EMPLOYMENT TRIBUNALS

Claimant: Mr Adam Clark

Respondent: DL Insurance Services Limited

Heard at: Bury St Edmunds (in person and CVP)
On: 6 and 7 December 2021, 13 January 2022

Before: Employment Judge Hutchings (sitting alone)

Representation
Claimant: Mr J Wallace of counsel
Respondent: Ms S Robertson of counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well founded. The claimant was unfairly dismissed.

1. The claimant's complaint of breach of contract is well founded. The claimant is entitled to 12 weeks' notice.

2. The Tribunal will decide the remedy for unfair dismissal at a further hearing listed for 1 day on 2 March 2022. This will include the question of whether any adjustment should be made under section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 for any failure to follow the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures, and any considerations relating to contributory fault and any reduction in the compensatory award for unfair dismissal will be made under the principles set out in Polkey v A E Dayton Services Limited 1998 ICR 142.

REASONS

Introduction

1. The claimant, Mr Adam Lee, was employed by the respondent, DL Insurance Services Limited, in a customer support role in the respondent's sales, service and partnerships department from 5 May 2004 until his dismissal without notice on 9 April 2020.

2. The claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996. He also claims that the respondent breached his contract of employment by failing to give him the required notice of termination of employment.

3. The respondent contests the claim. It says that the claimant was fairly dismissed for misconduct in the form of failing to adhere to the respondent's standard operating practices, particularised by the respondent as: making unauthorised personal telephone calls while scheduled to take customer calls; transferring customer calls he was trained to handle to other departments; and failing to follow the correct quoting procedure for his own financial gain. The respondent asserts it was entitled to terminate his contract without notice because of this misconduct, which it alleged amounted to repudiatory breach.

Preliminary matters

4. At the beginning of the hearing, before I heard any evidence, I had to deal with a couple of preliminary matters. It was agreed that the claimant could provide a mitigation bundle to the court and Respondent before commencement of the second day of the hearing on 7 December 2021.

5. Ms Robertson informed the Tribunal that Mr Turner-Smith was only available on 6 December 2021 as he no longer worked for the Respondent and had only been able to attend the Tribunal on the first day. It was agreed with the parties that Mr Willis would begin cross examination in the order preferred by both parties, starting with Nusha Osborne, but that the Tribunal would be mindful of timing and endeavour to hear all Mr Turner-Smith's evidence on 6 December.

6. Having agreed with the parties the basis of claim as (i) unfair dismissal and (ii) wrongful dismissal I set out the issues for the Tribunal to decide:

Issues for the Tribunal to decide - Unfair dismissal

1. The Tribunal was hearing issues as to liability only in relation to the claim for unfair dismissal. The issues on liability have 2 core elements:

(i) what was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct; and

(ii) If so, was the dismissal fair or unfair within section 98(4). Did the respondent in all respects act within the band of reasonable responses?

2. For the claimant's claim of unfair dismissal, the focus under section 98(4) is on the reasonableness of management's decisions. In reaching my decision it is immaterial what decision I would have made about the claimant's conduct.

3. When considering the fairness of the sanction, I must not substitute my own view for the employer's view; the Tribunal must decide if the sanction fell within the range of reasonable responses.

Breach of contract - Issues for the Tribunal to decide

4. First the Tribunal must determine how much notice was the claimant entitled to receive? This was not in dispute: it was 12 weeks' notice.

5. Then it must consider whether the claimant fundamentally breached his contract by committing an act of gross misconduct? This required the respondent to prove the claimant committed an act of gross misconduct.

6. For the breach of contract claim, I had to decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

Procedure, documents and evidence

7. The claimant was represented by Mr J Wallace of counsel and gave sworn evidence. The respondent was represented by Ms S Robertson of counsel, who called sworn evidence from Ms Nusha Osborne, one of the respondent's customer operations managers, and Mr Jonathan Turner-Smith, the contact centre manager at the respondent's Ipswich site. Evidence was considered by the Tribunal on liability only.

8. I considered the documents from an agreed 332-page Bundle of Documents which the parties introduced in evidence. Mr Wallace and Ms Robertson submitted written submissions on liability to the Tribunal, together with a joint authorities' index and made oral closing submission on behalf of the claimant and respondent respectively.

Findings of fact

9. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.

10. The claimant, Mr Adam Clark, was employed by the respondent, DL Insurance Limited, in a customer support role in the respondent's sales, service and partnerships department from 5 May 2004 until his dismissal on 9 April 2020. The respondent operates an insurance business, regulated by the Financial Conduct Authority. Mr Clark was employed at the Ipswich call centre. His role involved answering inbound customer calls relating to car insurance policies. He reported to Ms Claire Moore, centre manager, who was managed by Mr Jonathan Rose, one of the respondent's operations managers.

11. In February 2020 the claimant raised concerns with Mr Rose over the call types he was handling, suggesting some incoming calls were misdirected. This led Mr Rose to investigate, listening to recordings of some of Mr Clarks incoming calls for December 2019 and January and early February 2020. In doing so Mr Rose identified calls he felt did not follow the respondent's standard operating processes [transcripts 101-128, summary table 136-7]. As a result, he suspended Mr Clark and appointed Lianne Torres, another operations manager, to investigate his concerns.

12. Mr Clark attended an investigation meeting with Lianne Torres on 14 February 2020; he was given opportunity to respond to allegations of making personal calls during scheduled work time, forwarding calls he was trained to deal with and failing to follow the respondent's quoting processes. Mr Clark agreed making personal calls in scheduled work time was not acceptable and gave his explanation for the other allegations [140-145]. Ms Torres concluded that Mr Clark had breached the Respondent's Operational Conduct and Integrity Standards [80-81], a document he was asked to sign annually, most recently on 15 January 2020 [81]

13. In a letter dated 14 February 2020 Ms Torres informed Mr Clark that the outcome of the investigation meeting was to suspend him on full pay pending a disciplinary hearing, referred to by the respondent as a 'resolving issues at work meeting', scheduled for 18 February 2020 [146]. The letter enclosed a copy of the respondent's resolving issues at work policy and informed Mr Clark of his right to be accompanied to the hearing.

14. Initially this hearing was scheduled before Mr Rose. In an undated note (which Mr Clark confirmed in oral evidence that he handed to Ms Torres in person before the 18 February meeting) he asked for someone else to conduct the hearing, as he felt Mr Rose was not neutral. The note (submitted as evidence for the disciplinary hearing) asked that the meeting on 18 February be postponed allowing him to obtain further evidence, including documents from the respondent [147-148].

15. By dated 9 March 2020 Mr Rose informed Mr Clark that Nusha Osbourne, a customer operations manager, would hear the disciplinary matter; he also replied to Mr Clark's queries about the provision of requested documentation providing some and explaining why others were not available [194].

16. Before a new hearing date was finalised, Mr Clark emailed Sian Wythe, a human resources colleague who was co-ordinating the hearing, asking if the hearing could be delayed further due to first his wife and then him feeling unwell. In reply, Ms Wyatt suggested, as an alternative, the meeting could take place over the telephone [195A, 198, 197].

17. On 18 March 2020 Ms Osbourne invited Mr Clark to a disciplinary hearing on 23 March 2020. The letter set out the allegations against Mr Clark as: making several unauthorised personal outbound calls whilst scheduled to take incoming customer calls; transferring customer calls he was trained to handle to other departments / colleagues, rather than dealing with them himself; and failing to follow the correct quoting process during customer calls. The allegations were classified as gross misconduct; if substantiated the actions could result in Mr Clark's dismissal without notice. The letter informed Mr Clark that he had the right to be accompanied at the meeting, but if he decided not to attend, he could send a representative in his place and / or provide written submissions. Ms Osbourne noted she may proceed with the hearing and make a ruling in his absence. The letter listed enclosed documentation the respondent would refer to at the meeting [211-212].

18. Mr Clark emailed Sian Wythe the following day that a colleague he had asked to attend the meeting, Teresa Oxley, was not available on 23 March 2020 and asked if the hearing could be rescheduled, which it was to 24

March 2020 [212A]. Mr Clark confirmed he was happy to submit written evidence in place of attending, sending Ms Osbourne written submissions f [229-238]. The documents, reviewed by Ms Osbourne, set out Mr Clark's defence to the allegations: that he was following management instructions when using a different quoting process in referring incoming calls to the respondent's website to complete the quoting process and was putting customers first when redirecting to website as they might save money in line with a best for customer policy.

19. Ms Osbourne held the disciplinary hearing, by telephone, on 24 March 2020. She interviewed Teresa Oxley [224-228]. Mr Clark had asked for evidence from a colleague, Chelsea Chatfield. She could not attend the meeting by answered questions by email. I [237-238]. Following the disciplinary hearing Ms Osbourne conducted interviews with Claire Moore, [239-241] and Jonathan Rose [242].

20. On 9 April 2020 Ms Osborne wrote to Mr Clark to inform him that the decision had been taken to dismiss him without notice for gross misconduct [245-252]. The letter set out each allegation and explained why Ms Osbourne had reached her conclusion to dismiss Mr Clark without notice. The letter informed Mr Clark of his right of appeal. On 23 April 2020 Mr Clark appealed the decision [265] to dismiss him for gross misconduct and provided the respondent with written submissions and documents to support his appeal [265-291].

21. The respondent appointed Jonathan Turner-Smith, a contact centre manager at the Ipswich site, to chair the appeal hearing. By email dated 5 May 2020, copied to Mr Turner, Mr Clark was invited to an appeal hearing on 11 May 2020 (by video due to Covid restrictions). The email informed Mr Clark that he would have the opportunity to set out his points of appeal at the hearing and that he had the right to be accompanied. On 15 May 2020 Mr Clark sent Mr Turner-Smith further written submissions [253-291] followed on 7 May 2020 an email saying he had would not attend and was content for the hearing to proceed on the basis of his written submissions. [252A].

22. After reviewing the submissions and documents, on 28 May 2020 Mr Turner Smith interviewed Claire Moore [292-296], Jonathan Rose [297-299] and Ms Osborne [300-304]. The next contact from the respondent was a letter dated 12 June 2020 informing Mr Clark of the appeal outcome to uphold the decision to dismiss him without notice and setting out reasons by reference to the points of appeal.

Law – unfair dismissal

23. Section 94 of the Employment Rights Act 1996 (the '1996 Act') confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95. This is also satisfied by the respondent admitting that it dismissed the claimant (within section 95(1)(a) of the 1996 Act).

24. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a

potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

25. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

26. In misconduct dismissals, there is well established guidance for Tribunals on fairness within section 98(4) in the decision in *Burchell 1978 IRLR 379.* The Tribunal must decide whether the employer had a genuine belief in the employee's guilt.

27. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made. The Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23* and *London Ambulance Service NHS Trust v Small 2009 IRLR).*

28. Mr Wallace and Ms Robertson provided me with written and oral submissions on fairness within section 98(4) which I have considered and refer to where necessary when reaching my conclusions. In written submissions Ms Robertson of counsel reminded me that the employer is the primary fact finder; the Tribunal's role is to review of the facts evident during the disciplinary process, not what may be raised at a later date. *LB Brent v Fuller,* CA, at [32] of *Cossington.*

Conclusions – unfair dismissal

29. The respondent has satisfied the requirements of section 95 of the 1996 Act, admitting that it dismissed Mr Strutt (within section 95(1)(a)) on 9 April 2020.

30. The first issue is what was the reason for the dismissal? I find that the respondent's management, Ms Osbourne and Mr Turner-Smith, dismissed the claimant because it believed he was guilty of misconduct contrary to its Operational Conduct and Integrity Standards [49] by making a number of unauthorised personal outbound calls whilst scheduled to take incoming customer calls; transferring customer calls he was trained to handle to other

departments / colleagues, rather than dealing with them himself; and failing to follow the correct quoting process during customer calls. The conduct of the employee is a potentially fair reason for dismissal under section 98(2)(b). The respondent has satisfied the requirements of section 98(2)(b).

31. My next consideration is the three stages in the Burchell case. First, did the employer reasonably believe that the claimant committed the misconduct in that the respondent had a genuine belief in the employee's guilt. I find that Ms Osbourne, as dismissing officer, held genuine beliefs that the claimant was guilty of misconduct. Her evidence was clear about why she dismissed. Mr Clark accepted making personal calls in scheduled work time was in breach of Policy. In relation to the other allegations Mr Clark had signed a copy of the standards on 15 January 2020 [81] below a statement confirming that he had read and understood the standards and the potential consequences of not upholding them. The standards specify the standard Ms Osbourne was investigating relating to call avoidance: 'taking deliberate action or actions to avoid taking calls… examples of this would be transferring a call you are trained to deal with or releasing a call or chat without a valid reason to do so' [80].

32. Ms Osbourne was clear as to the grounds of investigation and set out the 'charge' clearly in her outcome letter [245-252]. The crux of her belief related to Mr Clarke being aware of the processes, aware that avoiding calls and / or not following processes would amount to misconduct under the Policy and that the call records showed evidence of Mr Clark transferring calls for which he was trained or not following the correct process when dealing. She minuted all conversations with detail, was clear in her evidence to the Tribunal and her dismissal letter about her belief and reasoning [245]. Ms Osbourn genuinely believed that Mr Clark was only completing quotes where he would gain personally and that he was transferring calls for which he was trained where there was no benefit to him. Ms Osbourne's decision letter of 9 April 2020 [245-252]. Was clear, structured, setting out allegations and addressed each allegation

33. In upholding the dismissal on appeal, Mr Turner-Smith also had a genuine belief that Mr Clark had committed misconduct contrary to the Standards. His appeal outcome letter [307-317] is detailed, responding to each appeal point in detail. His evidence to the Tribunal was clear and consistent.

34. Second, I must decide whether the employer held these genuine beliefs on reasonable grounds. In considering the objective test, I have in mind the evidence as understood by the employer at the time the decision to dismiss was made and any failure must be weighted in accordance with circumstances of that time.

35. The grounds for the decision were based on finding evidence from which the respondent could reasonably conclude that (1) Mr Clark knew the correct quoting processes; (2) knowing the process, the way he dealt with calls in not following the correct process amounted to deliberate call avoidance; and (3) he knew his behaviour was deemed misconduct by the respondent. Mr Clark's position is he transferred calls when he had been trained to do so, but where training was lacking, or he thought it was in the best interests of customer, he would refer to another department or back to the respondent's website and therefore he was not guilty of misconduct.

36. Ms Osbourne explored this proposition as part of a range of evidence reviewed. In determining fairness, the Tribunal must consider all grounds at the time which formed the basis of the employer's conclusion. Ms Osbourne based her decision to dismiss on the following grounds: that the Standard's [80-81] had been signed by the respondent on 15 January 2020; a table [136-137] and transcripts of calls [101-128]; a business communication known as Buzz 2017 [93]; team leader instruction at a meeting on 5 February 2020 and interviews with managers of the claimant's team and colleagues he identified. Ms Osbourne considered a range of evidence and witness testimony before reaching her decision. I set out below my conclusions as to whether this range of evidence gave the employer reasonable grounds for concluding misconduct.

37. It is important that where an employer places store in an act of misconduct such that engaging in the act will result in summary dismissal, the act should be clear in the employer's policy. It was reasonable for Ms Osbourne to conclude that the claimant was aware that the allegations he was facing were deemed misconduct by the respondent as this was expressly set out on the Standards, which he had signed on 15 January 2020 below a statement inviting him to confirm by signature that he had '*read and understand the content…fully subscribe…. and…appreciate the potential consequences of not upholding them'.* The Standards gave the dismissing officer reasonable grounds to conclude that Mr Clarke knew that allegations amounted to misconduct, including failure to follow correct processes can amount to call avoidance; however, the Standards are not grounds for concluding that Mr Clark knew the correct processes; the respondent required other evidence on which to draw this conclusion reasonably.

38. Were communications in the 5 February 2020 meeting reasonable grounds for the dismissing officer to conclude that Mr Clark was aware of the correct quoting processes? To determine Mr Clark's knowledge of the process Ms Osbourne conducted an interview with Claire Moore who led the 5 February meeting [239] at which processes were discussed and an email exchange with Chelsea Chatfield who attended the meeting. Mr Clark argued that, at the meeting, Claire Moore told her team to redirect calls back online if people were struggling to 'get rid' of them to reduce the amount of time being spent on internet sourced calls. In the interview Ms Moore says her words '*had been twisted'.* Ms Osbourne does not directly put the question to Ms Moore as to what instruction she gave at the meeting about quoting processes. While there are questions around whether Mr Clark had received training for certain tasks the transcript of the interview does not answer these or provide a reasonable basis to conclude that Mr Clark was aware of the correct quoting process at that time, the conclusion that was reached by Ms Osbourne.

39. Similarly, the email exchange with Ms Chatfield is generic, not specific to the content and any comments made at the 5 February meeting about the quoting processes; it has no time references or specific questions and does not give the respondent a reasonable basis on which to conclude that Mr Clark knew the correct process [248]. While Ms Osbourne does not doubt what Ms Moore says, or that Ms Chatfield knew the process, the content of the oral and written interviews does not provide a reasonable basis from

which to conclude Mr Clark knew the correct process at the time it was alleged he was avoiding calls. It is not clear from Ms Osbourne's examination of Ms Moore or Ms Chatfield whether any process was communicated in the 5 February meeting or that Mr Clark was clear as to the process, which was a consideration at the crux of this investigation.

40. Ms Osbourne interviewed Ms Oxley at Mr Clark's request [224-228]. This interview concluded that Ms Oxley understood the correct process, but as Ms Oxley was not at the meeting the interview does not provide a reasonable basis to conclude Mr Clark was aware of the process from that meeting or at all. Ms Robertson contends that if Mr Clark had been unaware of the correct process, he would have asked questions. This was not put to the claimant as part of the investigations, nor were details of the training received by the claimant investigated in any detail. Ms Osbourne's dismissal letter [246] references the 5 February meeting as a basis for concluding that Mr Clark was aware of correct processes [246]. Is this conclusion sufficient to discharge the obligation of fairness under section 98(4)? For the reasons set out above, I find that the 5 February communications are not reasonable grounds for concluding that Mr Clark understood the correct process.

41. Ms Osbourne interviewed Mr Rose to examine a statement made by Mr Clark in written submissions as to why he was receiving misdirected calls. However, this meeting does not examine the crux of the allegation and gives the respondent no grounds for the conclusion reached that Mr Clark knew the correct quoting processes.

42. In addition to the interviews Ms Osbourne conducted, she acknowledged in evidence that her decision was also based on a table of call records and transcripts of some of the calls listed in the table, which had been obtained from Mr Rose [136-137]. The table categorised calls as: call avoidance, personal calls, and transfer. Highlighted in yellow were the calls where the correct process had been followed. In oral evidence Ms Osbourne confirmed that she relied on the table and transcripts in making her decision. The table was explored in evidence to determine if it provided the respondent with a reasonable basis on which to conclude Mr Clark was guilty of misconduct. Ms Osbourne did not determine which calls amounted to call avoidance; this was determined for her and collated on the table as part of the initial investigation. There was some confusion on the part of Ms Osbourne aligning the list of calls contained in the table with the transcripts [136, 102]; for some Ms Osbourne could not explain the breach by the Claimant. There were transcripts identified as 'offending calls' [104 and 113] that were not listed in the table. It is not for the Tribunal to determine the nature of any call; that would be to adopt a substitution mindset. Ms Osbourne's analysis of the table as evidence of grounds for dismissal must be considered in the context of whether Mr Clark was aware of the correct process at the time of the calls listed in the table. If he was not, then the table is not a reasonable basis for concluding the claimant is guilty of misconduct.

43. Did the table [136-137] provide reasonable grounds for concluding Mr Clark knew the correct processes and was therefore not following them in the instances identified in that table? Ms Robertson points out that of 54 calls

listened to 26 calls were made after the Standards were signed and 14 of those calls were dealt with correctly. Ms Osbourne reviewed transcripts of 16, including transcripts of 4 calls which had been handled correctly at the time [117, 119, 124 & 125]. She also considered four transcripts for calls not listed in the table [102, 104, 110 & 113]. Two transcripts were of the personal calls. Six transcripts were determined to be call avoidance or transfer. From this analysis of the calls in the table Ms Osbourne concluded that Mr Clark could deal with certain types of call correctly, for example proof of no claims discount and generating a renewal [143] and from this analysis she concluded that Mr Clarke must have known the correct processes as he was using them on occasion, stating in oral evidence that he *'followed processes on some occasions and not on others*.'

44. The analysis of the table is industrious; however, it is complex, as are the way in which conclusions are drawn from it. Counsel for both parties spent considerable time exploring the table, how it was used, the conclusions reached, illustrating that this basis for the conclusions was not straight forward. I find the table alone is not a reasonable ground on which to reach the conclusion that Mr Clark knew the correct process and the facts he was not following them for some calls and was for others meant he was deliberating avoiding calls for his own benefit.

45. The grounds for this decision at numerous and can be looked at cumulatively. The cross reference of any communications in the 5 February meeting with the table is, however, problematic as only 1 call listed as 'call avoidance' is recorded in the table (for 6 February 2020) after this meeting had taken place. Reading the table in the context of the meeting communications does not provide reasonable grounds to conclude that Mr Clark was guilty of call avoidance, partly as the investigations into the 5 February meeting do not provide reasonable grounds.

46. The respondent contends that the quoting process had not changed since the Buzz communication on 1 May 2017 [93], a document received by Mr Clark, and therefore it was reasonable for Ms Osbourne to conclude that Mr Clark was aware of the process at the time he made the calls listed in the table. I conclude that the buzz provided Ms Osbourne with reasonable grounds to conclude Mr Clark was aware of the correct quoting process

47. Mr Turner-Smith did not formulate a different view on any other policy or documents. His appeal outcome letter sets out in detail the basis of his decision in detail, which echo the approach taken by Ms Osbourne.

48. Ms Osbourne considered a breadth of evidence considered relevant to the investigation and clearly worked hard in gathering the evidence. Overall did the investigations discharge the employer's obligation to have reasonable grounds on which to base the decision to dismiss without notice. In some instances, the conversations recorded lacked focus to the investigations, the call log evidenced a narrow period and was a comparative analysis of sometimes he did, sometimes he did not, rather than looking specially at the training record of the claimant; as a result, I conclude the burden was not discharged by the employer.

49. Third, the Tribunal must determine if the respondent conducted a fair and reasonable investigation in all the circumstances? In reviewing the fairness of the overall process, I must apply an objective standard of reasonable employer (mindful of the industry and context in which conduct takes place *Sainsbury's Supermarkets v Hitt [2003] IRLR 23, CA*). In submissions Ms Robertson noted that an employer does not have to carry out all possible investigations, chasing all possible lines of enquiry. I have considered the size of the respondent's undertaking in reviewing the procedure for fairness. Mr Taylor Smith spoke of the importance of the golden thread in service delivery given the respondent's business is regulated by the Financial Conduct Authority, and the need to report breaches for audit purposes. I am mindful of this context. The respondent is an organization with substantial resources. Elements of the respondent's disciplinary process lack the clear structure and sophistication of communication of a company with the resources available to the respondent, particularly given the regulated context in which work was conducted.

50. The investigation adhered to the ACAS code. It had 3 parts: investigation meeting, disciplinary hearing, and appeal hearing. Mr Clark was given the opportunity to respond to allegations during the investigation meeting on 14 February and informed of the respondent's policy for resolving issues at work policy and informed Mr Clark of his right to be accompanied to the hearing [146]. Initially the disciplinary hearing was scheduled before Mr Rose, Mr Clark's manger when, given the serious of the allegations (classified as gross misconduct and a dismissible offence under the respondent's own Standards, it would be reasonable for a company with the depth of resources of the respondent to appoint someone entirely independent and unknown to the claimant. It was the claimant's objection to this appointment that resulted in a third-party unknown to Mr Clark being appointed to carry out the disciplinary investigations.

51. The respondent did inform Mr Clark of the allegations against him with sufficient detail. He was interviewed at the investigation stage; however, he was not interviewed subsequently. This may in part be due to Mr Clark's decision not to attend either the disciplinary or appeal hearing. Further investigations and interviews were undertaken by Ms Osbourne and Mr Turner-Smith; after reviewing the submissions and documents, on 28 May 2020 Mr Turner Smith interviewed Claire Moore [292-296], Jonathan Rose [297-299] and Nusha Osborne [300-304]. Ms Robertson pointed out in submissions; he was not required to do so. However, in all the circumstances a reasonable investigation would have given Mr Clark the right of reply, even if Mr Clark chose not to act on this. It did not., The decision letter and appeal letter contained information used as part of the decision which Mr Clark received for the first time on receipt of the letters.

52. While Ms Osbourne speaks to having experience of disciplinary proceedings in her witness statement, some of her investigations lacked focus. This is not a criticism of Ms Osbourne. She cast the net to the individuals she felt were relevant but did not have guidance to follow. Given the regulatory context and consequences of a finding of misconduct for the respondent (and audit report) and the claimant (dismissal without notice) an employer in the industry and with the resources of the respondent would have had a clear framework. There was confusion as to the regulatory context. Ms Osbourne refers to a breach, Mr Turner-Smith acknowledge it

was not a breach; there was a reporting need. Given the size of the respondent's undertaking and have concluded that the investigation process lacked focus and depth commensurate with the size for employer, seriousness of the allegations, regulated context. The employer is not required to follow all levels of enquiry; however, when the crux of the conduct relates to whether the employee was trained to do something, a review of training records is reasonable, particularly in an industry which is regulated. On balance, in all the circumstances the respondent did not undertake a reasonable investigation.

53. The final consideration for the Tribunal is whether in all aspects of the case, including the investigation and the grounds for belief, the decision of Mr Clark to dismiss without notice was a fair sanction. The Tribunal must decide whether a reasonable employer would have decided to dismiss Mr Clark for misconduct in the circumstances. It was reasonable for the respondent to characterise the allegations as misconduct. This was stated in the standards; by signature Mr Clark knew that this was a dismissible offence if proven.

54. I find that dismissal without notice was not within the band of reasonable responses: the respondent held a genuine belief that Mr Clark was guilty of misconduct; it's belief at that time was not based on reasonable grounds; overall the process of investigation was structured in approach, but not reasonable in depth or conducted someone with sufficient experience, given the regulatory context of the employer. The respondent did consider 16 years of service but used this as a basis of assumption that Mr Clark should have known the processes, which was a leap too far without clear evidential grounds. Length of service was not considered in mitigation. As the grounds considered at the time for concluding misconduct were not, on balance, reasonable it was withing the band of reasonable responses to consider service of 16 years in mitigation and explore whether an alternative tariff was more appropriate.

55. Therefore, I find that the claimant was unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996.

Law – breach of contract

56. Did the claimant commit a fundamental breach of contract entitling the respondent to dismiss without notice? In distinction to a claim of unfair dismissal, where the focus is the reasonableness of management's decisions and it is immaterial what decision I would have made about the claimant's conduct, in a claim to determine repudiatory breach of contract the Tribunal must decide for itself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the contract without notice.

Conclusions – breach of contract

57. Under the terms of Mr Clark's employment contract, he was entitled to 12 weeks' notice.

58. The respondent has proved that the alleged act amounted to misconduct, and that this was a term of Mr Clark's contract, by signature of the Standards document.

59. To determine whether Mr Clark had fundamentally breached his contract the Tribunal must be clear that, on the balance of probability, Mr Clark had committed an act of gross misconduct; I had to decide for myself whether Mr Clark was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice. I find that, on the evidence available, he was not. The evidence (considered at paragraphs 33 to 48 above) does not establish that Mr Clark's failure to follow process on some occasions was wilful and for his own financial gain or benefit.

60. There is insufficient evidence before the Tribunal to conclude repudiatory breach. Therefore, the respondent was not entitled to dismiss Mr Clark without notice.

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Employment Judge **Hutchings**

30 January 2022

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RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date 9 February 2022

FOR EMPLOYMENT TRIBUNALS