



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr David Erwin

**Respondent:** Inglemere Metals (Blackpool) Limited

**Heard at:** Manchester (in person)

**On:** 20<sup>th</sup> and 21<sup>st</sup> December  
2022

**Before:** Employment Judge L Cowen

### REPRESENTATION:

**Claimant:** Mr Harrison (friend)

**Respondent:** Ms Barry (counsel)

## JUDGMENT

1. The judgment of the Tribunal is that the Claimant was not unfairly dismissed for gross misconduct and the claim is dismissed.
2. The judgment of the Tribunal is that the claimant was not wrongfully dismissed and the claim is dismissed.
3. The judgment of the Tribunal is that the Respondent did not make an unlawful deduction from wages in not paying him a bonus in December 2020, and the claim is dismissed.

## REASONS

### Introduction

1. The Claimant, Mr Erwin, was employed by the Respondent as a Breakers Yard Manager until his dismissal on 5<sup>th</sup> February 2021.
2. The Claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996. The Respondent contests the claim. The Respondent submits that the Claimant was fairly dismissed for gross misconduct. The Claimant alternatively claims that he was wrongfully dismissed, a claim which the Respondent also denies. The Claimant also claims that he was entitled to a bonus payment in December 2020, and that in not paying this bonus, the Respondent made an unlawful deduction from his wages. The Respondent denies that the Claimant was entitled to a bonus payment.

3. The Claimant was represented by Mr Harrison and gave sworn evidence. He called sworn evidence from Mr Gary Cloherty (previous employee (crane driver) of the Respondent), Ms Courtney Graham (previous employee (administrator) of the Respondent) and Mr Anthony Mark Graham (previous employee (site manager) of the Respondent).

4. The Respondent was represented by Ms Barry, counsel, and called sworn evidence from Mr Iain Swinson (Finance Director of the Respondent), Mr Andrew Dixon (Director of the Respondent) and Mr Jonathan Howarth (Managing Director of the Respondent) on behalf of the Respondent. The Respondent also relied upon a witness statement from Mr Duncan Moseley, who was not able to attend court.

5. I considered the documents from an agreed 279-page bundle of documents which the parties introduced in evidence. I also considered maps produced by the Claimant.

6. Judgment was reserved at the conclusion of the hearing on 21<sup>st</sup> December 2022.

### **Preliminary matters**

7. On 20<sup>th</sup> December 2022, the list of issues contained in the bundle was discussed. It was confirmed that although not included in the list of issues, the claimant also claimed for wrongful dismissal, which he would rely upon should his claim for unfair dismissal fail. Paragraph 4 (B) of the list of issues also appeared to raise a potential claim under the TUPE Regulations.

8. This had not been discussed at the Preliminary Hearing in relation to this case which was held on 31<sup>st</sup> August 2021. After discussion, it was confirmed that the Claimant was not seeking to claim any breach of the TUPE Regulations, the issue was rather whether any change to the Claimant's terms of employment had been made which affected the fairness of his dismissal. This issue arose again during the hearing, and was once again confirmed to relate solely to the fairness of the Claimant's dismissal.

9. The Claimant confirmed during the course of the hearing that he did not pursue his claim for holiday pay. In any event, the documents adduced demonstrated that holiday pay had been paid upon termination of the Claimant's employment.

10. The Claimant did pursue his claim for unauthorised deduction from wages in the form of non-payment of an annual bonus in December 2020.

11. The Claimant also sought to rely on the statement of Mr Duncan Moseley. Claimant objected to this. The Claimant was permitted to rely on the statement, but it would be given limited weight, as it was hearsay evidence that had not been tested through questioning during the hearing.

### **Issues for the tribunal to decide**

12. It is accepted that the claim was brought in time.

13. It is accepted that the Claimant was an employee of the Respondent and that he had the relevant qualifying length of service. It is accepted that he was dismissed

on 5<sup>th</sup> February 2021. The following issues relating to fairness were identified for the Tribunal to determine:

- i) What was the reason or principal reason for the Claimant's dismissal? The Respondent submitted that they had dismissed the Claimant on grounds of gross misconduct. The Claimant claims there was no such reason for dismissal, and the real reason for dismissal was to avoid making the Claimant redundant.
- ii) If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the Claimant. This necessitates consideration of the following issues:
  - (i) Did the employer have a genuine belief in the employee's guilt?
  - (ii) Did the employer hold this genuine belief on reasonable grounds?
  - (iii) Was the decision to dismiss procedurally fair? This entails consideration of the following issues:
    - a) Was the procedure flawed?
    - b) Did the Respondent investigate the matters complained of fully, considering its size and administrative resources?
    - c) Was there bias on the part of the dismissing officer and the appeal officer?
    - d) Was the decision to dismiss within the band or range of reasonable responses open to an employer in the circumstances?

#### *Wrongful dismissal*

- iii) Can the Respondent show that the Claimant was guilty of gross misconduct which entitled it to terminate without notice?

#### *Unauthorised deduction from wages*

- i) Did the claimant have a contractual entitlement to a bonus payment in December 2020, and if so, how much?

### **The Findings of Fact Relevant to the Issues**

#### *The Claimant's employment*

14. The Claimant, Mr Erwin, had been employed as a Breakers Yard Manager by the Respondent, and its predecessor company (Inglemere Metals Limited), since 19<sup>th</sup> January 2004, and was dismissed on 5<sup>th</sup> February 2021. Inglemere Metals Limited was acquired by the Respondent in March 2016. All members of staff were retained by the Respondent. The Respondent is a wholly owned subsidiary company of Ashvin Metals Ltd. The Respondent's business is car dismantling, and it operates as All Car Parts ("ACP") for the retail sales of recovered car parts. The Claimant was a manager at ACP. The Respondent employs 9 employees, and trades from a site in Blackpool.

15. The Claimant's service shows that he was a well-regarded and trusted employee. He had not had any sanctions, either informal or formal, in relation to his work in the seventeen years prior to his dismissal. He was recognised to have knowledge and skills that were of considerable use and value to the Respondent.

16. Following concerns regarding declining levels of profitability, the Respondent employed a consultant, Mr Lee Jones, in October 2020 to review the business operations. There is no dispute that the appointment of Mr Jones brought changes to the running of the business. The Claimant accepted in his evidence that he did not agree with the changes Mr Jones introduced, or with his style of communication. Mr Howarth said in his evidence that the Claimant did not want to be on board with everything the company was trying to do and did not readily accept the changes that the Respondent was seeking to make.

*The circumstances of the Claimant's dismissal*

17. On 8<sup>th</sup> December 2020, the Claimant was informed that he was suspended on full pay with immediate effect. He was informed of this decision by Mr Jones. Mr Swinson gave evidence to the Tribunal regarding the nature of Mr Jones' role at the Respondent, namely, that he was to be the Directors' "eyes and ears" on site.

18. The Claimant was notified of the reasons for his suspension in a letter dated 8<sup>th</sup> December 2020, which he received on 14<sup>th</sup> December 2020. The letter stated that the Claimant had been suspended pending an investigation into allegations of gross misconduct. The following allegations had been made:

- a) The Claimant had, on 2<sup>nd</sup> December 2020, allowed a customer (WB) to take engines from the Respondent's premises without WB paying his outstanding account in full, after the Claimant had been expressly instructed that payment was required from WB before the collection of any parts;
- b) That at least three of the engines sold to the customer were at significantly below comparable on-line sale prices;
- c) That the Claimant had, on 2<sup>nd</sup> December 2020, contrary to an express instruction that no tyres were to be removed from site, sent a number of tyres to a customer, without permission;
- d) That the Claimant had been allowing customers 12 months' credit, which was said to be contrary to the Respondent company's terms.

19. The Claimant was notified that an investigation would be carried out, and he would be written to in order to confirm whether a disciplinary hearing was required.

20. In a letter dated 21<sup>st</sup> December 2020, the Claimant was invited to attend a "Disciplinary Hearing" on 7<sup>th</sup> January 2021. The Claimant was informed that the hearing was to consider allegations of gross misconduct, namely that he had acted contrary to management instructions on 4 occasions. He was advised that the hearing would be held in accordance with the disciplinary procedure, and it was stated that a copy of this procedure had been sent to him with the Respondent's letter of 8<sup>th</sup> December.

21. The Claimant acknowledged this letter in a letter dated 28<sup>th</sup> December 2020, in which he stated that the disciplinary documents referred to in the letter of 21<sup>st</sup> December had not been sent to him in the letter of 8<sup>th</sup> December 2020. Mr Swinson replied to this letter in an email dated 6<sup>th</sup> January 2021. In this email, Mr Swinson accepted that the 3 pages from the disciplinary procedure from the latest staff handbook had been omitted from the letter of 8<sup>th</sup> December, but stated that the

Claimant had now acknowledged receipt of those three pages. Mr Swinson also summarised the contents of those three pages in his email.

22. The Claimant also sought to be accompanied by his brother at the meeting in January 2021, but this was not permitted, as the disciplinary policy allowed representation by a work colleague or a trade union representative. The Claimant's brother was not at that time an employee of the company and documentation showing his union accreditation had not been produced.

23. The disciplinary hearing took place on 12<sup>th</sup> January 2021. The notes of the meeting record that the meeting was attended by Mr Howarth and Mr Swinson. The Claimant was accompanied by Mr Mick Daniels (union representative). The notes record that one of the issues raised at the meeting was which handbook was to be used; one from 2013, which the Claimant had and had signed, or one produced in 2020, which the Claimant said he had not been sent.

24. I heard evidence as to whether the 2020 handbook had been distributed to staff. Mr Swinson believed that he had instructed Ms Courtney Graham to distribute the handbook to staff. Ms Graham gave evidence that she had not done this. I found Ms Graham to be credible, and judged her the best placed person to recollect whether she had distributed the handbook. I accept that prior to his suspension, the Claimant had not been given the 2020 disciplinary policy.

25. In any event, the notes of the meeting of 12<sup>th</sup> January 2021 record that Mr Swinson stated that the Claimant had now received copies of the relevant parts of the handbook relating to disciplinary meetings. In his evidence, the Claimant accepted that he has received a two page extract sometime between 14<sup>th</sup> and 28<sup>th</sup> December 2020. I have found that he did receive the relevant extracts of the updated policy before the meeting on 12<sup>th</sup> January 2021.

26. At the meeting on 12<sup>th</sup> January 2021, Mr Daniels raised two issues in respect of the difference between the 2013 handbook and the 2020 handbook. He stated that the 2013 handbook only allowed suspension by someone more senior in the organisation, and that the Claimant had the right to challenge suspension. Mr Swinson said in the meeting that Lee Jones was acting with the authority of the directors and that the business was so small that it would not be practical for the suspension to be by someone more senior in the company.

27. I have been provided with two statements prepared by Mr Jones. These statements are both undated. They contain the detail of the allegations that had been made against the Claimant. There is reference to this statement in the minutes of the meeting of 12<sup>th</sup> January 2021.

28. During the meeting, the Claimant denied that he had been instructed that he was not to allow WB to take engines away from the site without settling his account; he disputed that he had sold engines at less than market value; he denied that he had been instructed not to sell tyres to customers, and he denied that he had been instructed not to give extended terms of credit to customers. The meeting was adjourned to enable further investigation to be carried out.

29. In a letter dated 25<sup>th</sup> January 2021, the Claimant was notified that the meeting was to reconvene on 29<sup>th</sup> January 2021. The letter described the further investigation that had been carried out since the initial meeting, and provided copies of further statements that had been obtained. The meeting in fact reconvened on 5<sup>th</sup> February

2021. The meeting was attended by Mr Howarth and Mr Swinson. The Claimant attended, and was again represented by Mr Daniels.

30. The meeting considered statements that had been provided by Mr Aaron Whitewood (site manager), Mr Todd Noble (dismantler), Mr Robin Mulholland (depolluter), Mr Gary Cloherty (crane driver) and Mr Joshua Erwin (yard operative, and the Claimant's son).

31. In his first statement, dated 20<sup>th</sup> January 2021, Mr Whitewood described attending a meeting of Ashvin Metals on 10<sup>th</sup> November 2020. He stated that the Claimant attended this meeting. In his statement, Mr Whitewood does not refer to an express instruction being given not to sell tyres in this meeting. In his second statement, undated, Mr Whitewood describes himself and Mr Jones noticing WB leaving the site on 2<sup>nd</sup> December 2020, and being concerned that he had not paid his bill.

32. Mr Whitewood states that the Claimant accepted that he had let WB leave the site, because he had forgotten the instruction not to allow a customer to leave the site without payment, and the Claimant said he thought WB had paid his bill. Mr Whitewood also described an occasion where he was aware that a customer was taking tyres from the site after speaking to the Claimant, and that this was contrary to the instruction he (Mr Whitewood) had given staff regarding no tyres leaving the site.

33. In his statement, dated 20<sup>th</sup> January 2021, Mr Noble describes how WB had taken engines from the site without paying, and that the Claimant told Mr Noble that he had let WB do this, even though he had been told that the customer was not allowed to take anything, and that what had happened was the Claimant's fault and nothing to do with Mr Noble. Mr Noble also described a longstanding customer buying tyres from the site, and paying the Claimant for them.

34. In his statement dated 20<sup>th</sup> January 2021, Mr Mulholland describes changes that were brought in by Mr Jones regarding the sale of tyres. He states that Mr Jones was working on a deal for all tyres to be sold in bulk, and that he recalled a customer buying tyres, which Mr Mulholland assumed he had been given permission to do.

35. In his statement dated 20<sup>th</sup> January 2021, Mr Cloherty describes Mr Jones and Mr Whitewood talking to staff in the weekly meetings the deal for selling scrap tyres. He says the Claimant was at these meetings and Mr Cloherty assumed he was listening.

36. In his statement (undated), Joshua Erwin states that he had allowed the customer to take tyres away, after the customer had said he had permission to do so. Mr Erwin also stated that Mr Whitewood had not told the staff that they were not to allow this customer to take tyres. Mr Erwin stated that the Claimant was not involved in this incident.

37. At the meeting on 5<sup>th</sup> February, the Claimant was asked for his response to the matters contained in the witness statements described above. It was also confirmed that the allegation in relation to selling car engines at less than market price would not be pursued, as negotiation was subjective and it was acknowledged this allegation could not be proved in full.

38. The minutes indicate that the Claimant did not dispute what had been said by Mr Noble, but that he had said what he had to protect Mr Noble as Mr Noble was

unaware of the requirement for WB to settle his account. In relation to the allegation of selling tyres, the Claimant was asked about a meeting on 10<sup>th</sup> November 2020 when the instruction not to sell tyres was given. The Claimant said he didn't think that applied to the particular customer who had bought tyres on 2<sup>nd</sup> December 2020. The Claimant accepted providing extended credit terms, but thought there was nothing wrong with this.

39. Following the meeting, the Claimant was notified of his summary dismissal in a letter dated 10<sup>th</sup> February 2021. The reasons for his dismissal were that he had:

- a) Disobeyed an express management instruction not to allow the customer WB to take engines from the business premises without him settling his outstanding account;
- b) Disobeyed an express management instruction by selling part worn tyres for cash to another customer;
- c) Acted contrary to the company's best interests, unilaterally and without authority, in granting extended credit terms to a number of customers.

40. In his evidence to the Tribunal, Mr Swinson explained the risks that flowed from the Claimant's conduct. He viewed each of the allegations as capable of amounting to gross misconduct as they raised financial risks, and risks that the business would not comply with its regulatory obligations. Mr Howarth explained in his evidence that he viewed the matters as amounting to gross misconduct because by this stage he had "*lost trust*" in the Claimant.

#### *The appeal against the decision to dismiss*

41. The Claimant appealed against the decision to dismiss him. The hearing in relation to his appeal was heard on 22<sup>nd</sup> March 2021. The appeal hearing was attended by Mr Andrew Dixon and Miss Millership (notetaker). The Claimant attended, once again represented by Mr Daniels. The Claimant submitted that the reason for his dismissal was flawed. He submitted that the procedure followed should have been that from the 2013 disciplinary policy, that he had not been able to be represented by his chosen representative, and that statements had not been taken from all potentially relevant witnesses.

42. Mr Dixon was asked why he had not considered evidence from WB at the appeal hearing. He referred to a purported email from WB in which WB said he wanted no further involvement in the proceedings.

43. Following the hearing, Mr Dixon wrote to the Claimant in a letter dated 9<sup>th</sup> April 2021, confirming that his dismissal had been upheld. The Claimant submitted his claim to the Employment Tribunal on 25<sup>th</sup> May 2021, after following the appropriate ACAS procedure.

44. During the Tribunal hearing, the Respondent adduced evidence of further matters relating to the Claimant's conduct that had come to light following his dismissal. The statement of Mr Mosely is relevant to these issues. I have determined that it is unnecessary for me to reach a conclusion on these matters, given my conclusions below in respect of the Claimant's dismissal.

#### *The Claimant's entitlement to a bonus payment*

45. It is accepted that the Claimant's contract of employment does not set out any contractual entitlement to an annual bonus payment. The Claimant claims that bonus payments were regularly made to employees of the Respondent. I accept the Claimant's evidence that prior to December 2020, he had regularly received a generous bonus. I also accept the evidence of Mr Swinson that bonuses were related to an employee's performance and were at managerial discretion. I also accept the evidence of Mr Graham that bonuses were on occasion withheld; Mr Graham gave the example of one employee's bonus being withheld due to them talking too much.

46. In his evidence at the Tribunal, Mr Howarth stated that he, Mr Dixon and Mr Swinson would determine how bonuses were to be allocated. He thought they would normally meet in early/mid December, but could not precisely remember when the meeting took place in December 2020. When asked about why the Claimant didn't receive a bonus in December 2020 he described concerns that ACP not being profitable, and also recalled that it was clear the Claimant did not support the changes that were being made in the business, describing him as "*against everything we tried to do*". This attitude is consistent with the Claimant's own account of his views regarding the changes brought about to the business. I therefore accept Mr Howarth's account of the background to the Claimant not receiving a bonus in 2020.

## The law

### Unfair dismissal

47. 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.

48. Section 98(4) 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.

49. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **BHS v Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.

50. 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 or range 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, and 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 563).**

### **Wrongful Dismissal**

51. The Respondent will be in breach of the contractual right to notice of termination unless it can show that the Claimant committed a repudiatory breach of the contract of employment, such as committing gross misconduct.

### **Unlawful deduction from wages (unpaid bonus)**

52. Section 27 (1) (a) of the Employment Rights Act 1996 sets out that "wages" in relation to a worker, means "*any sums payable to the worker in connection with his employment*" including "*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*". It is possible for a discretionary bonus scheme to be treated as a contractual bonus, and so fall within the definition of wages in section 27 of the 1996 Act, so that non-payment amounts to a deduction because it is less than the amount properly payable under the contract.

53. The Tribunal must determine whether the employer told the worker that they would receive a bonus payment on certain terms, and then whether those terms were adhered to.

### **The parties' submissions**

54. The Claimant submits that he was not dismissed for misconduct, and that the allegations made did not amount to gross misconduct, either individually or collectively. The Claimant submits that his dismissal was to avoid paying him redundancy pay.

55. The Claimant submits that the investigation carried out by the Respondent was flawed in the following respects:

- i. Mr Jones had no authority to suspend the Claimant;
- ii. The Claimant had been called for a disciplinary hearing before an investigatory interview was carried out with the Claimant;
- iii. The dismissing officer (Mr Howarth) and appeal officer (Mr Dixon) were biased against the Claimant;
- iv. Using the later (2020) disciplinary policy had changed the Claimant's rights and entitlements, and;
- v. Relevant evidence was ignored during the disciplinary process.

56. The Claimant submits that the decision to dismiss was not within the band of reasonable responses available to the Respondent for the following reasons:

- i. The Claimant's seventeen years' of loyal and unblemished service;
- ii. There was no financial or personal gain, and no financial loss to the company, from the Claimant's conduct;

57. The Claimant submits that it was not reasonable to dismiss the Claimant in all of the circumstances when taking into account the above, and that a lower sanction would have been appropriate.

58. The Claimant does not accept that any reduction to reflect the Claimant's contributory fault or the likelihood that he would be dismissed had a fair procedure been followed should be considered.

59. The Claimant submits that bonuses were given every year, and the Claimant was entitled to this payment.

60. The Respondent submitted that there was no unfair dismissal, that the reason for the dismissal was misconduct. The Respondent submitted that the gross misconduct relied upon was the following conduct by the Claimant:

- i) That the Claimant disobeyed an express management instruction in relation to a specific customer by allowing that customer to remove engines from the Respondent business premises without settling his account;
- ii) That the Claimant disobeyed an express management instruction not selling part worn tyres for cash to a specific customer and that;
- iii) The Claimant unilaterally and without authority granted extended credit terms to a number of customers.

61. The Respondent submitted that each of these matters would individually amount to gross misconduct, and certainly taken cumulatively, amounted to gross misconduct. The Respondent submits that they had a genuine belief in the Claimant's misconduct because of the evidence heard from relevant parties.

62. The Respondent submitted that the decision to dismiss was taken by Mr Howarth. The Respondent submitted that the investigation was reasonable, and that dismissal was within the band of reasonable responses to the Claimant's conduct. It was submitted that the reference to the policy that did not exist did not render the whole process unfair and that this issue was rectified on appeal. It was submitted that the Claimant understood what conduct was a cause for concern on the part of the Respondent.

63. It was further submitted that if applicable, reductions in line with **Polkey v AE Dayton Services Ltd [1987] UKHL 8** and contributory fault should be made.

64. The Respondent accepted that entitlement to a bonus could be implied by custom and practice. In this case, bonus payments were related to an individual's performance, and could be withheld for conduct. The Respondent submitted that in this case, the bonus was not withheld due to the Claimant's suspension, but was withheld due to prior conduct.

### **The Tribunal's conclusions**

#### *Reason for dismissal*

65. I am satisfied that the Respondent has shown that the Claimant was dismissed for gross misconduct. I have reached this conclusion from my

consideration of the correspondence sent to the Claimant, the matters that were investigated by the Respondent, and the conclusions of the disciplinary hearings that were undertaken. I have also determined that there is insufficient evidence to conclude that the Claimant's redundancy was being considered at the time of his dismissal.

*Genuine Belief*

66. I have concluded that the Respondent did have a genuine belief in the Claimant's guilt. I have formed this conclusion after considering the evidence that the Respondent considered when reaching the decision to dismiss; namely, the statements of those working at the yard at the relevant time, and the Claimant's own account of his conduct given in the disciplinary hearings held.

*Reasonable grounds*

67. When considering whether the Respondent held this belief on reasonable grounds, and after carrying out a reasonable investigation, I have had regard to the size of the Respondent business and the resources at its disposal. I have concluded that the employer held this belief on reasonable grounds and after carrying out a reasonable investigation.

68. I have considered each allegation made regarding the Claimant's conduct, and what the Respondent found to be proved. In relation to the allegation that the Claimant acted contrary to management instruction in allowing the customer WB to leave without settling his outstanding bill, there was evidence from other members of staff that the Claimant had allowed the customer WB to take engines from the site without settling his outstanding bill, and that the Claimant had been instructed not to allow this to happen. The Claimant himself gave contradictory accounts of his conduct in relation to selling tyres to customer WB at the disciplinary hearings held. In relation to the second allegation, that the Claimant had allowed a customer to buy tyres contrary to the express instruction of management, again there was evidence from other members of staff that this instruction had been given and the Claimant had disregarded it. Finally, in relation to the final allegation, the Claimant accepted that he had unilaterally chosen to extend credit for 12 months to customers. I have therefore found that there were reasonable grounds for the Respondent's belief that the Claimant was guilty of misconduct given the allegations that were found to be proved.

*Reasonable investigation and procedure*

69. I have considered the investigation and disciplinary proceedings as a whole. First, I am satisfied that Mr Jones had the appropriate authority to suspend the Claimant. I have reached this conclusion in light of the clear evidence I heard of Mr Jones' role in the company.

70. I have then gone on to consider the issues raised in relation to the disciplinary process. I recognise that the letter of 21<sup>st</sup> December 2020 invited the Claimant to a "Disciplinary Hearing", which may have suggested a decision had already been reached, but the letter also made clear that the purpose of the hearing was to consider the allegations of gross misconduct that had been made. The letter also advised the Claimant that he should notify Mr Howarth of any witnesses he would wish to call at the hearing, and to provide copies of any further documents he wished

to be considered at the hearing. I conclude that it was apparent that no decisions had yet been reached at the time of the letter of 21<sup>st</sup> December 2020.

71. I am also satisfied that the Respondent carried out an appropriate investigation into the allegations of gross misconduct. The meeting of 12<sup>th</sup> December 2020 was postponed to enable further information to be obtained, which demonstrates that care was taken to consider all relevant information. I do not consider not allowing the Claimant to be represented by his brother is a flaw in the investigation and disciplinary proceedings, as the Claimant was represented by a union representative of his choice. I appreciate the Claimant's desire to be accompanied by his brother, but consider the decision not to allow him to attend to be consistent with the applicable disciplinary procedures.

72. I have noted that the statement from Josh Erwin was considered, and I conclude that a proper approach was taken to this statement. I do not consider the Respondent's approach to taking evidence from WB, or other customers to be unreasonable. I conclude it was reasonable for WB not to be further contacted following receipt of correspondence indicating a reluctance to be involved. I have found that the decision to dismiss was taken by Mr Howarth, after considering all the information available to him. I do not conclude that he or Mr Dixon were biased against the Claimant.

73. I do not conclude that the investigation was rendered unreasonable through the use of the 2020 disciplinary policy. I find that relevant sections of this had been provided to the Claimant, who was represented by a union representative and would have had time to consider and respond to the changes in policy. I do not conclude that the changes in the disciplinary policy were such as to prejudice the fairness of the investigation and disciplinary proceedings as the Claimant was represented at all meetings he attended, and I do not conclude that not being able to appeal against his suspension influenced the outcome of the investigation or disciplinary proceedings.

74. Taking the investigation as a whole, I therefore conclude that the investigation carried out was reasonable, and the Respondent held their belief as to the Claimant's guilt on reasonable grounds.

*Reasonable sanction*

75. I have finally considered whether the penalty imposed, summary dismissal, was within the band of reasonable responses available to the Respondent. In considering this issue, I have reminded myself that it is immaterial how the Tribunal would have handled the events or what decision it would have made, and 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 563**).

76. I have had regard to the Claimant's long, unblemished service with the Respondent. I have considered whether the Respondent acted reasonably in characterising the misconduct as gross misconduct, and also whether the Respondent acted reasonably in going on to decide that dismissal was the appropriate punishment. I am mindful that an assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors (**Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854**).

77. I consider that given the seriousness of the Claimant's conduct in disobeying three kinds of management instruction, with the attendant risks that this caused to the company meant that the Respondent was reasonable to categorise the misconduct as gross misconduct. I accept Mr Swinson and Mr Howarth's accounts of the gravity of the allegations made. I accept Mr Howarth's evidence that he viewed the matters as amounting to gross misconduct because by this stage he had "lost trust" in the Claimant.

78. I find that the decision to dismiss flowed from the seriousness of the misconduct. I have found that given the seriousness of the misconduct, the Respondent was reasonable to dismiss the Claimant despite his long record of unblemished service.

79. I have therefore concluded that the Claimant was not unfairly dismissed, and his claim for unfair dismissal is accordingly dismissed.

*Wrongful dismissal*

80. I have gone on to consider whether the Claimant was wrongfully dismissed, and so entitled to notice pay following his summary dismissal. I have found that there was significant evidence from other members of staff that the Claimant had disregarded management instructions on three occasions. In light of this, I am satisfied, on the balance of probabilities, that the Claimant was guilty of gross misconduct and was therefore not wrongfully dismissed.

*Unlawful deduction from wages*

81. Finally, I have considered whether the Claimant was entitled to a bonus payment. I have concluded that the award of a bonus was within the management's discretion, and that the award of a bonus was connected to an individual employee's performance.

82. In light of the evidence I heard regarding the Claimant's performance prior to his suspension, particularly his attitude towards the changes instituted by the management team, I conclude that withholding his bonus was within the discretion afforded to his management. I therefore conclude that there has been no unlawful deduction of wages in not paying his bonus in December 2020.

83. The Claimant's claim is therefore without foundation and is dismissed.

Employment Judge L Cowen  
Date: 12 March 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
21 March 2023

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

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