



THE EMPLOYMENT TRIBUNAL

SITTING: at London South (by CVP)

BEFORE: Employment Judge Tueje

BETWEEN:

WAYNE MCCARTHY

Claimant

-and-

**LONDON GENERAL TRANSPORT SERVICES LIMITED
(T/A GO-AHEAD LONDON)**

Respondent

ON: 3rd, 4th August 2023, 30th November and 1st December 2023.

Appearances:

For the Claimant: Ms A Fadipe (Counsel) (3rd and 4th August 2023)
Mr McCarthy in person (30th November and 1st December 2023)

For the Respondent: Mr C Ludlow (Counsel)

JUDGMENT WITH REASONS

JUDGMENT

1. The complaint of unfair dismissal is well-founded. Mr McCarthy was unfairly dismissed.
2. The complaint of wrongful dismissal is well-founded. Mr McCarthy's complaint of wrongful dismissal succeeds.
3. The complaint of unauthorised deduction from wages is not well founded, and is dismissed.

REASONS

Introduction

1. Mr McCarthy was employed by the Respondent from 3rd February 2018 until

he was summarily dismissed on 5th May 2022. Mr McCarthy claims he was unfairly dismissed, that it was a wrongful dismissal and that unauthorised deductions were made from his wages. The Respondent denies these complaints, arguing Mr McCarthy was dismissed for gross misconduct, and had been paid all wages he was entitled to.

2. Mr McCarthy's claim form was presented to the Tribunal on 9th October 2022. In addition to the above complaints, it included complaints of age and race discrimination. Employment Judge Wright determined the Tribunal did not have jurisdiction to deal with the discrimination; this was notified to the parties in a letter dated 16th February 2023.

Preliminary Matters

3. The final hearing took place on 3rd and 4th August 2023, when both parties were legally represented. It was adjourned part-heard to 30th November and 1st December 2023, when Mr McCarthy was unrepresented, and applied to postpone the hearing to 1st and 4th December 2023.
4. Mr McCarthy's former solicitors ceased acting on around 16th October 2023. At that stage, Mr McCarthy intended to represent himself. However, following a conversation with Ms Fadipe on 2nd November 2023, he decided he needed legal representation. So on 29th November 2023 Mr McCarthy met with another solicitors' firm, who explained they were unable to represent Mr McCarthy when the hearing resumed on 30th November 2023. Therefore, Mr McCarthy requested a postponement to allow time for him to formally instruct the firm to act for him.
5. The Respondent objected to a postponement, and I refused the application for reason given at the hearing. In brief, my reasons were:
 - 5.1 Due to availability, almost 4 months had elapsed since the initial hearing on 3rd and 4th August. Mr Ludlow was unavailable on 4th December, so the hearing could not be postponed to the dates requested. Therefore any postponement was likely to be some months away, increasing the risk of difficulty recalling the evidence given in August 2023.
 - 5.2 The Respondent had incurred considerable expense in anticipation of a further two day hearing: they had instructed counsel who was attendance on by a solicitor, and the Respondent's chief engineer, Mr McKeown had made himself available to give evidence.
 - 5.3 Mr McCarthy had not yet formally instructed the new firm, and even if he did, they would be unlikely to be ready to represent him on 1st and 4th December 2023.
 - 5.4 Mr McCarthy had been aware since 2nd November 2023 of the recommendation that he should be legally represented. However, without explanation, he left it until 29th November 2023 to speak to a

new solicitors' firm.

- 5.5 The Tribunal had set-aside two days for the resumed hearing which would be lost if the matter were postponed, with the consequent impact on other cases, if a further two days were required for the postponed hearing.
- 5.6 Therefore, in all the circumstances it would be disproportionate and contrary to the interests of justice to grant the postponement.

The hearing

6. I heard evidence on behalf of the Respondent from its following employees:
 - 6.1 Ms Debbie Lamshead, HR manger;
 - 6.2 Mr Luke Wood, engineering manager;
 - 6.3 Mr Robin Stevens, workshop manager;
 - 6.4 Mr Lewis Margrave, engineering manager;
 - 6.5 Mr Chris McKeown, chief engineer; and
 - 6.6 Mr Robert Bullock, senior vehicle engineer.
7. I heard oral evidence from Mr McCarthy, who relied on hearsay evidence contained in witness statements from his former colleagues Mr David Brolawski and Mr Matthew Oyite.
8. In addition to the above evidence, the following documents were provided to the Tribunal:
 - 8.1 A 567- page joint hearing bundle;
 - 8.2 A 67-page witness bundle;
 - 8.3 A chronology;
 - 8.4 A cast list;
 - 8.5 An agreed essential reading list; and
 - 8.6 A 64-page additional bundle provided for the resumed hearing on 30th November 2023.
9. Unless otherwise stated, page references relate to the joint hearing bundle at paragraph 8.1 above.
10. On 1st December 2023 Mr Ludlow also prepared written closing submission. Mr McCarthy presented his closing submissions orally.

Issues for the Tribunal

11. At a case management hearing on 14th April 2023, the parties agreed a list of issues for determination which are set out below.
12. Unfair dismissal
 - 12.1 What was the reason or principal reason for dismissal?

- 12.2 Was it a potentially fair reason?
- 12.3 Did the respondent genuinely believe the claimant had committed misconduct.
- 12.4 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular, whether:
- (i) there were reasonable grounds for that belief;
 - (ii) at the time the belief was formed the respondent had carried out a reasonable investigation;
 - (iii) the respondent otherwise acted in a procedurally fair manner; and
 - (iv) dismissal was within the range of reasonable responses.
13. Wrongful dismissal
- 13.1 What was Mr McCarthy's notice period?
- 13.2 Was Mr McCarthy paid for that notice period?
- 13.3 If not, was Mr McCarthy guilty of gross misconduct?
14. Unlawful deduction from wages
- Did the Respondent make unauthorised deductions from Mr McCarthy's wages?

Findings of Fact

15. The following findings of fact were reached on a balance of probabilities, having considered the witnesses' evidence, including documents referred to in that evidence, and taking into account my assessment of the evidence.
16. Only findings of fact relevant to the issues, and those necessary to determine the issues, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. I have not referred to every document that I read and/or was taken to in the findings below, but that does not mean it was not considered if it was referred to in the evidence and was relevant to an issue.

Background

17. Mr McCarthy is an electrician, and from 3rd February 2018 was employed by the Respondent initially to work on the night shift at its New Cross garage.
18. He transferred to the Merton garage on 31st July 2021 on the basis that his shift pattern was to be flexible. Prior to which, in a letter dated 29th July 2021,

the Respondent notified him that his rate of pay was £731.93, and enclosed an employment contract reflecting that rate (at pages 120 and 122 respectively). By clauses 9.1(i) and 9.1(ii) of that contract, Mr McCarthy was entitled to one week's notice of termination of employment for up to two years continuous service, plus one additional week's notice for each complete year worked thereafter. However, clause 9.3 states the Respondent may terminate his employment without notice in appropriate circumstances.

19. Subsequently, when Merton required someone to work on the night shift, Mr McCarthy agreed that from 25th September 2021 he would cover this role. Mr McCarthy's evidence was that the night shift was short staffed; which was agreed by Mr McKeown during cross examination. Mr McCarthy's unchallenged evidence was that he did a lot of overtime to help alleviate the shortage.
20. As a result of moving to the night shift, Mr McCarthy was entitled to an increase in his pay. However, on 26th November 2021 Mr McCarthy posted a complaint on the Respondent's viewpoint system. As a result of that complaint, on 6th December 2021 his workshop manager, Mr Robin Stevens, wrote confirming there had been an error with his pay, but he would receive the shortfall backdated from 25th September 2021.

Mr McCarthy's Grievance

21. In an e-mail sent on 19th December 2021, Mr McCarthy raised a further grievance. One of the points he made in that e-mail was (pages 224 to 225):

"I have put aside my personal desires to support you with you [sic] staff shortage situation that's the only reason I am on nights shift."

22. A couple of months later, on 28th February 2022, Mr McCarthy e-mailed Mr Jonathan Brown, the Merton engineering manager, copying in Karim Naji-Stewart, as follows:

"Hi Jonathan

Attached is another request for some time off.

As mentioned, I know it [sic] short notice, but I really need to rest and take a break from nights as I have been covering various duties since before Xmas.

Regards

Wayne"

23. Mr McCarthy's leave request is at page 228, which shows he requested leave on 20th February 2022 and 24th February 2022, which appears to have been denied as these dates are crossed out. The form contains a further leave request on 1st March 2022, which was granted.
24. In a further e-mail Mr McCarthy sent on 9th March 2022 to the service centre manager, he wrote (page 279):

"I am having a slight issue with re adjusting back to nights hence the reason

*for leaving slightly early before my shift ended.
Normally this resolves itself in a couple of days and then I will be back on point. Please bear with me and this process.”*

25. Mr Wood was tasked with investigating Mr McCarthy's 19th December 2021 grievance. Mr Wood had already and separately been asked to investigate low productivity at Merton. Mr Wood met with Mr McCarthy on 31st March 2022 to discuss the grievance; the Respondent's record of that interview is at pages 310 to 317. During the meeting they discussed the contents of Mr McCarthy's 19th December 2021 e-mail, including discussing how Mr McCarthy's requests for leave were dealt with.
26. Mr Wood then asked whether there were any other absences he wanted to discuss, at which point Mr McCarthy raised 7th to 10th March 2022. He was asked what hours he had worked on these days, he gave various times for when he finished work on these days ranging from 4am to 6.23am (his shift was due to finish at 6.24am). Mr Wood asked why he had left work early. Mr McCarthy's response was that he felt tired. He also said that he'd told a colleague Victor, that he was leaving early, and had also told the satellite manager, Karim. In oral evidence Mr Wood explained he did not ask Victor about this because it was accepted Mr McCarthy had in fact told Victor, as claimed.
27. The following exchange between Mr McCarthy and Mr Wood during the interview is then recorded (page 313):

“LW – in your e-mail you stated “ I am having issues re-adjusting to nights this is why I left early” were you on days before this?

WM – no it's the transition from holidays when you swap your sleeping pattern from days to nights, I don't feel safe when I'm that tired”
28. In addition to the above discussion, during the meeting Mr Wood asked Mr McCarthy what work he had completed during his 7th to 10th March 2022 shifts. The meeting ended with Mr Wood agreeing to investigate the points Mr McCarthy raised.
29. Mr Wood resumed his meeting with Mr McCarthy on 12th April 2022. They dealt with and concluded Mr McCarthy's grievance, as part of which Mr Wood explained a further error with Mr McCarthy's wages had been identified, and as a result Mr McCarthy would receive a backdated payment of £2,962.04 shortly. Mr Wood later confirmed the outcome of the grievance in writing.

Wages Claim

30. Mr McCarthy's ET1 claim form complains he is owed arrears of pay, but it does not specify the amount owed, nor the dates this complaint relates to. Nor was Mr McCarthy able to provide additional information about this complaint in response to the Respondent's request for further and better particulars. His reason was that he no longer has access to the electronic

payslips since he was dismissed. The hearing bundle and additional bundle contain printouts of the information on Mr McCarthy's payslips, but even with these he is unable to be more specific about the arrears of pay owed to him. Mr McCarthy's schedule of loss does not deal or quantify the wages claim.

31. I find that while there had been errors in Mr McCarthy's pay, these were resolved by the Respondent. Mr McCarthy was notified about these resolutions by Mr Stevens in December 2021, and by Mr Wood following their grievance meeting on 12th April 2022.

The Respondent's Fact-Find

32. At paragraphs 33 to 59 below, I set out the events relating to the Respondent's fact find and disciplinary process. My assessment of this is dealt with at paragraphs 60 to 60.16 below.
33. After the grievance meeting, and still on 12th April 2022, Mr Wood began his fact find in connection with low productivity at Merton. He interviewed Mr McCarthy, and his record of that interview is at pages 321 to 327. He asked Mr McCarthy whether 7th to 10th March 2022 were the only dates he left work early. Mr McCarthy said Mr Stevens had agreed he could leave work at 6am so that he could take his partner to work.
34. Also as part of his fact-find, on 12th April 2022, Mr Wood met with Mr Stevens to discuss whether he had agreed Mr McCarthy could leave work early as the latter claimed. The record of that meeting is at page 328, and the relevant part of the record reads:

"LW – whilst you were workshop manager at Merton, can you confirm if an agreement was in place for Mr McCarthy to finish his work shifts at 6am, and for him to start early, this is to allow him to take his wife to work?"

RS – what continuously?

LW – yes continuously.

RS – no, if this would have been agreed, I would have made changes to his shift times on das through payrolls.

LW – did you make any sporadic agreement on the day to enable him to finish early to take his wife to work?

RS – not that I recall."

35. At a further meeting on 14th April 2022 Mr Wood informed Mr McCarthy that as a result of his fact find, Mr Wood considered there was a case for Mr McCarthy to answer. The written record of that decision is at page 329, in which Mr Wood states the case to answer is in relation to the following allegations:

- Fraudulently claiming payment;
- Inadequate defect rectification and insufficient work out put;
- Allegation of alleged agreement made in bad faith.

The Disciplinary Hearing

36. The disciplinary hearing was held on 4th May 2022, and was conducted by Mr Margrave. Mr McCarthy was present and represented by his union representative Mr Maflin. The record of the hearing shows Mr Wood presented his fact-finding report and answered questions, including questions about the agreement Mr McCarthy said he had with Mr Stevens to leave early. Mr Wood's response was as follows (page 339):

"LW: No, this is the one he alleged to have with Rob Stevens that he claims gave him permission to leave early which his current manager was unaware of. Subsequently I interviewed Rob Stevens and he says no arrangement was made of the sort. This is shown in Wayne's pack that was sent to him."

37. Regarding Mr McCarthy's account of leaving early, Mr Wood continues (page 340):

LW: ... He said on occasion he has left early.

38. Mr Margrave asked Mr McCarthy about the hours he worked between 7th to 10th March 2022. Mr McCarthy is recorded as saying (page 337):

"WM – What happened was I was slugging it out since before Christmas, covering people absent and people on holiday. I worked 7days/14days. I was tired and I asked for a few days holiday. I asked one, twice and no one gave me it. The third time I requested it I told them I was tired, I could not continue like this. I want to be helpful but I'm tired. That's when they gave me the days off."

39. Mr Margrave discussed the transfer from New Cross to Merton garage, about which Mr McCarthy said (page 338):

WM: No, I came and spoke with the engineering manager ... He asked me which shifts I would like to work, and I said I am flexible. The only thing I need to do is drop my Mrs to work some mornings.

40. Mr McCarthy continued (at page 339):

"Sometimes I come in early to compensate for the 30mins."

41. On page 340 Mr McCarthy then says:

"WM – Because most shifts I come in early because everyone here is struggling. When I know I need to take my Mrs, I stay late before. Nobody's effort here at the depot can compare to mine. I receive e-mails from Ian Hogg thanking me. He stopped emailing and called instead to thank me for the

support.”

42. An example of such an e-mail is on page 224 of the bundle.
43. They discuss Mr McCarthy’s tiredness, with Mr Margrave querying whether he was tired on 7th March even though he had just returned from 3 days annual leave and 4 rest days. Mr McCarthy explained:

It’s not really tired.... You cannot come back into the routine and work nights in this environment after living on days and sleeping at nights. Even on rest days people struggle. It’s the first time it happened but it’s just how I felt.
44. During the appeal hearing and in his oral evidence, Mr McCarthy explained he wasn’t sure if his difficulty adjusting to the night shifts could be his age because he hadn’t found it so difficult to adjust to working nights in the past.
45. During the disciplinary hearing Mr McCarthy’s productivity was discussed; Mr Wood confirmed that prior to that disciplinary, the Respondent hadn’t raised any concerns with Mr McCarthy about his productivity (see page 341).
46. Mr Margrave gave his decision orally at the end of the disciplinary hearing (at page 355-6), concluding the allegations were made out and that Mr McCarthy should be summarily dismissed.

The Appeal

47. Mr McCarthy appealed against that decision. The grounds of appeal were as follows:
 - Disputed evidence;
 - Severity of award;
 - Discrimination;
 - Unfair and wrongful dismissal contrary to the Employment Rights Act 1996 section 94.
48. The appeal hearing was on 19th May 2023. The appeal panel comprised Mr McKeown, as chair, together with Mr Burke, the area engineering manager. During the appeal Mr McCarthy was again represented by Mr Maflin. The written record of the appeal hearing is at pages 360 to 376.
49. Mr McCarthy was asked about the amount of work he completed during his shifts. Also, he was asked about the agreement to leave work early, and he again explains that was agreed with Mr Stevens so he could take his wife to work. Mr McKeown asks him why he didn’t mention his agreement when he was first asked about leaving work early. Mr Maflin explains there were two different reasons that need to be considered separately, namely him leaving early due to the agreement with Mr Stevens, and why he left early on 7th to 10th March 2022.
50. As to the latter, Mr McKeown, Mr McCarthy and Mr Wood have the following exchange (page 372):

“CMc: By my recollection you have done nightshifts your whole time with us, why is it a problem now?”

WM: You don't understand, maybe it is my age. I was begging to have time off.

LW: on 28th February he was on holiday and then he had rest time aswell.

CMc: So, you had sufficient time off to rest?

WM: I had time off and when I came back, I needed more time off.”

51. Regarding the agreement to leave work early, Mr McKeown, Mr Burke and Mr Wood have the following discussion (pages 372-373):

“CB: What was your decision behind that LW?

LW: That there was no agreement there at all. It wasn't official or written anywhere to anyone.

CB: So, there might have been some sort of agreement but to you it seemed it was not presented clearly enough.

LW: Correct.”

52. Mr McKeown refers to Mr McCarthy having difficulty adjusting to the night shift when he worked at New Cross. Mr Burke points out Mr McCarthy is again struggling to adjust, to which Mr McCarthy responds:

WM: I wanted to help people with nightshifts and I then stated that some days I would have to drop my wife to work some days and that was the agreement.

53. At the end of the appeal hearing the panel's decision to uphold the summary dismissal was explained orally by McCarthy as follows:

“Cmc: Having listened to all the evidence in this case and hearing from yourself and your representative the conclusion on the first ground is disputed evidence in terms of all evidence being considered. We have concluded there was no disputed evidence. In terms of the severity of award charge the decision behind that was the arrangement you had with Rob Stevens which was for you to leave at 6am and on numerous occasions the times you were leaving were not at 6am as you were leaving earlier. The reason behind you being issued with a DP3 form was due to the serious breach of company trust, based on that your appeal fails in terms of the severity of the award. In terms of discrimination, we are satisfied that correct measures were completed, and the appeal fails under that point. The last point in terms of unfairness in terms of your dismissal, there is previous paperwork in your file which present that you have had prior events to hold

you accountable for your work and performance. We do not have trust and confidence in you completing the work required and completing the required shift pattern. For those reasons today's appeal has failed, and the decision is upheld."

54. Although it is not expressly stated in the decision given at the end of the hearing, Mr McKeown's oral and written evidence (see paragraph 16 of his witness statement) was that Mr McCarthy's explanations for leaving work early were dishonest. Mr McKeown said Mr McCarthy kept changing the reasons he gave after he was caught leaving early. Also, in his oral evidence to the Tribunal, Mr McKeown stated Mr Stevens had not agreed that Mr McCarthy could leave work early.

The Dismissal Decision

55. At the Tribunal hearing Mr McKeown confirmed when the appeal panel were concerned only with Mr McCarthy's 7th, 8th, 9th and 10th March shifts.
56. As to Mr McCarthy's contention that he arrived at work early to compensate for occasions when he had left early, Mr McKeown confirmed during cross examination, the Respondent didn't investigate whether Mr McCarthy arrived at work early as he claimed. Mr McKeown's justification was that Mr McCarthy's shift were contractual, therefore if he chose to start work early, that was not relevant, the focus of the disciplinary was on Mr McCarthy leaving work early without proper authorisation, and being paid for a full shift when he had not worked a full shift.
57. The Respondent's written record taken throughout the disciplinary process, and the written and oral evidence from Mr Wood, Mr Margrave and Mr Mckeown was that the Respondent had lost trust and confidence in Mr McCarthy to work his contractual hours. And by not working a full shift, Mr McCarthy was unable to complete a sufficient amount of work on those days. Furthermore, the fact-find and disciplinary hearing (but not the appeal panel) concluded Mr McCarthy had dishonestly claimed Mr Stevens agreed he could leave work early, and he was fraudulently seeking payment for incomplete shifts worked.
58. In the disciplinary and appeal hearings Mr McCarthy and Mr Maflin say Mr McCarthy was dismissed immediately after the successful outcome of his December 2021 grievance. Mr McCarthy's ET1 claim form repeats this assertion. This implies he considers there to be a connection between his grievance and his dismissal.
59. If that is what Mr McCarthy is alleging, I do not consider it that is the case. Mr McCarthy admits he left work before his contractual shift time ended. Further, Mr McCarthy's allegation is not supported by the contemporaneous documentary evidence. And the contemporaneous documents show that Mr McCarthy's working hours and output were the main focus of the Respondent's disciplinary process, namely the fact-finding interview, the disciplinary and appeal hearings. Those are the Respondent's reasons given

for the dismissal, and I have not seen any evidence to indicate the Respondent had an ulterior undisclosed motive.

Findings Relevant to the Dismissal

60. Taking into account paragraphs 32 to 59 above, I make the following findings of fact regarding Mr McCarthy's dismissal:
- 60.1 The Respondent's records show the explanation Mr McCarthy gave for leaving work early on 7th to 10th March 2022 was that he was tired because he had done a lot of overtime, and he had requested leave which had been refused. Although he took leave immediately before his rest days, when he returned to work on 7th March he said he was still tired because he was struggling to adjust to nights.
 - 60.2 The records also show that before the disciplinary process began, Mr McCarthy had complained of feeling tired due to the overtime he had worked as stated in Mr McCarthy's e-mail sent on 22nd February 2022 (see paragraphs 22 to 23 above).
 - 60.3 During the fact find meeting, Mr McCarthy referred to an agreement he had with Mr Stevens to leave early in response to Mr Wood's question about whether there were any occasions he left work early other than on 7th to 10th March 2022. He said he had an ongoing arrangement to leave work early when required, in order to take his partner to work. During subsequent hearings, he also said that on occasions he came in early to compensate for this.
 - 60.4 I find Mr McCarthy's explanation that he left work early on 7th to 10th March 2022 because he was tired is the only explanation he gave regarding those dates. Therefore, I do not accept Mr McKeown's view that Mr McCarthy gave different explanations for this.
 - 60.5 None of the Respondent's written records of the various meetings or hearings record Mr McCarthy as relying on his agreement with Mr Stevens as the reason he left work early on 7th to 10th March 2022.
 - 60.6 During the fact-find meeting on 12th April 2022, Mr Stevens denied there was an agreement that allowed Mr McCarthy to continuously leave work early, but could not recall whether he had agreed on sporadic dates that Mr McCarthy could leave work early.
 - 60.7 Following the fact find, Mr Wood concluded Mr Stevens had not agreed that Mr McCarthy could leave early.
 - 60.8 During the appeal hearing Mr Wood initially said he considered there was no agreement that Mr McCarthy could leave work early, but then accepted there might have been a verbal agreement that was not officially recorded.

- 60.9 At the disciplinary hearing, Mr Margrave concluded Mr Stevens had not agreed Mr McCarthy could leave work early.
- 60.10 The appeal panel concluded that Mr McCarthy left work earlier than 6am, despite his agreement with Mr Stevens being that he could leave work at 6am. I find this shows the appeal panel accepted Mr Stevens had agreed Mr McCarthy could leave work early.
- 60.11 The appeal panel's decision does not address the reason Mr McCarthy gives for leaving work early in March 2022, namely that it was because he was tired.
- 60.12 In his witness statement (see paragraphs 11 and 12), Mr McKeown does not provide an express view about whether Mr Stevens in fact agreed that Mr McCarthy could leave work early, although he refers to it as an alleged agreement.
- 60.13 In his oral evidence to the Tribunal, Mr McKeown denied Mr Stevens had agreed Mr McCarthy could leave work early.
- 60.14 The appeal panel's decision does not mention Merton being short staffed or the overtime Mr McCarthy did due to staff shortages.
- 60.15 The appeal panel does not mention what impact if any staff shortages may have had on productivity at Merton.
- 60.16 Although it is common ground Mr McCarthy was summarily dismissed, absent any fundamental breach of contract, Mr McCarthy would have been entitled to four weeks' notice of termination of his employment.

The Law

61. I have applied the following law in this case.

Unfair Dismissal

62. Where it is admitted or it is found that an employee has been dismissed, an employer must show the reason for the dismissal was one that was potentially fair as set out in section 98(2) of the Employment Rights Act 1996.
63. According to 98(2)(b) of the 1996 Act, dismissal due to an employee's conduct is a potentially fair reason.
64. Where the employer has shown the reason for dismissal is potentially fair, the Tribunal must consider those matters set out at section 98(4), namely whether the dismissal is fair or unfair.
65. To assess fairness, section 98(4)(a) requires the Tribunal takes into account whether the employer acted reasonably or unreasonably having regard to the employer's size and administrative resources.

66. The assessment of fairness also requires consideration of the following:
- 66.1 Whether the employer had a genuine belief in the employee's guilt;
 - 66.2 Whether there are reasonable grounds for the employer's genuine belief;
 - 66.3 Whether that belief is as a result of a reasonable investigation; and
 - 66.4 Whether that belief provides sufficient reason for the employee's dismissal.
67. When considering reasonableness under paragraphs 66.2 to 66.4 above, the Tribunal must consider whether the employer's actions were within the band of reasonable responses open to an employer in the circumstances.

Wrongful Dismissal

68. Where an employee is dismissed, they are entitled to the notice period set out in their contract of employment, providing the contractual period is not less than the notice period at section 86 of the Employment Rights Act 1996.
69. If there is no contractual provision or it is less than the notice period at section 86 of the 1996 Act, the employee is entitled to the notice period in that section.

Unauthorised Deduction from Wages

70. By section 13 of the Employment Rights Act 1996, where an employer fails to pay a worker the amount of wages properly payable, the shortfall amounts to an unlawful deduction from wages.
71. It is for Mr McCarthy to show there has been an unauthorised deduction.

Conclusions

72. I have applied the above law to the findings of fact that I have made in order to reach the conclusions below.

Unfair Dismissal

73. I find the Respondent has discharged the burden of proving that the reason or principal reason for dismissing Mr McCarthy was a genuine belief that he was guilty of misconduct for leaving work early on 7th to 10th March 2022. The matters referred to at paragraph 59 above support this finding.
74. By 98(2)(b) of the 1996 Act, dismissal due to misconduct is a potentially fair reason.

75. However, taking into account all the circumstances of this case, and having regard to the range of reasonable responses available to an employer, I find the Respondent acted unreasonably in treating Mr McCarthy leaving work early as a sufficient reason to dismiss him,
76. I remind myself that what decision I would have made is immaterial, and that the correct approach is to assess whether the Respondent actions fall within the band of reasonable responses available to an employer. In the circumstances of this case, I conclude the Respondent's actions did not fall within the band of reasonable responses for the following reasons:
- 76.1 I consider a reasonable employer would have appreciated that the reason Mr McCarthy gave for leaving work early on 7th to 10th March 2022 was because he said he was tired due to having difficulty adjusting to the night shift. This was the reason Mr McCarthy had given during the fact find, the disciplinary and appeal hearings, as stated in the Respondent's written records of those meetings and hearings.
- 76.2 I find a reasonable employer would not have concluded Mr McCarthy's gave different explanations reasons for leaving early in March.
- 76.3 A reasonable employer would also have taken into account the surrounding evidence relevant to the reason Mr McCarthy gave for leaving work early due to tiredness. For instance, they would have taken into account that Mr McCarthy had done overtime to help out while they were short staffed at Merton, and as acknowledged by Mr Hogg (see paragraphs 41 and 42 above). Additionally, they would take into account that he had been refused annual leave, and that he had complained of being tired due to overtime before the disciplinary process began.
- 76.4 I also consider a reasonable employer would have appreciated that Mr McCarthy's agreement with Mr Stevens that he could leave work at 6.00am, was not the reason Mr McCarthy gave for leaving work early on the dates in question. Therefore they would also understand that was the reason Mr McCarthy left work before 6am on those dates.
- 76.5 They would also take into account that difficulties adjusting to the night shift was the contemporaneous reason Mr McCarthy gave in his e-mail to Mr Richards, sent before the disciplinary procedure began.
- 76.6 However, even if an employer had concluded Mr McCarthy left work early because of his agreement with Mr Stevens, before concluding there had been breach of trust and confidence, they would have carried out a reasonable investigation to establish the relevant facts. Such an investigation would include checking whether Mr McCarthy had arrived at work early, as he claimed. And if he had arrived early, that factor would have been taken into account. While an employer is entitled to expect a employee to adhere to their contractual hours,

where an employee leaves work early, but makes up that time by arriving early, that is relevant to whether trust and confidence is broken.

- 76.7 A reasonable employer would have been clear and consistent about those matters relied on that amount to misconduct. However, Mr Wood's position on this changed (see paragraph ... above). But perhaps more significantly, Mr McKeown's position on this also changed: the panel's decision given at the end of the appeal hearing, refers to the arrangement Mr McCarthy had with Mr Stevens to leave early. This is referred to as an alleged agreement in Mr McKeown's witness statement, but in his oral evidence he stated there was no such agreement. I find a reasonable employer would have been consistent regarding an issue that it relied on as justifying summary dismissal.
- 76.8 Furthermore, Mr McCarthy's recent history, that he had transferred to the nightshift because they were short staffed, and he had also done overtime to alleviate staff shortages.
- 76.9 Taking all of the matters set out at paragraphs 76.1 to 76.8 above into account, a reasonable employer would not have characterised Mr McCarthy leaving early on 7th to 10th March 2022 as gross misconduct.

77. Wrongful dismissal

- 77.1 Under clause 9.1 of Mr McCarthy's contract he was entitled to four weeks' notice on termination of his employment.
- 77.2 Mr McCarthy was dismissed without any notice.
- 77.3 I must decide if Mr McCarthy committed gross misconduct entitling the Respondent to dismiss him without notice. In distinction to the complaint of unfair dismissal, where the focus was on the whether the decision to dismiss was within a reasonable range of responses, for wrongful dismissal I must decide for myself whether there has been gross misconduct.
- 77.4 I set out my findings about Mr McCarthy's actions at paragraphs 60.1 to 60.5 above, which are applicable to whether Mr McCarthy is guilty of gross misconduct. I find that considering all of the surrounding circumstances, this is not a case of gross misconduct justifying dismissal without notice. My reasons are as follows:
- (i) Mr McCarthy was helping out by doing overtime, which help had been acknowledged by Mr Hogg. However, doing overtime caused or contributed to his tiredness.
 - (ii) Mr McCarthy tried to take annual leave, but his initial leave requests were denied. In his final leave request, Mr McCarthy explained he was desperate for leave because he was tired.

- (iii) In his e-mail to Mr Richards, Mr McCarthy explained he had left work early because he was tired. He had also told a colleague Victor.
- (iv) The above matters are documented before the disciplinary process began, so it is unlikely Mr McCarthy retrospectively fabricated this explanation to justify leaving early. The consistency of Mr McCarthy's explanation also supports it being his genuine reason.

78. Unauthorised deduction from wages

- 78.1 Mr McCarthy has been unable to clarify the amount of wages he claims to be owed, nor what period he is claiming for. He said he has not has access to his electronic payslips since he was dismissed, however there is information regarding his payments in the main hearing bundle and additional bundle.
- 78.2 In any event, without particulars regarding the wages claim, I cannot determine that the Respondent has failed to pay the amount properly payable to Mr McCarthy. Nor do I have any evidence showing that the back payments made in December 2021 and April 2022 failed to properly compensate Mr McCarthy for the past payment errors the Respondent admitted to and rectified.
- 78.3 I therefore conclude the complaint of unauthorised deduction from wages is not well-founded.

Employment Judge Tueje

Date: 29th December 2023