on those dates. Miss Fythe referred to the witness statements from members of the team who had been on site that day, none of whom had seen Mr Cree. Miss Fythe concluded by stating, "*In my view Adam*

did not attend the site to complete any of those shifts and you have processed payments fraudulently.”

30. By letter dated 24 November (pages 371-372) the claimant appealed the outcome on the following grounds:-
- (1) The grievance outcome is wrong.
 - (2) The process was wrong and unfair.
 - (3) I have been dismissed for an unfair reason.
31. The appeal was heard before Mr James Thomas on 18 December 2023. Minutes of the appeal hearing appear at pages 297-412 in the bundle. The claimant was again accompanied by his son Martin Walker. The appeal was conducted by James Thomas (accounts manager) and Miss Natalie Kaczmarek was the note taker.
32. The first of the claimant’s grounds of appeal was that the “*grievance outcome is wrong.*”. That was thought to refer to a grievance which had been raised by the claimant on 21 August 2023, a copy of which appears at page 226 in the bundle. The letter is addressed Sin Sian and states as follows:-

“Myself, John Baron and Darren Cunningham all work at the Sabic Plant based in the North East of the UK. We have two sites/plants here and together we have approximately 40 staff (cleaners) and a cleaner supervisor for each site. And then there is myself and John Baron who are SSMs and above us Darren Cunningham who overlooks the site’s running. Back in March 2023 we were notified of the increase to the minimum wage. This would take the rate of £10.42 for the cleaners and £12.06 for the cleaner/supervisor. Both John and myself, along with Darren were informed by our then manager (Terry Hollis) that we too would get the pay rise so that we would remain above the hourly rate of the cleaners/supervisors. This is because even though we have been SSM for over 10 years and salaried our hourly rate still only works out at £11.49 so with the increase to the staff this would put them on more than John and I. April the first has come and gone and we still have not had any pay rise this year and therefore this means that the staff who work for us do in fact earn more than we do. We have asked our new finance director (Andy White) on more than one occasion to look into this, but to date the issue has not been resolved. I am hoping that this can be sorted amicably and without fuss and backlash as John, Darren and I just want a fair day’s pay for a fair day’s work and it seemed to us that this is not happening.”

33. That letter was accepted by the respondent as a formal grievance and was passed to the finance director Andy White to resolve. Mr White’s evidence to the Tribunal was that he became aware of the grievance on 25 August 2023, having been made aware of the allegations against the claimant involving Adam Cree, on 23 August 2023. Mr White’s evidence to the Tribunal (which was accepted by the Tribunal as it was not challenged by the claimant) was that his investigation into those allegations began on 23 August, which was before he was made aware of the claimant’s grievance. The claimant has accepted that his grievance was not against Mr White personally, but was simply a grievance raised to his employer regarding what he considered to be a previously promised pay increase. The claimant’s case was that the investigation by Mr White into the

allegations concerning Mr Cree were no more than retaliatory action against the claimant because he had raised a grievance about his pay. The Tribunal found that not to be the case. The claimant alleged that Mr White decided to conduct the investigation and accelerate the matter to a disciplinary hearing, because the claimant had raised a grievance about his pay. The Tribunal found that not to be the case. The claimant alleged that because Mr White was in some way the subject matter of the grievance, then he should not have been involved at any stage in the investigation into the allegations concerning Mr Cree. Ordinarily, there would be a clear and obvious perception of bias if a manager against whom the employer had raised a grievance was then asked to conduct an investigation into allegations of misconduct against the employee. The Tribunal found that this was not the case here. In any event, Mr White's investigation into the allegations concerning Mr Cree were limited to the production of documentary evidence from records taken 12 months earlier (the electronic records and Miss Langstaff's diary) together with straightforward statements from those persons who were present on those sites at that time, all of which confirmed that they had not seen Mr Cree on those dates. The claimant has alleged that those statements were pre-prepared by Mr Cunningham with malicious intent against the claimant, even though the grievance letter itself was sent on behalf of the claimant and Mr Cunningham. When that discrepancy was put to the claimant, his response was that Mr Cunningham wanted to have the claimant dismissed because his own job was "on the line". The Tribunal found that there was no evidence whatsoever to support that allegation by the claimant.

34. Whilst the letter of appeal itself refers to "*the grievance outcome as wrong*", the appeal officer Mr Thomas accepted that what the claimant really meant was the outcome of a disciplinary hearing and not the grievance relating to the claimant's pay. The claimant and his son Martin conducted the appeal hearing in a far less confrontational manner, but still maintained that Mr White and Miss Fythe ought to have allowed them to question those persons who had provided statements or information upon which the respondent had relied in reaching its original decisions. Mr Thomas' position throughout was that this was not the respondent's policy nor was it appropriate to require an employee to answer questions in front of an employee who was accused of misconduct. Mr Thomas confirmed that he would have been prepared to put to any of the witnesses any questions proposed by Mr Walker and would have provided him with the answers. Mr Thomas also rejected Mr Walker's allegation that Andy White should not have been allowed to obtain statements and again confirmed that he would be willing to put to those witnesses any questions which Mr Walker was to ask. The Tribunal accepted Mr Thomas' evidence, which was that he was more than willing to give the claimant an opportunity to put forward any evidence to support his position and would have been prepared to put any questions to any of the witnesses.
35. Mr Thomas in his evidence accepted that the electronic log in systems are not faultless and that there are frequently circumstances where it is necessary for the manager to log in a cleaner as being present on site when the electronic system does not work. Mr Thomas was not prepared to accept that this was the case in respect of each of the dates when Mr Cree was recorded as being present for work. Mr Thomas' position remained that there was no justifiable explanation for there being no record whatsoever of Mr Cree being present on site on any of the dates for which he was paid. Mr Thomas rejected Mr Walker's proposal that they be allowed access to all of the data in the respondent's possession relating to the

sites where Mr Cree was alleged to have worked. Mr Martin Walker's objection was that he should have been allowed access to all of the data of every employee on each site for the six months prior to the period in question. Mr Thomas found that to be unreasonable and unnecessary. Similarly he was not prepared to provide copies of the entirety of Miss Langstaff's diary for examination by Mr Walker.

36. Throughout the appeal hearing, Mr Martin Walker maintained their allegations that witness statements had been "*tampered with*" and that the disciplinary proceedings were "*malicious*". Mr Martin Walker also concentrated on the allegation that his father must have known that Adam Cree was not on site. Mr Walker alleged that Miss Langstaff could not have seen her cleaning staff three or four times a day saying, "*I know 100% that she doesn't*". Mr Thomas asked whether there was any evidence to suggest that Mr Walker knew that Adam Cree was on site, but no meaningful explanation was provided.
37. Mr Thomas concluded the hearing and informed the claimant and Martin Walker that he would undertake further investigations on other points which they had raised. Mr Thomas interviewed Darren Cunningham, Helen Fythe and Debbie Langstaff again to check those parts of their evidence which had been challenged by Mr Walker. Mr Thomas also conducted further investigations into the processes at the North Tees site for arranging cover for shifts, gaining access to the car park and signing on to the shift.
38. Having concluded those further investigations, Mr Thomas decided that the claimant's appeal would not be upheld. Mr Thomas found that, whilst he could not evidence that Mr Walker had knowingly paid Mr Cree for shifts which he had not worked, it was clear that the claimant's role as the approving manager meant that he should have had in place a process to confirm the presence of staff on site which could be reviewed before manually entering shifts for staff or approving payroll. Mr Thomas concluded that it was the claimant's responsibility to verify that Adam Cree was on site on each of the dates in question. Mr Thomas concluded that the outcome of the disciplinary hearing was not wrong and should be upheld.
39. Mr Thomas considered the allegation that the process followed by Mr White and Miss Fythe was "*wrong and unfair*". Mr Thomas did not uphold that part of the appeal. Mr Thomas concluded that Mr White's involvement in the claimant's grievance about pay caused no conflict in terms of the outcome reached. Mr Thomas was satisfied that, in accordance with the respondent's policy, an independent manager (Miss Fythe) had been assigned to conduct the disciplinary hearing, to review all the evidence and to reach her own decision. Mr Thomas was satisfied that it was not part of the respondent's disciplinary procedure for witnesses to be called to the disciplinary hearing to give evidence in front of the person under investigation. Mr Thomas was satisfied, had the claimant been willing to provide questions to be put to those persons, then those questions would have been properly put and the claimant would have been provided with their answers. Mr Thomas was satisfied that the claimant had been given a fair opportunity to put forward any evidence of his own and to challenge any of the evidence of the respondent.
40. Mr Thomas then rejected the ground that the claimant had been dismissed for an unfair reason. Mr Thomas concluded that the claimant was accountable for the payroll of staff on site and for ensuring the accuracy of the information upon which

payment was made. The claimant failed to ensure that Adam Cree “pinned in” using the In Touch App or where that wasn’t operational, via his phone. Failing that, the claimant neglected to have in place any process whereby an employee could verify their presence on site, confirming their arrival and departure time which would have in turn enabled manual payroll to be processed correctly. Mr Thomas was satisfied that the claimant, despite having been given a full and fair opportunity to do so, had not provided any sufficient or compelling reasons for the original decision to be altered. The appeal was therefore rejected. The outcome was confirmed to the claimant in the letter dated 12 January 2024 which appears at pages 429 to 431 in the bundle.

41. The claimant presented his complaint to the Employment Tribunal on claim form ET1 on 10 February 2024.

The law

42. The claimant’s complaint of unfair dismissal engages section 94 and 98 of the Employment Rights Act 1996.

94 The Right

(1) An employee has the right not to be unfairly dismissed by his employer.

98 General.

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

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

...

(b) relates to the conduct of the employee,

...

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

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

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

43. The caselaw on the interpretation and application of section 98 is vast. In 1978 the Employment Appeal Tribunal said in (**British Home Stores Limited v Burchell [1978] IRLR 379**):-

“In the case where an employee is dismissed because the employer suspects or believes that he has committed an act of misconduct, in determining whether that dismissal is unfair an Employment Tribunal has to decide whether the employer who discharged the employee on the

ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First there must be established by the employer the fact of that belief – that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage in which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

*Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give the employee a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which would have been reasonable to postpone in all the circumstances until they had, “carried out as much investigation into the matter as was reasonable in all the circumstances of the case”. That means they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or given the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably. (**Weddel v Tepper [1980] IRL96 – Court of Appeal**)”*

44. The question to be determined is not whether, by an objective standard, the employer’s belief that the employee was guilty of the misconduct in question was well founded, but whether the employers believed that the employee was guilty and were entitled to so believe having regard to the investigation carried out. It does not matter whether the Employment Tribunal itself is convinced of the employee’s guilt. (**Scottish Midland Co-operative Society Limited v Cullian [1999] IRLR 261**).
45. The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances, as it does to the other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. (**Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23 – Court of Appeal**). In determining whether the employer had carried out a reasonable investigation, the Tribunal should consider the nature of the material which was before the employer when the decision to dismiss was taken. (**Dick v Glasgow University [1993] IRLR 581**). At some stage the employer must face the employee with the information which it has. That may be during the investigation prior to a decision that there was sufficient evidence upon which to form a view, or it may be at an initial disciplinary hearing. It is not incumbent on a reasonable employer to carry out a quasi-judicial investigation into an allegation of misconduct, with the confrontation of witnesses and cross-examination of witnesses. While some employers might consider that necessary or desirable, an employer who fails to do so cannot be said to have acted unreasonably. (**Ulsterbus Limited v Henderson [1989] IRLR 251**). There may however be case in which it will be impossible for an employer to act fairly or reasonably unless cross-examination

of a particular witness is permitted. The issue under S.98(4) is always reasonableness and fairness. In each case the question is whether or not the employer fulfils the test laid down in **British Home Stores Limited v Burchell** and it will be for the Tribunal to decide whether the employer acted reasonably and whether or not the process was fair. It is sometimes argued there is a difference between the reasonableness of the employer's investigation into the reasonable allegations and the reasonableness of its investigation into the employee's response to those allegations. However, to say that each line of defence must be investigated unless it is manifestly false or inarguable is to adopt too narrow an approach and to add an unwarranted gloss to the **Burchell** test. The investigation must be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific enquiry into them in order to meet the **Burchell** test will depend on the circumstances as a whole. (**Shrestha v Genesis Housing Association Limited 205 EWCA 94 (Court of Appeal)**).

46. An employer's reason for dismissing an employee is a set of facts known to the employer or may be a set of beliefs held by him which caused him to dismiss the employee. It is only when that set of facts or beliefs has been established by the employer that the reasonableness question under section 98(4) can be properly answered.

47. In (**A v B [2003] IRLR 405**) the Employment Tribunal gave guidance as to the approach to be adopted in cases where serious allegations are made against an employee and which may have "career changing consequences".

"Serious allegations of criminal misbehaviour at least where disputed must always be the subject of a most careful investigation always bearing in mind that the investigation is usually being conducted by lay men and not lawyers. Of course even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiry should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as it should on the evidence direct it towards proving the charges against him. This is particularly the case where, as is frequently the situation, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even handed approach to the process of investigation would not be reasonable in the circumstances."

48. The claimant through his son Martin Walker has challenged the motive behind the initial allegations. The claimant alleges that he was investigated and dismissed because of a malicious motive by Andy White as a result of the grievance raised about wages. The Tribunal found that to be a spurious allegation which was wholly unsupported by the evidence. The Tribunal found that Mr White's involvement in the investigation was reasonable in all the circumstances. Mr White undertook an examination of pre-existing records and in addition obtained statements of persons who were in a position to confirm whether or not they had seen Mr Cree on site. The allegation that witness statements had been manipulated was similarly disingenuous.

49. The Tribunal found that the investigation undertaken by Mr White displayed an even-handed approach to the process of investigation and was reasonable in all the circumstances.
50. In accordance with the ACAS code and indeed in accordance with the basic rules of natural justice, the claimant was made fully aware of the nature of the allegations against him, was provided with copies of the evidence upon which the allegations were based and was given a fair and reasonable opportunity to prepare his case. At the investigation meeting and both disciplinary hearings, the claimant was provided with a fair and even-handed opportunity to challenge the evidence against him and to put forward his own evidence which may have contradicted that. The claimant's refusal to answer any questions, effectively meant that he failed to provide any meaningful explanation for the conduct which formed the subject matter of the allegations against him. Such evidence as the claimant said he had in his possession, he refused to disclose. His refusal to provide any questions to be put to the witnesses which he now says may have supported his position, was similarly unjustified and unreasonable.
51. In submissions, Mr Martin Walker argued that the 12-month delay between the matter first being reported and the commencement of the investigation, meant that the entire process was unfair. The Tribunal acknowledged that this was a matter of concern, particularly as such a delay may well have meant that memories of the relevant matters may have faded due to the passage of time. However, the evidence collated and retained by the respondent was well documented and it was those documentary records that were put to the claimant when he was required to provide an explanation. It may have been understandable for the claimant to say he simply could not remember whether or not Mr Cree had been on any particular site on any particular date. That was not the issue. The allegation was that the claimant had manually recorded Mr Cree as being on site and thus entitled to be paid, when there was no evidence whatsoever that Mr Cree had in fact been on site.
52. Mr Martin Walker submitted that there was an inconsistency in the approach adopted by Helen Fythe to that adopted by James Thomas. Miss Fythe had concluded that the claimant had "fraudulently" recorded Mr Cree as being present on site. Mr Thomas' approach was that he was unwilling to conclude that the claimant had in fact been "fraudulent", but that he had been grossly negligent in failing to put in place the necessary procedures to ensure that staff were attending for work before they were paid. The Tribunal found that this difference in approach made no difference whatsoever to the conclusions of both Miss Fythe and Mr Thomas, namely that the claimant had been dismissed for a reason related to his conduct, which conduct justified summary dismissal.
53. The Tribunal did not accept Mr Martin Walker's submissions that the claimant had been prejudiced by not being permitted to have legal counsel present at any of the hearings. That is not a requirement of the ACAS Code of Practice, nor is it in accordance with the respondent's policy. The Tribunal was not satisfied these allegations against this employee fell into the category of those which justified representation or that his professional reputation would be tarnished to such an extent that future employment would be possible.
54. Mr Martin Walker submitted on behalf of the claimant that the respondent failed to take into account the claimant's length of service, previous good disciplinary record and previous good character. Those matters were put to Mr Thomas who

confirmed that he was aware of all of those matters, yet agreed with Miss Fythe that these allegations were of such a serious nature that they justified summary dismissal.

55. The Tribunal was satisfied that the respondent genuinely believed that the claimant had committed a serious act or acts of misconduct in his role as a service support manager. The Tribunal was satisfied that some reasonable employers in all the circumstances of this case would have dismissed their employee for that reason. Accordingly, the respondent genuinely believed on reasonable grounds after a reasonable investigation that the claimant had committed an act or acts of misconduct. The Tribunal was satisfied that the respondent had followed a fair procedure throughout the investigation, disciplinary process and appeal process. The Tribunal found that the respondent's decision to dismiss the claimant for that reason was a decision which fell within the range of reasonable responses open to a reasonable employer in all the circumstances.
56. For those reasons, the claimant's complaint of unfair dismissal is not well founded and is dismissed.

G Johnson

Employment Judge Johnson

Date 14 October 2024

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