EMPLOYMENT TRIBUNALS

Claimant: Daniel Kibblewhite

Respondent: Mitie Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal (by CVP)

On: 24 May 2021, 25 May 2021, 10 June 2021 and in chambers on 22 June 2021

Before: Employment Judge Kelly (sitting alone)

Appearances
For the claimant: Mr P Kibblewhite, lay representative
For the respondent: Ms Whittington of counsel

JUDGMENT

The judgment of the Employment Tribunal is that

1. The claimant's claim for unlawful deductions or breach of contract is dismissed on withdrawal.

2. The claimant was unfairly dismissed.

REASONS

1. By a claim presented on 17 Dec 20, the claimant claimed unfair dismissal and deduction from wages/breach of contract relating to alleged unpaid overtime.

2. This has been a remote hearing. The form of remote hearing was V. It was partly a fully remote hearing and partly a hybrid hearing with the claimant present at the Tribunal centre. The parties did not object to a remote hearing format. However, during the first day of the hearing, problems with the claimant's internet connection and his accessing documents led

us to propose that he attend at the hearing centre, which he did for the second and third days of the hearing while the other participants continued on a remote basis.

3. The claimant withdrew his claim for unpaid overtime and agreed that the claim be dismissed.

4. We heard evidence from the following witnesses: For the respondent, Aaron England (AE), supervisor, Martyn Rogers (MR), operations supervisor and the claimant's line manager, Julian Tedstone (JT), Head of Operations, and Chris Thompson (CT), Operations Director. The claimant gave evidence for himself.

5. We were referred to a bundle of documents of 545 pages to which the respondent added pages during the hearing. Page numbers below are references to pages of this bundle.

6. At start of hearing, we discussed with the claimant why he said his dismissal was unfair and he relied on the following:

    6.1. Meeting notes made of the second investigation meeting and the disciplinary hearing and the appeal hearing were not accurate and the claimant did not know if his amendments had been forwarded to the decision making managers.

    6.2. With regard to the offences alleged, the claimant did what he did because he was instructed by AE and/or MR to do it or it was agreed with them.

    6.3. The decision to dismiss was pre decided and victimisation for asking to claim old overtime payments.

    6.4. The appeal manager did not investigate the claimant's concerns and did not produce evidence of any investigation. In particular, he did not investigate with other engineers what they were instructed to do at 'tool box talks' ('TBT').

    6.5. The appeal manager, CT, ignored the evidence of engineers that managers instructed engineers to manipulate timesheets and the online job system, that is evidence of Mr Brum, Mr Boghean, and Mr Lyons. He did not look into the disciplinary case of Mr O'Hanlon to see if it was relevant to the claimant's disciplinary.

    6.6. The appeal manager, CT, said at the start of the hearing that they had an hour and this led to a truncated discussion and the claimant felt unable to state his case fully.

    6.7. The claimant was not sent a copy of (1) the first investigation notes, (2) notes of the further investigation undertaken by the disciplinary decision maker, JT, after the disciplinary hearing or, (3) prior to the appeal decision being made, notes of the further investigation undertaken by the appeal manager, CT.

    6.8. The investigator was the manager, MR, whom the claimant alleged instructed him to contravene policy and he did not carry out a fair and objective investigation.

7. It was agreed that liability only be dealt with initially.

8. This was a case of a huge disparity of arms between the parties. The claimant was represented by his father and it was clear that neither the claimant nor his father had any knowledge or experience in the area of employment tribunal claims. The respondent, on the other hand, was represented by a competent barrister. The claimant and his father were entirely at sea over what the issues were in the case and how to present the case. This presented a huge challenge in holding a fair hearing. The claimant was unable to

challenge the respondent's witnesses as would usually be required by rules of evidence and the respondent's representative objected whenever an issue was raised by the claimant which was not put to its witnesses. We consider that to take the approach on this advocated by the respondent would emphasise the disparity of arms between the parties and make it impossible to fairly weigh up the claimant's case. We have therefore at times had to make a decision based on the documents and what was said by parties even if the respondent's witness was not challenged on it by the claimant. However, this does not mean that the respondent, with competent professional representation, should not be held to the rules of evidence for which it argued.

What happened

9. We find the following as the relevant facts in this case.

10. The claimant started employment with the respondent in February 2018. He was dismissed with effect on 5 August 2020 for the stated reason of gross misconduct.

11. The claimant was a mobile engineer doing maintenance work at client sites remotely without an office base. It was not part of his role to work from home. Each day, the claimant was given a list of jobs to complete. He entered details of his completion of the jobs on a Personal Digital Assistant. His company van was monitored by a vehicle tracking system. He completed and submitted time sheets for each day.

12. The respondent is a substantial organisation with around 500 mobile engineers in the UK. The number of mobile engineers working in the claimant's team was about 12 (p201).

13. The respondent's policy on use of a company vehicle (p53) stated that the general rule was that a company vehicle must not be used for private journeys although incidental private use was permitted for a company van, and private use should be recorded by the employee and monitored by the company for tax purposes. There would be no tax implications for a company van where the van was used only for business travel, and ordinary commuting and where private use was insignificant. Examples of insignificant use were given as regularly making a slight detour to stop at a newsagent on the way home, taking rubbish to the tip once or twice a year and calling at the dentist on the way home. Examples of use of a company van which were not insignificant were using it to do supermarket shopping each week, taking it on holiday and using it for social activities.

14. On 4 Mar 2020, MR emailed the claimant about the claimant's van usage telling him there was no personal van usage, the odd occasional detour or minimal usage of about 2 miles is permitted only. Every occurrence must be sanctioned by AE or himself.

15. On 21 May 2020, the claimant emailed MR that he had not received payment for overtime on certain dates. He supplied MR with details. MR and then AE found discrepancies between the claimant's time sheet entries, the vehicle tracking information for his vehicle and the time recorded by him via his PDA; the discrepancies primarily related to the claimant recording that he was working for a client when his van records showed that he was actually at home. They also found that the company van was being driven by the claimant outside working hours.

16. AE invited the claimant to a meeting on 11 Jun 2020 to discuss his overtime query. Discrepancies in the records as noted above were put to the claimant and he commented. The claimant did not say that he had been instructed to make entries which were not true or accurate by his manager or supervisor. The claimant was given a copy of the notes which amounted to margin notes of what the claimant had said.

17. AE suspended the claimant on 19 Jun 2020, in relation to allegations of falsifying documents, and invited him to a further investigation meeting on 25 Jun 2020. Among other things, in this meeting, the claimant stated that

    17.1. his private use of his van on 10 and 11 March was not authorised. He did not say that the journey fell within the 2 mile exception in the policy or that he had been told at his interview he could use the van to go to a property he was doing up at Stratton Road on his way home (as he claimed he had been told at his interview, in the Tribunal).

    17.2. he adjusted his timesheet as per instruction from manager/supervisor to suit an 8 hour day (p344).

    17.3. re an incident on 16 April 20, he referred to a TBT which said that he should do an 8 hour day (p350).

18. In the Tribunal, the claimant's representative conceded that the claimant never raised in the investigation that the discrepancies were due to his following instructions from MR or AE where they had told him to manipulate the time sheets. However, it can be seen from para 18.2 above the above that this concession was clearly incorrect.

19. On 3 July, the claimant was invited to a disciplinary hearing. The disciplinary allegations are set out at p371 and related to (1) failing to complete his timesheet accurately, falsifying data on his timesheets and claiming payment for work he did not complete, not working full contractual hours, saying he was at one location when the vehicle tracker said he was at another, conducting himself in a way that could potentially bring the company into disrepute and breaching trust and confidence with the respondent (which we call the 'Working Time Issue') and (2) using his company vehicle for private use outside normal working hours (which we call the 'Company Van Issue').

20. On 13 Jul 2020, the claimant texted JT and said that the investigation notes were inaccurate (p375). He was invited to send in amendments and sent in one amendment (p378).

21. On 20 Jul 2020, the claimant wrote to JT with a written statement in answer to the disciplinary allegations. This included the following:

    21.1. As instructed by a manager, he had not logged off a job until he got to the next job or home.

    21.2. His contractual hours were 08.00 to 17.00. When he had not been given enough work, he had notified the planner and supervisor, usually with no job being added.

    21.3. Regarding the four allegations of use of van outside of normal working hours: On 6 Apr 2020, MR was aware of it.

22. JT chaired a disciplinary hearing on 20 Jul 2020 (p382). Among other things, the claimant said:

    22.1. he was instructed not to log off a job until he got to the next job or 'home finished as travelling time'. In the Tribunal, he was questioned as to why he did not say that he was instructed to stay logged onto a client job until the end of the working day. He answered that this was implicit in his reference to 'travelling home' which was part of a job.

22.2. there were 4 occasions of using the van for personal use and MR was aware of this. Three were continuation journeys after work via Stretton Close to home.

22.3. the supervisors instructed them what to write on timesheets.

23. JT raised the following incidents in particular:

23.1. on 1 April 20, the claimant booked himself as working on his time sheet to 17.00 but was at home at 16.10. The claimant said he checked with a planner if there was any more work and was told not and to go home. He had been told at TBTs to record time in this way. JT said he would speak to the planner but refused the claimant's request to investigate what other engineers were doing.

23.2. On 7 April, the claimant used the van for a private purpose to pick up a prescription. The claimant said MR would be OK with it.

23.3. On 14 Apr, the claimant was at home at 14.53 and booked on as working through his PDA until 18.00 (p 386). The claimant said he was attempting to get onto online training. He said that MR and AE had instructed him to adjust his timesheets to match the PDA data. He said booking to 18.00 may have been a mistake.

23.4. On 16 April, the claimant had claimed he was working until 17.00, but he got home at 15.07. The claimant said the planner told him to go home when there was no work, and he booked time on a client job on his PDA from 16.00 to 17.00, as he had been instructed by AE and MR. He said it was to make up the 8 hour day. He said he had been told at TBTs not to use the code 'unproductive' to explain his hours at work. The claimant's trade union representative said it was important to broaden the investigation to what other were told to do. JT said he would ask others.

24. After the meeting, JT conducted a further investigation. He did not take notes of what he found out. He did not inform the claimant of the outcome of the investigation prior to making his disciplinary decision. The claimant was never provided with it, other than through comments in the dismissal letter we refer to below.

24.1. AE's evidence was that he spoke to a planner who told him that they never told the claimant or any engineer to go home. He also spoke to MR and AE. AE denied telling engineers to make up hours worked at client sites and add them to their hours even if they had not worked them. MR denied telling engineers to manipulate their time sheets. JT's witness statement is silent on whether he asked MR about the company van issue.

24.2. JT said that he relied on his own recollection of a TBT which he attended to conclude that MR and AE had not instructed engineers to complete timesheets in the way alleged by the claimant. He did not inform the claimant of this. In the Tribunal hearing, the claimant said that the points discussed at the TBT related to what would happen after a new system was implemented. As JT's reliance on the TBT was not brought to the claimant's attention in the disciplinary process, he could not make this point. JT said he did not review all engineers' timesheets as there had been no issues raised by anyone in relation to other engineers and he had no concerns that AE or MR told engineers to complete their time sheets in the way the claimant alleged.

25. JT wrote to the claimant on 5 Aug 20 dismissing him, finding that all the allegations in the disciplinary invitation letter were true.

25.1. He said he had talked to AE and MR and they denied the claimant's claims regarding the instructions they allegedly gave to the claimant for completion of his time sheet, and that they referred to a TBT at which they said anything logged to a client job must stand up to scrutiny. He said the planner did not advise the claimant to go home on 16 April. He said as part of his investigation no other discrepancies had come to light regarding other engineers. He informed the Tribunal that this referred to his asking MR and AE if there had been any discrepancies with other engineers time recording. Therefore, he did not, as he had committed to in the hearing, talk to other engineers (para 23.4 above).

25.2. He referred in particular to:

25.2.1. 1 Apr 2020: The claimant booked on his time sheet that he worked to 17.00 but he was at his home address at 16.10. The claimant's explanation was that he had been instructed to do this at TBTs, but AE and MR denied this.

25.2.2. 14 Apr 2020: The claimant arrived at his home address at 14.43 but booked onto jobs until 18.00. The claimant's explanation was that it could have been a mistake.

25.2.3. 16 Apr 2020: The claimant was at home when booked onto his PDA as attending a job from 16.00 to 17.00.

25.3. He concluded that the claimant had booked time on his time sheet to assigned client jobs while still being at his home address which was fraudulent.

25.4. He said he spoke to MR about whether MR was aware of the claimant's use of the company van for personal purposes and MR denied being aware of it or authorising it.

26. JT said in the Tribunal that:

26.1. Travel home was not booked to a client. The claimant should be working 8 hours a day in the field; travel home was not part of his working hours;

26.2. The reason for the dismissal was inaccuracies in the timesheet, falsification of timesheets, potentially claiming for overtime not worked, the claimant could not back up what he was saying, private use of company vehicle, and all trust was lost. He did not particularise this.

27. The claimant appealed his dismissal on the following grounds:

27.1. There were no written instructions given by his managers because instructions were given verbally during TBTs; and other engineers heard the instructions which was to ensure that a full days hours were to be booked onto timesheets and PDAs; clearly this would never match the vehicle tracking records. He said that engineers were reluctant to give him signed statements because of the position they were in.

27.2. The notes of the investigation meeting did not capture all that the claimant said.

27.3. In the disciplinary hearing, he asked for other engineers to be interviewed and their responses reported back.

27.4. He said that 3 members of the management team had colluded to make an unfair case against him to cover their own positions.

27.5. He said he was coping with very difficult personal circumstances; and his standard of work had never been questioned and his attendance had never been an issue. Due to the passage of time, he may not be able to remember all the circumstances to give an explanation.

28. He included what was an anonymous statement, apparently from a colleague, saying:

28.1. that managers asked employees to work outside the remit of their contracts.

28.2. The initial policy was that the journey home should be done while still logged onto the last job. That policy changed. They were told to use 'other time' on their PDA for the journey home, not a client job or the client would get billed for the travel home which would defraud the client. Then, the supervisor told them to travel home logged onto the job again. Then in a TBT, they were told to log 'other time' which resulted in time sheets being rejected by MR, who told the employees to change their time sheet to show they were at the client until 17.00

29. At the appeal meeting on 16 Oct 2020, CT said the claimant was dismissed for failing to complete time sheets accurately which caused discrepancies. The claimant said, among other things:

29.1. he was following instructions.

29.2. he understood that he stopped work at 17.00 at which time he was entitled to be at home.

29.3. he rang the planner when he finished his jobs at 15.00 and went home but was still available.

29.4. he was under instruction to stay on the last job. He was told this by other engineers and at TBTs.

30. The claimant relied on the anonymous statement from the other engineer referred to above. CT said he wanted a signed statement. The claimant asked CT to organise the statements as the claimant was hesitant to put people forward and did not want to compromise anyone. CT indicated he would not randomly sample engineers and asked the claimant to provide signed and dated statements. The claimant said the statement he had provided was from Liam Lyons (LL). CT noted LL no longer worked for the respondent and asked the claimant to get a signed statement from him. The claimant said he would ask him. In the Tribunal, CT said there was no evidence from LL; he did not take LL's statement into account because it was not sent to him directly.

31. Regarding the alleged instructions from managers, CT wanted the claimant to provide something 'objective' like an email and said if it was 'only verbal it's hard to consider'. the claimant said he did not have access to his emails anymore. CT said he would approach IT to try to get access to the claimant's emails. CT required there to be an email from the claimant saying he was not comfortable with a management instruction. The claimant said there were no such emails. CT said 'I need some evidence that you've written back that says your uncomfortable doing something'.

32. The claimant said he had some other supporting statements. CT said it had to be from a named individual and dated and to come from the person, not the claimant. The claimant said he did not want to put his witnesses in that position. The claimant said he would ask engineers if they could write out statements but it was hard for them.

33. CT said using a company vehicle outside work was not key to the dismissal but was counted (p407). The claimant said he used the van with permission. He said they were allowed to do this when he first started. He said he asked if he could pop into a house he was doing up when passing close by; and he told MR about using his van to pick up a prescription. He said he used the van for private use on the way home with permission. According to the notes, CT said to the claimant 'In the meeting you admitted doing that with authorisation', 'that' being using the van for private purposes out of hours. The claimant said 'yes'.

34. At the end of the appeal meeting, CT asked both the claimant and his trade union representative if they had anything to add and they were able to make further points. In the Tribunal, the claimant conceded that he was given full opportunity to give information to CT.

35. After the appeal meeting, CT interviewed AE. AE denied that he instructed the claimant to make up his time to 40 hours a week, so if the claimant finished at 15.00, he covered the time on his time sheet to 17.00. He denied telling the claimant to book time to a job he was not on. AE said there was an email from MR to the claimant saying he could not use the van without authorisation for private use which was sent before the matters for which the claimant was disciplined. AE said they had a similar issue (IE regarding time recording) with another engineer, Neil O'Hanlon, where it looked like a similar pattern and they were investigating.

36. CT also interviewed MR. MR denied that the claimant was advised to make up time on the time sheet if he got home early; he denied the claimant was told to stay booked onto a job. MR said if the claimant finished early, he was asked if there was any training he could do and told to record that as 'unproductive'. MR said he was having a similar issue with Neil O'Hanlon who was not at the site he said he was. On the company van issue, MR said he had one incident where the claimant asked to use it, and an email saying that it had to be authorised.

37. CT also interviewed JT. JT denied telling the claimant to make up time to 40 hours a week if he didn't have work. He said there had been the same issue with Neil O'Hanlon and other had been dismissed for the same thing. On the vehicle issue, MR gave permission for use of the company van on one occasion and this seemed to be viewed as a blanket approval.

38. AE, MR and JT did not sign their interview meeting notes.

39. CT did not look into the circumstances of Mr O'Hanlon's case. The reason he gave for this to the Tribunal was that it was an ongoing separate investigation which had not been concluded, Mr O'Hanlon was on furlough, he saw no need to link the two investigations, and he did not know the circumstances.

40. Witnesses for the claimant then provided more evidence:

    40.1. Jagmohan Brom, ex employee, emailed CT saying he had been asked to do a number of unprofessional and questionable things. He said on many occasions 'we' were told to travel back home and close the job when we got home. CT asked for clarification and JB said it was AE who made the remarks but he did not have any specific dates; issues were never raised formally because they could not raise it with the manager and supervisor they were complaining about. Mr Brom did not say that he was instructed to keep the client job open to 17.00 after he got home.

40.2. Alberto Boghean, ex employee, emailed CT saying AE told him to stay booked on the job when he travelled home. Then they were told to categorise travel home as 'other time'. Then he discovered that colleagues were doing things differently. They all asked AE what to do and he did not know and said 'carry on as you are'. Then at a big TBT with JT, JT told them to stay on the job for your travel home because its chargeable time. If you look on our time sheets you will see that everyone was booked onto the job while travelling home after this meeting. He said MR asked them to make up travelling time and say they checked things they had not checked because the respondent was going to get charged for not doing it. He said he asked MR for it in writing before he would do anything like this and MR refused to give it and stopped asking him. Another employee said MR asked him to buy things for a job and then give it to him to use at home and suggested he got his new bathroom from clients paying. CT responded asking AB if he had raised the incidents formally. AB said he raised them in TBTs. Mr Boghean did not say he was instructed to keep the client job open to 17.00 after he got home.

41. CT arranged an update to the disciplinary hearing notes. However, it did not contain everything which the claimant wanted included. The claimant emailed CT about this and said that statements by his representative at the disciplinary hearing were missing. The statement related to JT's allegedly aggressive manner in the meeting and badgering the claimant. CT failed to amend the notes as requested. His explanation to the Tribunal why this was that the notes were key points and not verbatim; and the note taker said the omitted comments were not noted because they were a personal attack on JT.

42. In Tribunal, CT conceded that it would have been an easy job to ask the engineers if they had been instructed to add time to their time sheets. He said the reason he did not do so was he was after specific people to look at.

43. JT provided relevant emails to CT. IT provided CT with access to the claimant's emails.

44. CT did not provide the claimant with any evidence from his further investigations.

41. In the Tribunal, CT said of Mr Brom and Mr Boghean: I asked them if they had flagged or raised any issues IE with the respondent, and they said they had not done so. They were both ex employees. In the emails, they did not say they were told to falsify timesheets. There were no specific references to dates or times when they said they were told to falsify time sheets.

42. It was pointed out to CT, in the Tribunal, that Mr Boghean said JT told them to stay on the job for your travel home because its chargeable time. CT's response was that this was not specific enough and was contradicted by the TBT notes. CT was asked if staying on the job to travel home was correct procedure and CT answered that it was not. CTbwas asked where in the TBT notes they contradicted Mr Boghean's statement. CT answered that they said 'engineers must ensure time sheets are accurate'. When it was suggested that this statement was vague and did not contradict Mr Boghean's statement, CT relied on the notes of his interview with JT conducted after the appeal hearing in which JT had denied engineers had been told to make up time. He then referred to emails which he had seen as confirming that engineers were not asked to make up time. These were emails from AE to engineers of 10 June and 17 June 2019 saying that travel home should not be recorded except for overtime. The claimant was not shown these emails in the disciplinary process. CT said that his attitude to Mr Brum's evidence was that he was an ex employee, he had not flagged any concerns while working for the respondent, no dates or times were provided and he believed he was colluding with the claimant.

43. CT was asked in the Tribunal if he understood that an employer should do a full and proper investigation or did he understand that it was the role of the employee to defend himself. He replied that he understood that at the appeal stage, it was for the employee to provide further evidence.

44. CT dismissed the appeal by letter of 12 Nov 2020.

    44.1. He said there was email evidence of the claimant being asked by MR to ensure the times for his jobs were completed in real time on his PDA. AE and MR denied that the claimant was instructed to falsify time sheets by making up time if he arrived home early; if there was no work, the time was to be recorded as unproductive. JT recalled a TBT confirming everything should be logged to an assigned job and must stand up to scrutiny from the client. He referred to email correspondence which he had seen evidencing the claimant had been informed multiple times that the half hour at start and end of the day is the claimant's travel time and should not be logged as working time on the time sheet.

    44.2. He said that no other discrepancies had come to light in relation to other engineers displaying the same conduct. He dismissed the evidence from other engineers as circumstantial and referring to matters which were not raised at the time during their employment. JT denied the claimant was instructed to falsify his timesheet, and MR and AE had also denied it. It was standard practice for management to monitor all engineers' time sheets.

    44.3. On 14 Apr 2020, the claimant arrived at his home address at 14.43 but was booked on jobs until 18.00 and the claimant said it was a mistake. On 16 Apr 2020, the claimant went home at 15.07 but was booked on a job via his PDA until 17.00.

    44.4. He referred to emails from MR to the claimant stating that private use of the company vehicle was prohibited. He had had no evidence that the claimant had been authorised to use the company vehicle for private use; and emails showed he was made aware he needed this authorisation.

45. In the Tribunal, CT was asked what offences he considered the claimant had committed for which he was dismissed. CT answered that it was based mainly around falsification of time sheets; he booked on to work and he was not at the place he claimed to be. He was invited to refresh his memory from the bundle to provide specifics and replied that he relied on the incidents on 14 and 16 April 2020. On 14 April, the claimant arrived home early and stayed booked on as working. He said it could have been a mistake and did not give a satisfactory explanation. It was pointed out to him that the appeal meeting notes did not provide this explanation from the claimant for what happened on 14 April, but rather he said that he was under instruction to stay on the last job. CT did not comment on that. CT did not refer to the use of the company van. He was asked what part the claimant's private use on the van played in the validity of the dismissal and he said that he took it into account in deciding if dismissal was appropriate.

46. The claimant was not asked in cross examination what difference it would have made to what he said in his defence had he been shown the evidence which was not made available to him during the disciplinary process.

47. In the bundle (p190), there was an email from MR to the claimant of 30 Sep 2019 asking the claimant to correct his timesheet because 'its low on hours'. The claimant asked JT about this in the Tribunal and JT said he would have to ask MR what he was referring to.

48. In the Tribunal, we asked the claimant if any notes other than the disciplinary hearing notes were inaccurate and he said not.

The law

49. Under section 94(1) Employment Rights Act 1996 ('ERA') an employee has the right not to be unfairly dismissed by his employer.

50. Under section 98(1) ERA, in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

51. Under section 98(4) ERA, where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

52. It was confirmed by the Court of Appeal in *Foley v Post Office; HSBA Bank plc v Madden 2000 ICR 1283*, that the tribunal must not substitute its decision as to what the right course of action was for the employer to have followed and, in many cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another employer quite reasonably take another. It is the function of the tribunal to determine whether in the circumstances of the case, the decision to dismiss fell within the band of reasonably responses which a reasonable employer might have adopted.

53. In *British Home Stores v Burchell 1980 ICR 303*, the EAT stated that, in dismissals for misconduct, the employer must show that it believed the employee guilty of misconduct, that it had in mind reasonable grounds upon which to sustain that belief and that, at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

54. In *Sharkey v Lloyds Bank UKEATS/0005/15/SM*, the EAT said: 'It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness, any prospect of there having been a dismissal in any event being a matter for compensation and not going to the fairness of the dismissal itself. In assessing fairness an overall approach must be taken (see Taylor v OCS Group Ltd [2006] ICR 1602 and Whitbread plc v Hall [2001] ICR 699, the former in particular emphasising that procedure and substance run together where the section 98(4) test is being applied). Procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.'

55. The ACAS Code of Practice on Disciplinary and Grievance Procedures states at section 4 that employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

Conclusions

56. We now consider the issues identified as allegedly making the dismissal unfair.

Meeting notes made of the second investigation meeting and the disciplinary hearing and the appeal hearing were not accurate and the claimant did not know if his amendments had been forwarded to the decision making managers.

57. The claimant supplied an amendment to the investigation notes. We consider that this was therefore taken into account. The claimant conceded that all notes other than the disciplinary hearing notes were accurate.

58. The respondent failed to include in the disciplinary hearing notes comments by the claimant's union representative about JT. We do not consider that this was a reasonable action for a respondent when the comments were made by a union representative and it was the claimant's stated case that JT was in collusion with two other managers. CT was apparently unaware of what the comments were because they were not included in the notes; all he said about them to the Tribunal was that the notetaker said they were not relevant. He did not indicate he knew what was said.

With regard to the offences alleged, the claimant did what he did because he was instructed by AE and/or MR to do it or it was agreed with them.

This point was made in general terms by the claimant in the disciplinary process. The question is whether it was sufficient for the respondent to have investigated the issue simply by asking AE and MR about it. If they had been giving verbal instructions which were at odds with official company policy, they were hardly likely to admit this. This issue is really part of the question as to whether the respondent should have investigated with the other engineers what they were told to do. See below.

The decision to dismiss was pre decided and victimisation for asking to claim old overtime payments.

We do not accept that there is any evidence that the claimant was being victimised for claiming overtime, or that the decision to dismiss was pre decided.

The appeal manager did not investigate the claimant's concerns. In particular, he did not investigate with other engineers what they were instructed to do at 'tool box talks'.

CT did not carry out any investigation into what other engineers were instructed to do. Given that the claimant was in a team of about 12, this would hardly have been onerous. CT conceded that it would have been an easy job to ask the engineers if they had been instructed to add time to their time sheets. Given that the claimant was claiming that the managers were colluding to hide what happened, we consider that it was outside the range of reasonable actions in the investigation to fail to do the easy job of asking the other engineers in the claimant's team if they had been instructed to falsify time sheets in the way that it was alleged the claimant falsified his time sheet.

The appeal manager ignored the evidence of engineers that managers instructed engineers to manipulate timesheets and the online job system, that is evidence of Mr Brum, Mr Boghean, and Mr Lyons. He did not look into the disciplinary case of Mr O'Hanlon to see if it was relevant to the claimant's disciplinary.

59. CT did not look into the circumstances of Mr O'Hanlon's disciplinary. We consider that it was not within the remit of a reasonable investigation for him to have failed to do so. This

is because the case which the claimant put forward was that all engineers were given the instructions which he said he was given; if Mr O'Hanlon had done the same thing as the claimant and was defending himself on the basis that he was following instructions, this would have corroborated the claimant's case. MR told CT that there had been the same issue with Neil O'Hanlon. Therefore, it did appear that he had done the same thing as the claimant. This failure of investigation omitted a part of the investigative process which was envisaged as being required by JT. JT said he did not review all engineers timesheets as there had been no issues raised by anyone in relation to other engineers. Now that a similar case had come to light, the logical corollary was that it should be investigated. CT stated in his appeal outcome that no other discrepancies had come to light in relation to other engineers displaying the same conduct. This was apparently not true. Having failed to take any steps to look into it, CT was certainly not in a position to say this.

60. We find CT's explanation as to why he did not investigate Mr O'Hanlon's case completely and do not consider that an employer acting within the range of a reasonable investigation would have failed to take any steps to look into it. The fact that the investigation into Mr O'Hanlon had not concluded did not preclude him from finding out what he was suspected of doing and if there were any details of what he was saying in his defence.

61. The respondent argued that it was not under any obligation to investigate Mr O'Hanlon' case because the claimant had not raised it. We consider this argument misconceived for the reasons set out above. In closing submissions, the respondent did not say that it could not reasonably investigate Mr O'Hanlon's case because he was on furlough.

62. CT did effectively ignore the evidence of Mr Brum and Mr Boghean. We find CT's refusal to organise a company interview with the other engineers but to insist that the only way he would consider their evidence would be if a named individual sent him direct a dated statement to be outside a range of reasonable steps in an investigation. As CT conceded, this would have been easy.

63. We also find CT's attitude to the evidence of Mr Brum and Mr Boghean unreasonably narrow minded. He indicated that he was not interested in it unless they had flagged the issue with the respondent at the time, which does not take into account how difficult it may be for an employee to raise issues in relation to their managers. CT also expected them to remember the dates of incidents when they were no longer working for the respondent. If Mr Brum and Mr Boghean had been asked open questions in a genuine spirit of investigation into the issues, instead of being left to come up with their own statements, we do not know what they may have said. CT exhibited his closed attitude to their evidence in the Tribunal when he said he believed that Mr Brum was colluding with the claimant, a point he did not put to the claimant or Mr Brum. CT imposed a different level of evidence on the claimant's witnesses than the managers he chose to interview. He did not require AE and MR to provide signed statements, but required this of the claimant's evidence. His evidence to the Tribunal that it is the responsibility of the employee to produce any new evidence at the appeal stage reveals a misconception of the duty on an employer to ensure that a fair investigation has taken place, throughout the process, and meant that he failed to ensure that all relevant evidence was taken into account.

64. The respondent argued that the fact that LL, Mr Brum and Mr Boghean did not substantiate the claimant's claims indicated that any further investigation would have been futile and unnecessary. However, this point was not made by CT at all in his assessment of their evidence and his explanation for his actions. Further, we do not know what they would have said if they had been interviewed by the respondent with questions relevant to the claimant's defence being put to them.

65. The respondent relied on the evidence provided by AE and MR that they reviewed timesheets generally from time to time and had not found any anomalies showed that no other engineers were acting in the same way as the claimant under instruction and so a further investigation was not warranted. Evidence of these ad hoc time sheet reviews as not provided to the claimant for comment. Since the claimant's case was that AE and MR were colluding, we do not consider it reasonable to rely on what AE an MR said without checking the point independently. In any event, there was another employee apparently with time sheet anomalies, Mr O'Hanlon, and this was not looked into.

The appeal manager said at the start of the hearing that they had an hour and this led to a truncated discussion and the claimant felt unable to state his case fully.

66. At the end of the appeal meeting, CT asked both the claimant and his trade union representative if they had anything to add and they were able to make further points. We consider that the claimant had full opportunity to state his case fully in the meeting.

The claimant was not sent a copy of (1) the first investigation notes, (2) notes of the further investigation undertaken by the disciplinary decision maker after the disciplinary hearing or, (3) prior to the appeal decision being made, notes of the further investigation undertaken by the appeal manager. The appeal manager did not produce evidence of any investigation

67. The claimant was sent a copy of the first and second investigation notes.

68. The claimant was not sent at any time notes of the further investigation carried out by JT prior his issuing his dismissal decision. In fact, JT did not make any notes of this investigation. The investigation involved key interviews with the planner, MR and AE.

69. The claimant was not provided with the evidence arising from CR' post appeal meeting investigation, namely key interviews with AE, MR and JT, nor the emails CR accessed from IT or JT provided to him. In fact, the only evidence he was provided with was the notes of his own disciplinary investigation.

70. Therefore, the claimant at no time saw the evidence provided by AE, MR and JT, the three managers whom he said colluded together.

71. The respondent failed to cross examine the claimant as to whether he would have conducted his defence differently if he had seen the evidence withheld from him. Therefore, it cannot be said it would have made no difference. In fact, the claimant gave an example of a different point which he would have made if provided with all relevant information; he would have said that the instructions given in the TBT on which JT relied applied to circumstances which were not yet in place.

The investigator was the manager whom the claimant alleged instructed him to contravene policy and he did not carry out a fair and objective investigation.

72. Given that the claimant said in the disciplinary hearing that he was following AE's instructions in the way he completed his activities, it was clear at that stage that AE was not an appropriate person to have conducted the investigation. This was not rectified on appeal because CT failed to ensure there was a fair investigation as set out above.

<u>Working Time Issue</u>

73. For the reasons set out above, we do not consider that the respondent carried out as much investigation as was reasonable in the circumstances, as required in the *Burchell* test.

74. Further, the respondent failed to supply the claimant with any of the evidence on which it based its decision to dismiss other than the notes of the meetings held in the investigation and disciplinary process, and the evidence supplied by the claimant. Therefore, the claimant could not comment and we do not know what additional points he may have made in his defence had he been given the opportunity to do so. We consider that this runs counter to the principles of natural justice and, in particular, section 4 of the ACAS Code of Practice on Disciplinary and Grievance Procedures as referred to above.

75. We consider that these failings are so significant as to amount to unfairness (as per *Sharkey*) and that the employer was of a size and had the resources to have avoided these failings.

76. We therefore consider that a dismissal for the Working Time Issue is unfair

Company Van Issue

77. However, that is not the end of the matter as the dismissal would avoid unfairness if the respondent dismissed for a misuse of the company van and this was within the range of responses of a reasonable employer.

78. CT informed the claimant in the appeal hearing that the Company Van Issue was not key to the dismissal but was counted. We understand this to mean that, alone, it would not have resulted in dismissal, but was added to the general mix of offences when deciding to dismiss. This is supported by CT's answer, in the Tribunal, as to why the claimant was dismissed. When this question was put to him, he replied that the reason was based around falsification of time sheets, and when invited to refresh his memory from the bundle, only referred to the Work Time Issue. He did not think to mention the Company Van Issue at all until he was asked what part that had played in the decision.

79. We do not therefore consider that the Company Van Issue alone could have reasonably resulted in dismissal and we do not consider that the respondent avoids the unfair dismissal finding by relying on the Company Van Issue.

80. Given this decision, we are not obliged to go into the evidence and process surrounding the Company Van Issue.

81. Accordingly, we find the dismissal unfair.

Remedy

82. Unless the parties settle the question of compensation, there will now need to be a remedy hearing to determine the compensation due to the claimant.

83. The respondent has already indicated that it intends to pursue arguments relating to:

    83.1. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604] *Polkey;*

    83.2. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

83.3. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

84. These arguments will involve the respondent to persuade the Tribunal of what the outcome would have been had a fair procedure been followed and also to prove that the claimant's actions were actually blameworthy or culpable. This will involve further substantial evidence.

85. We make the following provisional comments on this, subject to submissions from the parties. We suggest that the respondent will need to demonstrate what answers the claimant's colleagues and ex colleagues would have given in a reasonable investigation by the respondent of the Working Time Issue. It is not at all clear to us how this could be demonstrated. Alternatively, it may be that the respondent will need to produce an objective analysis of all the various time records of the colleagues and ex colleagues over a reasonable sample period. We therefore envisage that the respondent will be put to considerable work and there will be substantial further evidence to be exchanged. We make these comments merely to invite the respondent to consider whether it is proportionate to pursue these points.

86. We shall arrange for a remedy hearing to be listed.

Employment Judge Kelly
22 June 2021