



EMPLOYMENT TRIBUNALS

Claimant: Mr J Dalton

Respondent: Volair Limited

HELD AT: Liverpool

ON: 7 December 2017
15 January 2018
18 January 2018
(in chambers)

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Mr M Hurst, lay representative

Respondent: Mr T Kenward, counsel

JUDGMENT

The decision of the Tribunal is that the claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Issues for the Tribunal to decide

1. Mr Dalton's complaint is one of unfair dismissal. He was dismissed from his employment with Volair Limited by reason of gross misconduct on 27 March 2017.

2. The parties agree that the reason for his dismissal was misconduct. The other issues in the agreed List of Issues provided by the respondent and agreed by the claimant at the start of the hearing remained for the Tribunal to decide. Those issues were:

- (1) Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged?
- (2) Did the respondent have reasonable grounds for the belief in the misconduct alleged?

- (3) Was the belief in misconduct arrived at having carried out as much investigation into the matter as was reasonable in all the circumstances of the case?
- (4) Was the procedure within the band of reasonable responses?
- (5) Was the sanction within the band of reasonable responses?

3. Specifically, Mr Dalton and his representative allege that the claimant has suffered disparity of treatment such that the Tribunal should find his dismissal unfair. Mr Hurst's argument on behalf of Mr Dalton was that the claimant was given a disproportionate sanction when compared with all of his other colleagues, who were also found guilty of similar acts of misconduct, but none of whom were dismissed.

4. Mr Hurst told the Tribunal that if the claimant is guilty of gross misconduct then it should be the case that all of his colleagues are also guilty of gross misconduct, and that furthermore the claimant ought not to be held accountable for any actions that may amount to misconduct because of the poor management that he received from the respondent.

5. Mr Hurst, on Mr Dalton's behalf, also made submissions to the Tribunal, particularly in closing, of complaints made to the Information Commissioner's Office, which, according to Mr Hurst, were upheld by the Information Commissioner's Office, that the respondent had failed to disclose certain information in relation to this case within the relevant timescale proscribed.

6. The Tribunal does not have jurisdiction to determine issues that fall within the remit of the Information Commissioner's Office. Where Mr Dalton's complaint overlaps with the respondent's duty of disclosure of documents or information relevant to the issues in these proceedings, it was open to Mr Dalton or Mr Hurst to apply to the Tribunal for an order for disclosure and they did not do so during these proceedings.

7. It was Mr Dalton's case that there had been a failure properly to investigate and provide information relating to two of the claimant's colleagues, Mark Lynn and Charlie Owen. The claimant will say that Mr Eccleston, the investigating officer, did not look at all of the relevant interviews provided by the audit investigators, in particular those of Mr Lynn and Mr Owen.

8. It is the respondent's case that the full interview notes for Mr Lynn and Mr Owen are not directly relevant to Mr Dalton's investigation and dismissal, and in any event the contents of their interviews were summarised to an appropriate extent in the audit report.

9. A further issue was raised by the claimant during the course of the hearing, which was not in the agreed List of Issues nor in the claimant's claim form. This was that the act of whistle-blowing against Mr Dalton that started the investigation that eventually led to his dismissal was done as a malicious act on the part of the whistle-blower, with the intent to frame and discredit Mr Dalton in order to take Mr Dalton's job. It was Mr Dalton's evidence in response to questions from the Judge that the whistle-blower was subsequently appointed to his role as Duty Manager/Assistant

Facilities Manager, and that this had been the whistle-blower's intention when he or she made the initial whistle-blowing complaint.

10. During the course of cross examination of Ms Cullen, the respondent's senior auditor, Mr Dalton's representative, Mr Hurst, sought to introduce this issue for the first time and put to Ms Cullen that there was an ACAS guide for whistle-blowers which required the whistle-blower to write a report and give it to the "accused", in this case Mr Dalton.

11. When further information was requested from Mr Hurst he said that paperwork relating to the whistle-blowing issue was not filed or scanned in and that "it may well be in someone's interest to change that information", and that the question needed to be asked of who had taken Mr Dalton's job after his dismissal. Mr Hurst's put it to Ms Cullen that the claimant was a victim of being set up by the whistle-blower.

12. Judge Barker noted that this was the first time that she was aware that the respondent had been told that this was an issue that the claimant wished the Tribunal to decide. Furthermore, the allegation, if the Tribunal were to be able to consider it, needed evidence to support it as opposed to assumptions or speculations. There was no evidence before the Tribunal that would support this allegation.

13. Judge Barker cautioned Mr Hurst against disclosing the identity of the whistle-blower in these proceedings. The identity of the whistle-blower had not been formally disclosed or made known during the audit process or the investigation process. A degree of anonymity and protection should be afforded to whistle-blowers to prevent them from suffering adverse consequences of their disclosure and to allow others to have the confidence to come forward. It was acknowledged that it is quite possible that many of those in the hearing room knew the identity of the whistle-blower, but that did not mean that it should be disclosed to the Tribunal to become a matter of public record without good reason.

14. Taking all of those issues into account, Mr Hurst was asked by the Tribunal not to pursue his line of questioning of Ms Cullen in relation to the whistle-blower's motivation and identity. However, the Judge told Mr Hurst that in the event that there was evidence that he wished the Tribunal to take into account in relation to this issue he could make an application to introduce it so that the issue could be properly considered. No application was made by Mr Hurst on Mr Dalton's behalf.

15. There were several further issues raised by way of complaint by Mr Dalton and Mr Hurst against the respondent which were not directly relevant to the issues agreed and set out above. The role of the Tribunal is not to resolve all of the conflicts between the respondent and the claimant, but just those that were relevant to the issues which were for the Tribunal to determine, therefore where this judgment is silent on some of the conflicts of evidence and disagreements between the parties, it is for that reason and not because those issues have been ignored or overlooked.

16. The Tribunal heard evidence from Mr Dalton on his own behalf and from Ms Cullen, who carried out the initial audit with Ms Hawkins, Mr Eccleston who conducted the investigation, Ms Goodwin who took the decision to dismiss Mr Dalton, and Mr Schofield the respondent's managing director, who conducted the appeal against dismissal.

Findings of Fact

Background

17. The claimant transferred to the respondent under the terms of a TUPE transfer (Transfer of Undertakings (Protection of Employment) Regulations 2006) in 2016, having commenced his employment with Knowsley Metropolitan Borough Council on 1 August 1999.

18. Mr Dalton was employed for 18 years, 13 of which had been in either a supervisory or a managerial position. He was promoted to Duty Manager on 1 July 2013, which post was described as “Assistant Facility Manager” (“AFM”) after the TUPE transfer to Volair. It is the respondent’s evidence, which the Tribunal accepts, that although the post had changed its name, no material changes were made to the job description or person specification. At the time of the events to which these proceedings relate, he was the AFM at the Knowsley Leisure and Culture Park (“KLCP”) in Huyton, Merseyside.

19. Mr Dalton, as well as being employed as an AFM at the KLCP, was also employed on a casual basis to provide cover at the Prescott leisure centre. Mr Dalton was not obliged under the terms of his contract to do so, but said that he did so as “a favour” to Shirley Buxton, who is the manager of Prescott.

20. Mr Dalton also worked overtime on events that took place at the KLCP from time to time, such as swimming galas and Taekwondo tournaments. The respondent described his role in relation to these events as a “Casual Events Assistant” and Mr Dalton himself describes this role as “Assistant Events Manager”. It was Mr Dalton’s evidence that he was put under pressure to work this overtime by Jay Jones, his manager. It was the respondent’s case that any overtime that Mr Dalton agreed to work, both at the KLCP or at Prescott, was entirely voluntary. On the balance of probabilities I find that Mr Dalton’s overtime at Prescott was entirely voluntary. It cannot be said, taking his evidence that he did the hours as a “favour” to the manager there into account, that this was obligatory or the result of any pressure on him.

21. In relation to the overtime for events at KLCP, although there may have been occasions when some degree of pressure was brought to bear on him to help out, in answer to a question as to what would have happened had he refused to do such overtime, Mr Dalton’s response was “*I suppose they would have found somebody else to do it*”, although he said that he was the only person trained to deal with events. I do not accept Mr Dalton’s evidence in that regard. If he was the only one trained to cover such events, it would have been impossible for the respondent to find somebody else to cover his overtime and so I find on the balance of probabilities that Mr Dalton was not obliged, or put under such pressure that he could not refuse to work overtime, over and above his AFM role.

22. The evidence before the Tribunal was that the management team at KLCP was in a state of flux at the time of the events that led to Mr Dalton’s dismissal. Mr Dalton was the most experienced AFM at KLCP, having been in post since 2013. Although there were two other AFM roles at KLCP, Adam Buxton was an AFM but had only been in post for 12 months. Chloe Foster was “acting up” temporarily as AFM and had been for five weeks at the time of the act of whistleblowing. Joe

Fowler, Charlie Owen and Mark Lynn on occasion covered the AFM's duties, but were themselves shift leaders or lifeguards.

23. The parties agree that, prior to the start of November 2016, only the claimant had been given a copy of the respondent's financial procedures while in post as AFM. Adam Buxton had not been trained in the twelve months that he had been in post, and had not been given a copy of the financial procedures. For this failure, Jay Jones received a six month verbal warning at the time of Mr Dalton's dismissal. Adam Buxton, despite having received no training and having only been in post for twelve months, received a twelve-month written warning at the time of Mr Dalton's dismissal for a failure to act responsibly and in accordance with proper procedures.

24. Mr Dalton accepted that he had been given a copy of the procedures in 2013, prior to the TUPE transfer, and had sat and passed a test on those procedures. Although at certain points in his evidence Mr Dalton suggested that he had not had the opportunity to read the Volair set of financial procedure regulations handed out in November 2016, he accepted under cross examination that they were identical to those handed out in 2013, and at other points in his evidence he accepted that he understood and was familiar with the respondent's financial procedure regulations at the time to which these proceedings relate. Therefore, on balance, I find that at the material time in these proceedings, October 2016, Mr Dalton was trained on and familiar with the respondent's financial procedure rules and regulations.

25. Mr Dalton's case to the Tribunal was that he was generally under pressure at work and that Jay Jones did not support him adequately. Mr Jones was not before the Tribunal to give evidence or answer questions. Mr Jones' evidence to the respondent's investigation was that he had asked Mr Dalton if he needed any help with his workload, including his overtime workload on events and that Mr Dalton had refused. Mr Jones told the respondent's investigation that he generally made himself available as they shared an office.

26. Mr Dalton's evidence to the Tribunal was that neither of these statements by Mr Jones was correct. Mr Jones was given a six-month written warning, as stated above. However, Mr Dalton could reasonably have been expected to provide some on the job training for the inexperienced and/or temporary members of staff acting up as Assistant Facilities Manager with him at KLCP.

27. Following the eventual issuing of the respondent's financial regulations to all supervisory and managerial staff at KLCP at the beginning of November 2016, the Managing Director of the respondent, Kevin Schofield, received a whistle-blowing allegation on 2 November 2016. The email, which was anonymous, stated:

"Hi Mark, I think you need to know that there have been some instances of staff not following procedures at KLCP. The Duty Manager has been forging other staff signatures and not doing the vending right. I don't think this is being dealt with, so wanted you to know."

Audit Investigation

28. There then followed an investigation by Knowsley Council's internal audit team into this allegation and more generally into the management of vending machines, stock, cash and floats, on behalf of the respondent. The internal audit

team attended KLCP to review its processes and procedures for vending and to also review paperwork. This investigation included, on 16 November 2016, the claimant and five colleagues who worked with money, being Adam Buxton, Chloe Foster, Joe Fowler, Charlie Owen and Mark Lynn, being brought into a room at 9.00am, told to turn off their mobile telephones and wait to be interviewed by the audit team. Mr Dalton was interviewed last.

29. Mr Dalton's evidence to the Tribunal was that he was under a state of extreme stress and confusion during the audit interview, due partly to having to wait for six hours for the interview to take place at a time when his mother was ill. He alleges that he was also left without adequate food during this wait. However, he accepts that he did not raise the fact of his mother's illness or his stress and confusion to either the audit team or anyone else at KLCP, Volair or Knowsley Council during or immediately after the investigation.

30. Mr Dalton's conversation with the audit investigators, Ms Cullen and Ms Hawkins, led them to conclude that Mr Dalton did not take his responsibility seriously nor attempt to raise issues with senior management in any formal way, as the following exchange shows, taken from the transcript of Mr Dalton's audit interview on 16 November 2016:

JD: We just try and get things done as quickly as possible.

NH: Has anyone ever brought it up with the management that you haven't got enough time before the building opens to the public to do the jobs you should be doing?

JD: We have had a conversation but...

CC: Who is 'we'?

JD: Well we always speak about it together, you know, as I say...

NH: When you say 'we' do you mean all the Assistant Facility Managers?

JD: Yeah.

CC: You don't raise it with senior management?

JD: No.

CC: Why not if you know it's an issue?

JD: Nothing will change will it? I feel you know nothing will change. It's basically just try and like erm sort it out, manage it sort of thing.

CC: You're breaching procedure rules though aren't you?

JD: Of course, yeah."

31. Following the interviews and the investigation, Mr Dalton was suspended on 18 November 2016 by a letter from Kevin Schofield, Managing Director, on the grounds of "financial irregularities".

32. Mr Dalton was then invited to an investigatory meeting on 19 January 2017. The claimant was interviewed by Eddie Eccleston, the investigating officer. Mr Dalton was accompanied by his union representative, Kenny Parry, who was an officer of Unite union. Mr Eccleston also interviewed Joseph Fowler, Charlie Owen, Mark Lynn, Adam Buxton, Chloe Foster, Lucy McLelland who was the receptionist at KLCP, and Jay Jones.

33. Mr Eccleston's investigation interviews established a number of relevant issues in relation to Mr Dalton, namely his knowledge of financial procedures, his understanding of stocktaking documentation, the events relating to vending machines on 3rd and 4th and 29th October 2016 and the vending sheets on 5th and 6th and 23rd October 2016 and 1st November 2016, all events where the auditors had found significant errors. Mr Eccleston also discussed float issuing and signatures with Mr Dalton.

34. Mr Eccleston concluded in his audit report that the following events had taken place in relation to Mr Dalton's actions:

- a. He had a "*full and comprehensive understanding of the vending and float checking/allocation process*";
- b. The audit investigator established that he had a "*full understanding of how to complete the relevant documentation and was competent at completing it as required. This contradicts his actions and behaviour around the vending process*";
- c. He did not adhere to the financial procedure rules in place, particularly those for the vending and float allocation processes;
- d. He had a copy of the financial procedures and undertook the test of understanding in April 2013 and scored well in it;
- e. During the audit interview he openly admitted that he cut corners and counted vending income and floats on his own in breach of financial procedure rules;
- f. He failed to complete the correct manual stock taking documentation on 30 September and 1 October 2016 and offered no reasonable explanation for this;
- g. He failed to complete the correct documentation in relation to the vending income reconciliation process and failed to cash up the vending income on a daily basis, failing in particular to do this on 3rd and 4th October 2016;
- h. He failed to accurately transfer the manual stock data to the electronic reconciliation sheets on 5th October 2016, failing to record closing stock and write-offs, blaming "*human error*" for this;
- i. He recorded inaccurate figures for loose vending stock and cash reconciled on 8th, 9th and 10th October 2016. His explanation for this was that he could have been "*rushing*";

- j. He undertook both the vending reconciliation process and the vending income reconciliation process on his own on 23rd October 2016, in breach of financial procedure rules, and failed to process the income through the till;
- k. He counted the vending income on his own in the Facility Manager's office in breach of the financial procedure rules;
- l. He undertook the vending reconciliation process alone on 29th October 2016, in breach of the financial procedure rules;
- m. He failed to undertake the vending reconciliation process at all on 30th October 2016, instead leaving a note to excuse this which stated "*Did not count machine, no money in it*". The respondent alleges that CCTV footage shows that Mr Dalton did not check the machine. It is further alleged that he asked Joe Fowler, his shift leader to sign paperwork about this in retrospect, in breach of the financial procedure rules;
- n. He counted the float on his own on 29th October 2016, in breach of the financial procedure rules, and Joe Fowler alleged that he requested that he retrospectively sign the paperwork for this;
- o. He issued the float to the receptionist on 5th October 2016 without counting it with the receptionist first and failed to issue the relevant paperwork, in breach of the financial procedure rules;
- p. Two members of staff alleged that he issued his login details to them in breach of the rules, with both staff able to inform Mr Ecclestone of Mr Dalton's user name and password;
- q. Mr Ecclestone identified a further number of discrepancies of signatures on paperwork during the investigation, which only occur on paperwork completed while Mr Dalton was on shift. Mr Dalton denied falsifying signatures during the investigation and denies doing so during this hearing.

35. Mr Eccleston also interviewed Mr Jones to establish the level of pressure Mr Dalton was under and the level of support offered to him. Mr Jones denied that Mr Dalton was put under pressure to work overtime and maintained that Mr Dalton had not raised issues of pressure or workload with him. This evidence regarding Mr Dalton not having raised issues of workload with Jay Jones was corroborated by Mr Dalton himself in the original audit interview as described above. After Mr Dalton raised issues of pressure of work and lack of support in the investigation interview, Mr Eccleston referred him to the respondent's Occupational Health Unit for an assessment.

Disciplinary hearing and appeal

36. The respondent took the decision, following the conclusion of the investigation, to invite Mr Dalton to a disciplinary hearing by a letter dated 3rd March 2017. Accompanying the letter was a substantial pack of documents, containing the vast majority of the investigation materials. Mr Hurst and Mr Dalton ask the Tribunal

to note that no transcripts of the interviews with Charlie Owen or Mark Lynn and ask the Tribunal to draw adverse conclusions as to the fairness of the decision to dismiss in the light of these omissions, suggesting to the Tribunal that this demonstrates that the respondent is hiding a sinister and unfair motive. No further evidence to support these allegations was provided to the Tribunal.

37. The respondent's case is that the evidence of Mr Owen and Mr Lynn was not material to the decision to dismiss the claimant, and has been disclosed as part of these proceedings in any event.

38. I find that there is no evidence before me from which I could conclude that the respondent acted with sinister or unfair motive in this regard.

39. Mr Dalton's disciplinary hearing was conducted by Sam Goodwin. Mr Dalton was accompanied by his trade union representative, Mr Parry. Ms Goodwin noted that Mr Dalton agreed with many of the findings of Mr Eccleston's investigation report, which concluded that Mr Dalton had made many errors which were in breach of the financial procedures. Ms Goodwin noted further that Mr Dalton said that these errors were made due to pressure of his workload and for "*quickness*".

40. Ms Goodwin heard evidence from Mr Dalton and also from Mr Jones about Mr Dalton's pressure of work and levels of support. She concluded that as Mr Dalton had not raised issues of work pressure with Mr Jones and as his overtime duties were voluntary and that he was not unsupported or put under undue pressure to work.

41. Ms Goodwin also expressed concern that the audit investigation had uncovered such a large number of errors in the time frame concerned and also that Mr Dalton's answers to the audit team's questions and the investigating officer's questions were at times conflicting, which led her to question his integrity, as did his unwillingness to take accountability for his actions during the hearing. She concluded that these issues were therefore not able to be addressed through additional training and that dismissal was the appropriate sanction.

42. Mr Dalton was informed of his dismissal in a letter dated 27 March 2017. he was summarily dismissed as of that date for gross misconduct. He was given a right of appeal, which he took up. His grounds of appeal were threefold and were set out in a letter to Mr Schofield which was received on 4 April 2017. These were those of;

- a. "*My lack of supervision and support*"
- b. "*I feel I have been singled out in this investigation*" as other team members had also been found to have made mistakes but he had been made the "*scapegoat*" for everyone else involved; and
- c. He had been "*an outstanding employee and have always done the job to the best of my ability*".

43. Mr Dalton's appeal hearing took place on 25 May 2017 and was conducted by a panel which comprised Mr Schofield, Dave Turner, and Clare Kerr for the respondent. Mr Dalton was represented by Mr Hurst. Mr Dalton told the Tribunal that he did not consider that the panel had properly deliberated at the end of the

hearing as he observed the panel members leaving the building very soon after the end of the hearing. Mr Schofield, when this allegation was put to him, told the Tribunal that the panel had deliberated further by telephone the following day.

44. The appeal decision was that the dismissal would be upheld. Mr Schofield told the Tribunal that the panel concluded that they did not have the relevant level of trust in Mr Dalton or that he had the appropriate level of integrity required to carry out the AFM role, in light of the evidence before them. Therefore, the panel concluded that dismissal was the only appropriate outcome.

The Law

45. It is well established law that determination of an unfair dismissal complaint is to be done, in the first instance, in accordance with section 98 of the Employment Rights Act 1996.

46. A respondent employer must show on the balance of probabilities that it had a fair reason for dismissal, and in this case it is accepted by both parties that the respondent's reason is that of misconduct.

47. Where the potentially fair reason given by the employer is misconduct, the Tribunal is to have regard to the guidance set down in the case of ***British Home Stores v Burchell [1978] IRLR 379*** which is:

- a. Did the respondent have an honest belief that the claimant had committed an act of misconduct?
- b. Did the respondent have reasonable grounds for holding that belief?
- c. At the time that that belief was formed on those grounds, had the respondent carried out as much of an investigation as was reasonable in the circumstances?

48. Although the ACAS Code of Practice on Disciplinary and Grievance Procedures is not legally binding, the Tribunal must have regard to it when assessing both the substantive and procedural fairness of an employer's decision to dismiss. However, it is a well-established feature of the law of unfair dismissal that the investigation and procedure need only be within a range of reasonable actions. For example, the investigation need only be a reasonable one and need not be a forensic examination of all possible evidence.

49. The respondent must show that the reason to dismiss was within a range of reasonable responses that a respondent could have taken in that situation. There must be a fair investigation in all the circumstances, and the decision to dismiss must take into account equity and the substantive merits of the case

50. Furthermore, the Tribunal is expressly cautioned against substituting its view for that of the respondent in reaching the decision to dismiss. The Tribunal must not decide the case on the basis of what it considers to be the correct action in the circumstances, but instead must decide whether the respondent's actions, including the decision to dismiss, were the actions of a reasonable employer in the circumstances.

51. Mr Dalton and Mr Hurst raise issues of disparity of treatment, and Mr Dalton complains to the Tribunal that his colleagues who are in a similar situation were treated differently and more leniently than he was.

52. Mr Kenward for the respondent referred the Tribunal to the case of *Paul v East Surrey District Health Authority [1995] IRLR 305 CA*, which considered the case of *Hadjoannou v Coral Casinos Limited [1981] IRLR 352 EAT*. The *Hadjoannou* case, which was followed in the case of *Paul* states that the emphasis in a decision to dismiss taken by a respondent must be on the individual circumstances of each particular employee's case. The courts caution against Tribunals adopting a "tariff" or rule of thumb approach where broadly similar cases are given uniform regular sanctions.

53. The case of *Paul v East Surrey District Health Authority* also refers to the case of *Securicor Limited v Smith [1989] CA*, which established the principle that if an employer distinguishes between two employees in terms of the sanction given, the employer can only be challenged on the difference in treatment between two employees if there was no rational basis for the distinction made.

Application of the law to the facts as found

54. It was agreed by the parties at the outset of the hearing that the respondent dismissed the claimant for the potentially fair reason of misconduct.

55. It is for the respondent to show that the decision-maker had a genuine belief in Mr Dalton's culpability. I find that Ms Goodwin has demonstrated such a genuine belief.

56. The question for the Tribunal to consider next is whether such a genuine belief was reasonably held. Was that belief held on reasonable grounds as a result of an investigation that was a reasonable one in the circumstances?

57. I find that the respondent's investigation was a reasonable one in the circumstances. Mr Dalton admitted to, and did not challenge, many of the findings of fact of the audit investigation and the disciplinary investigation. He admitted to or did not challenge all of the errors and breaches of procedure found and listed in Mr Eccleston's report, save for the issues of the password and forged signatures. Mr Hurst and Mr Dalton assert that the decision to restrict the scope of the investigation to the month of October is unreasonable, as it does not allow for the possibility that Mr Dalton's errors were a "blip". However, I find that limiting the investigation to one month is not unreasonable, given the number and scale of the errors uncovered and Mr Dalton's open acceptance of his failure to comply with correct practice and procedure..

58. The Tribunal notes that Mr Hurst wished an inference to be drawn from the respondent's failure to produce transcripts of the recorded interviews with Mr Owen and Mr Lynn. Mr Hurst and Mr Dalton were unable to provide any supporting evidence for these allegations. I find on the balance of probabilities that the failure to produce these transcripts does not affect the fairness of the respondent's procedure or the decision to dismiss. Mr Owen and Mr Lynn's evidence was not a material part of the investigation, given the number and scale of Mr Dalton's errors and his admissions that he made those errors.

59. I find that on balance, the respondent has carried out a thorough investigation which was reasonable in the circumstances of the case. The audit investigation was extensive and interviewed all relevant members of staff. The investigation team assessed relevant documents and CCTV footage. Relevant information from this investigation was then made available to Mr Ecclestone and Mr Dalton.

60. I find further that, on the balance of probabilities, the procedure carried out was reasonable. As well as making relevant documents and information available to Mr Dalton and his representative, they were given appropriate notice of meetings which were properly conducted, and were given the opportunity to question other members of staff. Appropriate reasons were given at each stage by the respondent for decisions taken. Mr Dalton gave evidence to the Tribunal that, in effect, his answers to the audit investigation interview should be viewed in the context of him being under a great deal of stress at the time and that they are therefore unreliable. I accept that being interviewed by the audit team would have been stressful. Many employees find such situations extremely stressful by their very nature. However, I find that the answers given by him during the audit interview were truthful. Mr Dalton was readily prepared to admit that he had not followed the correct procedures in many cases. Had he not been stressed, I do not accept that his answers would have been any different, in that I do not find that they would have been less honest or less truthful.

61. Was Ms Goodwin's belief and Mr Schofield and the rest of the appeal panel's belief that dismissal was an appropriate sanction a reasonably held belief, on the basis of the investigation carried out? I find that it was.

62. Mr Dalton's evidence to the Tribunal was, in effect, that it was not his responsibility to ensure that proper procedures were being followed. This was also, in effect, his evidence during the audit investigation and disciplinary process. His evidence suggested by implication was that it was solely Mr Jones' responsibility and that Mr Jones did not fulfil that responsibility.

63. The Tribunal accepts that Mr Jones was responsible, and also accepts that Mr Jones did not do enough to train those new in post, Adam Buxton in particular, who was in post for 12 months without receiving training from Mr Jones.

64. Furthermore, on the balance of probabilities, I find that while Mr Dalton did not raise the issue of his workload with Mr Jones in any material or significant way, and although Mr Dalton continued regularly to accept overtime work both at KLCP and at Prescott, Mr Dalton would have been working in an environment where those around him were inexperienced and unfamiliar with the respondent's financial procedures and that this would have placed him under some additional day to day pressure.

65. However, Mr Dalton was the most experienced AFM at KLCP and had been in the AFM post since 2013. I accept the respondent's evidence that he was paid at the top of his pay scale to reflect his seniority and experience. I find that it was expected by the respondent that Mr Dalton would act in a way that was commensurate with this experience and seniority when leading a junior and inexperienced team. The Tribunal accepts that this would have placed an additional workload on Mr Dalton, had he taken this "leadership" and training role seriously and accepted the responsibility that it was assumed by the respondent that he would accept.

66. However, Mr Dalton's ET1 claim form states:

"This lax attitude was allowed throughout the centre and all duty managers and deputies were allowed to contravene their daily duties which were evident in other employee statements made during internal investigative hearing."

67. Although Mr Dalton asserts that he and others ("all duty managers and their deputies") were "allowed to contravene their daily duties", in fact, the responsibility lay with him as a duty manager, even in somewhat disrupted staffing circumstances at KLCP, either to carry out the training on the job of those more inexperienced than him or in the alternative to raise the issue formally with Mr Jones, or even with Mr Schofield, to ensure that proper procedures were being followed. Mr Dalton did neither of those things.

68. In fact, Mr Dalton appeared to take the situation with his AFM colleagues as justification for "cutting corners", "making mistakes", "rushing" and generally ceasing to ensure that he or those he worked with followed correct financial and vending procedures, such that of all members of staff investigated, he made the largest number of breaches of the rules and the most serious breaches, in spite of his training and experience.

69. Mr Schofield's evidence to the Tribunal accorded with this, in that he states

"...throughout his appeal, Joe Dalton offered no apologies or explanation for the numerous irregularities. Furthermore he never appeared to acknowledge his own responsibilities in all of this as a very seasoned and senior Assistant Facilities Manager; it was always someone else's fault or it was because he claimed that he was over-worked"

70. The Tribunal accepts Mr Schofield's evidence that, by contrast, Adam Buxton was apologetic and contrite when presented with his failings and accepted the need to be more thorough and compliant with procedures in future.

71. I find that the difference in attitude of the two employees is a factor in their different treatment and in the different sanctions applied to each of them. In Mr Dalton's case, his failure to acknowledge that he was responsible for his own actions in failing to comply with proper procedures meant that the respondent had lost trust and confidence in him as an employee. In addition, the respondent also took their different levels of training and experience into account in differentiating between them, and that is, I find, reasonable in the circumstances.

72. I also find that the respondent has acted rationally and reasonably in relation to the other members of staff at KLCP and the sanctions or lack of sanctions applied to them. Mr Jones received a six month verbal warning, for failing to ensure proper training for Mr Buxton in the twelve months he had been in post. Other members of staff were not sanctioned at all. They were significantly more junior than Mr Dalton and Mr Buxton and/or had only been in post for a very short period of time. All other members of staff investigated had made significantly fewer errors than Mr Dalton. Therefore, in conclusion there is a clear and rational basis for the difference in treatment between Mr Dalton and his colleagues.

73. Finally, was dismissal a reasonable sanction to apply in the circumstances of the claimant's case? I find that it was. The claimant initially offered no explanation for his failure to carry out his tasks properly, other than that he was busy and that everyone else did the same thing. The respondent concluded, reasonably, that Mr Dalton was not particularly concerned by having to admit to such failings, maintaining that they were neither his fault nor his responsibility.

74. As the disciplinary process went on, Mr Dalton began to offer mitigating circumstances for the respondent to consider, such as that he was under stress and was not supported by Jay Jones, forced to work overtime and so on. However, Ms Goodwin and Mr Schofield concluded that there was not sufficient evidence of this to accept that these issues were as significant as Mr Dalton began to maintain, and they did not accept that they were significant enough to excuse the number and significance of the errors found by the audit team.

75. I find that the decision to dismiss Mr Dalton for gross misconduct, and thereby to treat him differently from his colleagues, was based on two appropriate and rational reasons; firstly his seniority, training and experience as set out above, and secondly the far larger number of errors made by him, that experience and training notwithstanding, than made by his colleagues. The dismissal was therefore for a fair reason and within the range of reasonable responses.

Employment Judge Barker

Date 5th February 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
12 February 2018

FOR THE TRIBUNAL OFFICE