EMPLOYMENT TRIBUNALS

Claimant: Mr L Otter

Respondent: Wirral Borough Council

Heard at: Liverpool **On:** 27 September 2018
5 October 2018
(in Chambers)

Before: Employment Judge Buzzard
(sitting alone)

REPRESENTATION:

Claimant: Mr Gosling of Counsel
Respondent: Mr Jewell of Counsel

Judgment

The judgment of the Tribunal is that the claimant's claims are not well founded and are dismissed.

REASONS

1. The claimant in this claim initially presented claims of:

   (a) Unfair dismissal;

   (b) Breach of contract;

   (c) A claim for a redundancy payment.

2. Prior to the commencement of the final hearing the claimant withdrew his claim of breach of contract.

3. Accordingly, at the hearing, only the claims of unfair dismissal and a claim for a redundancy payment were pursued. As explained below, during the course of the hearing, it became apparent that the claimant's claim for a redundancy payment, in fact, was a claim that his unfair dismissal compensation should include, when calculated, his entitlement to a statutory and contractual redundancy payment. It is not a claim for a statutory or contractual redundancy payment per se, given that neither party suggests that the claimant was actually dismissed by way of redundancy.

Preliminary Matter

4. At the outset of the hearing the respondent made an application to the Tribunal to adjourn the matter. This application was made on the basis that the respondent had not in advance of the hearing intended to call the dismissing officer as a witness. It was the respondent's position that, in light of the fact that the claimant asserts that the reason for his dismissal was a vendetta against him by individuals within the respondent organisation. The dismissing officer, who can present evidence as to the reason for dismissal, is potentially an important witness. It was the respondent's position that, in the interests of fairness, an adjournment to allow the dismissing officer to be called was needed.

5. The claimant submitted that his claim, insofar as it relates to the true reason for dismissal, was not one which should be any surprise to the respondent. The claimant's witness statement clearly states at paragraph 7 that he "*believed, and still do[es], that it was a personal vendetta against [him]*". Further, the claimant's representative submitted that, in an unfair dismissal claim, it is standard practice and unsurprising that the dismissing officer would be an important witness.

6. It was determined that it was proportionate and appropriate to proceed with the hearing in the absence of the dismissing officer. This determination was reached after taking into consideration the potential prejudice to the parties of further delaying the hearing of this matter, the potential prejudice to the respondent which would be caused by not being able to call the dismissing officer, the opportunity which the respondent has had to call the witness and the opportunity which the respondent has had to seek a postponement in advance of the hearing day.

Issues and The Law

<u>Unfair Dismissal</u>

7. It is not denied by the respondent that the claimant was dismissed. Accordingly the first question is what the reason for the dismissal was. s98 (1) Employment Rights Act 1996 states:

> *"In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principle reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

8. Thus it is for the respondent to present evidence to establish to the Tribunal the reason for the dismissal, and if established that the reason falls within the scope of s98(1)(b).

9. In the case before us the respondent submits the reason for dismissal was that the claimant committed an act of gross misconduct. Subsection (2) (b) states:

> *"A reason falls within this subsection if it –*
> *…..*
> *(b) relates to the conduct of the employee,*
> *….."*

10. The claimant in this case does not accept that this was the reason for his dismissal. It is the claimant's position that the dismissal was motivated by a personal vendetta against him. This personal vendetta had resulted in the claimant being given notice of redundancy, and then later the claimant being summarily dismissed the day before his redundancy took effect.

11. The determination of the reason for dismissal is a matter of fact to be determined by consideration of the evidence applying the balance of probabilities test.

12. In the event that the reason for dismissal was the claimant's conduct, the question then becomes whether the dismissal for that reason was fair. Section 98(4) of the Employment Rights Act 1996 states (as applicable to conduct dismissal):

> *"Where the employer has fulfilled the requirements of subsection 1 the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
>
> *(b) shall be treated in accordance with equity and the substantial merits of the case."*

13. There is a substantial body of case law that assist Tribunals in application of this section.

14. Firstly, in **Iceland Frozen Foods v Jones [1982] IRLR 439** the EAT summarised the correct approach to adopt in applying the section 98(4) test giving the following key guidance:

(a) The starting point should be the wording of section 98(4) itself;

(b) In applying the section a Tribunal must consider the reasonableness of the employer's conduct not simply if the Tribunal considered the dismissal to be fair;

(c) In adjudging the reasonableness of the employer's conduct the Tribunal must not substitute its own view of what is the right action for that employer to adopt;

(d) In many cases (though not all) there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one and another quite reasonably take another; and

(e) The function of the Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

15. There is further specific guidance on the application of section 98(4) in conduct dismissals. Notably the case of **British Home Stores v Burchell [1978] IRLR 379** set out a four stage test which should be applied in a case where a claimant is dismissed in response to an allegation of misconduct, namely:

(a) The employer must have a genuine belief that the claimant was guilty of the misconduct alleged;

(b) The employer must have carried out a proper investigation as a basis for that belief;

(c) The employer must have reasonable grounds as a consequence of that investigation to form the belief; and

(d) Dismissal for the act of misconduct alleged must lie within a band of sanctions open to a reasonable employer.

16. In this case the claimant did not deny the misconduct which the respondent sought to rely upon. The claimant's position was that:

(a) the respondent in reaching the decision to summarily dismiss had not followed a proper and fair procedure which would have allowed him to fully explore and explain to the disciplinary panel the background to the dismissal, including dealing with grievances submitted by the claimant, and proper evidence regarding mitigation; and

(b) dismissal for the conduct which the claimant admitted to lay outside the range of reasonable responses given the relevant circumstances.

17. In this case the respondent had a clear written disciplinary policy which the claimant alleges was not followed. The procedural issues raised by the claimant were as follows:

(a) Contrary to the respondent's contractual disciplinary procedure, the investigating officer had not been appointed by the dismissing officer but by a third party, and was, accordingly, potentially not independent.

(b) The first meeting in the disciplinary process occurred in November 2017, with the disciplinary investigation that followed taking longer than provided for in the respondent's contractual disciplinary policy.

(c) The claimant was not given five working days' notice of a disciplinary hearing scheduled for 31 January 2018 at 9.50am, having been notified of it by a letter delivered by courier late in the evening of 24 January 2018 contrary to the respondent's disciplinary procedure.

(d) The respondent rescheduled the disciplinary hearing referred to at (c) above to 6 February 2018, despite being aware that the claimant would be out of the country on that date and unable to attend.

(e) The claimant was invited to the hearing by a letter dated 2 February 2018. Accordingly, he was not given five days' notice of the rescheduled hearing contrary to the respondent's disciplinary procedure.

(f) Having adjourned the disciplinary hearing to obtain evidence regarding the claimant's health, it was rescheduled without having obtained any such evidence.

(g) The respondent proceeded with the disciplinary hearing of 6 February 2018 in the claimant's absence, despite the points referred to at (d) to (f) above.

(h) During the claimant's appeal against his dismissal there was no consideration of whether the disciplinary hearing should have occurred on 6 February 2018, or been adjourned to a later date.

(i) The respondent, contrary to its disciplinary policy, had not dealt with a grievance submitted by the claimant, either alongside or prior to the disciplinary procedure. This was despite the grievance being related to issues related to those being considered as part of the disciplinary process; specifically, the grievance related to the vendetta which the claimant believes was the true reason for his dismissal.

(j) At his appeal the claimant requested, but was refused, permission to have a lawyer with him. This was despite the respondent having a solicitor in attendance at the appeal hearing.

18. In relation to the substantive fairness, the claimant raised the following points:

(a) The misconduct which he is alleged to have committed took place outside of work time, and was not done using work equipment. The misconduct in question relates to an email sent by him to a friend who has no connection to the claimant's employer or work. The claimant further argues that, but for a quirk of Microsoft calendar appointments, and an unexpected side effect of how they operate, the respondent would have never been aware of the misconduct alleged.

(b) The misconduct alleged had no impact on the respondent as an organisation, because the email was not intended to, and has not in fact, entered the public domain. The claimant alleges that the respondent at no time produced any information or evidence to suggest that the recipient of the email had suffered any distress or alarm as a result of receipt of the email. It is the claimant's claim that the email was drafted such that any threat or intent contained therein was so extreme that it lacked any realistic credibility and, accordingly, could not cause genuine distress or concern.

(c) The respondent did not, when considering dismissal as a potential sanction, give due weight and consideration to the fact that the day after the claimant's disciplinary hearing he was due to be made redundant in any event.

19. The respondent's position is that, whilst there may be some procedural flaws with the disciplinary procedure up to and including the hearing itself, there was a full and fair appeal. The claimant was given the opportunity to make extensive representations at that appeal, and did so. On the basis of what was heard at that appeal, the appeal panel independently decided that dismissal was the correct response.

20. The respondent did not accept that all of the procedural issues raised by the claimant were accurate, nor that they either individually or collectively had any substantial impact on the fairness of the process. In particular the respondent's position was as follows:

(a) There is no prejudice or potential prejudice caused by the identity of the person who appoints the investigating officer in an organisation as large as the respondent;

(b) That the entire process ran slowly, in large part because the claimant requested delays and/or had health concerns, which caused delays;

(c) That the claimant was given five days' notice of the disciplinary hearing on 31 January 2018, such notice being given exactly one calendar week previously, on 24 January 2018;

(d) That in relation to the hearing on 6 February 2018, whilst not being given five days' notice of that particular hearing, it was a rescheduled hearing. Accordingly, the shorter notice did not prejudice the claimant in terms of time to prepare. Further, the respondent's position was that, given the claimant would cease to be an employee on 7 February 2018, unless the

disciplinary hearing proceeded on 6 February it would be impossible to proceed at all. In the light of this, the claimant was offered an extension to his redundancy termination date, to allow more time for the process to be dealt with, which he declined;

(e) The claimant's appeal hearing amounted to a full re-hearing of the matter. Accordingly, any procedural defects at the original disciplinary hearing were remedied;

(f) The claimant's grievance was dealt with, although not prior to the claimant's dismissal;

(g) The claimant was not entitled to have a solicitor present at a disciplinary hearing. He was accompanied, as permitted by the respondent's procedures, and made full representations at the appeal hearing.

21. Determination of validity of the claimant's claims on these points is reached applying a neutral burden of proof. They are issues for the Tribunal to determine based upon the evidence and submissions heard.

22. It is clear from further guidance (**Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23**) that the band of reasonable responses test applies to every decision made by the respondent, both procedural and substantive.

23. Finally, if there is a procedural flaw in the process up to and including dismissal, this can be remedied by an appeal. In **Whitbread and Co plc v Mills 1988 ICR 776**, the EAT suggested that to be able to remedy a procedural flaw, an appeal had to be a full rehearing not a mere review of the initial decision. However, in **Taylor v OCS Group Ltd 2006 ICR 1602**, the Court of Appeal made it clear that it was incorrect to assume that a review of an initial decision could not remedy a procedural flaw. The fairness of the disciplinary process as a whole had to be considered. Where an appeal is argued to remedy one or more procedural flaws, the procedural fairness and thoroughness of the appeal, along with the open-mindedness of the decision-maker had, to be considered to decide whether the flaws were in fact remedied.

The Facts & Evidence

24. The Tribunal had the benefit of hearing oral evidence from three witnesses. The Tribunal heard from the claimant, Mr Otter, on his own behalf. For the respondent the Tribunal heard from Mr Paul Satoor, who chaired the disciplinary appeal panel, and from Ms Maria Saleemi, who works within the respondent's Human Resources team.

25. In addition, the parties presented a substantial bundle of documentary evidence, the relevant parts of which the parties brought to the specific attention of the Tribunal during the course of the hearing.

26. On the basis of the evidence heard, the key relevant facts were found as summarised below.

27. The claimant was employed by the respondent as a Chief Investment Officer. He had worked for the respondent since September 1997. He had had various contracts of employment and policies issues to him over time, including a contractual disciplinary procedure and the following relevant workplace policies:

(1) An ICT security policy;

(2) An employee's Code of Conduct policy; and

(3) A Dignity at Work policy.

Events in 2015/2016

28. In December 2015 the claimant was suspended. The suspension followed allegations of gross misconduct made against him. The allegations related to a potential neglect of duties by failing to comply with procurement rules. These allegations were investigated over a period of eight months and, in relation to only some of the allegations, the claimant was issued with a written warning. The claimant believes that this eight month investigation was part of a contrived process following a vexatious set of allegations, aimed at justifying his dismissal.

29. During the eight months process following on from that suspension, the claimant submitted a grievance. The claimant's grievance raised concerns about a Ms Donna Smith and a Mr Joe Blott, and their potential breaches of data protection rules. The claimant gave evidence that this grievance was ignored for many months.

30. It is the claimant's claim that he became aware at a later time that a Mr Peter Wallach had been keeping a file of sensitive information relating to the claimant in an unlocked drawer on his desk, in an open plan office, which other members of the respondent's workforce had access to. This was again raised as a concern by the claimant. The claimant's belief is that, as a result of this history, the respondent, or individuals within the respondent at a seniority level higher than his, were looking for an excuse to dismiss him.

31. The respondent did not produce as witnesses any of the individuals whom the claimant asserts were seeking to dismiss him.

Redundancy Process

32. In June 2017 the claimant received a letter from the respondent which stated that a restructure was planned, as a result of which his post would no longer exist.

33. The claimant attended an individual consultation meeting on 13 July 2017 with Mr Wallach. The claimant raised concerns regarding Mr Wallach's involvement given his history with Mr Wallach referred to above. The claimant asserted in evidence that at his individual consultation meeting Mr Wallach had been dishonest regarding the process which had led to the production of the restructuring proposal.

34. The claimant was notified by a letter dated 7 November 2017 that he was to be made redundant and that his employment would terminate on 7 February 2018.

35. The claimant's dismissal did not, in the eventuality, occur by way of redundancy on 7 February 2018. Accordingly, the full details of the redundancy consultancy process are of limited relevance to this claim and there is no need to set them out in full here.

36. The claimant would have been entitled, if he had been dismissed as having been made redundant, to receipt of an enhanced redundancy payment and early access to the local Government Pension Scheme.

Events surrounding the Email

37. On 25 October 2017 the claimant received an electronic notification that a calendar appointment had been cancelled by his employer. The cancellation was because Mr Blott was unwell. The claimant forwarded this calendar appointment to a personal friend, a Mr H. Mr H has no direct connection with the respondent, other than as a resident in the council district. When forwarding the calendar cancellation, the claimant added a comment which read as follows:

> "*FMBI*
>
> *Nigbo's witch doctors voodoo spell on Blotto seems to be working quicker than I anticipated!*
>
> *Hope the CUNT is in the primary stages of inoperable brain bum hole and liver cancer and that his demise is lingering and agonising which is no more than that deceitful, lying corrupt piece of SHIT OVERPAID FUCKING CUNT deserves!*
>
> *We will finish the FUCKING TWAT off when we incinerate the CUNT on BONNYNIGHT!*
>
> *Hope you are practicing the dance and chant that I forward to you from NIGBO'S WITCHDOCTOR.*
>
> *FMB The Marsh will be wondering WTF IS going on in the garden when we get going….like the LAST ONE with NSG although…..mind you….he might have found something to* ***WARM HIMSELF UP*** *avin* ***GREAT SEX*** *in the compost heap(s) or out in the Jigger!".*

38. Mr H replied to the claimant. When clicking "*reply*" to a forwarded message regarding a calendar appointment, the reply is automatically copied to the original sender of the calendar appointment. In this case this meant that Mr H sent his reply, which included a copy of the claimant's email, direct to Mr Blott.

39. Neither party in evidence suggested that either the claimant or Mr H had ever intended this email to be sent to Mr Blott. Neither party suggested that the email had been sent using IT facilities or equipment belonging to or controlled by the respondent, save to the extent that Mr H's reply had been sent to Mr Blott.

40. The claimant gave evidence that the email and language concerned was mimicry of a 1960s comedy sketch by Dudley Moore and Peter Cook called "*Derek and Clive*". It was the claimant's claim that this is something that he and Mr H, who had been at school together, had enjoyed as a private joke for many years.

41. Following Mr Blott's receipt of the email the respondent undertook an investigation to find out who Mr H was, and why the email had been sent to him. It was noted by the parties, that at this point, all that was known about Mr H was his Gmail address. Once the source of the email was determined, it was referred to the police. The police investigated the email, and, with the agreement of the CPS, determined that no further action would be taken by them.

42. On 20 November 2017 the claimant was informed, verbally, that he was facing an allegation of gross misconduct. At an initial meeting on 21 November 2017 he was suspended, to allow a disciplinary investigation. This meeting was held with Mr Wallach, Ms Saleemi from HR and the claimant. At this meeting the claimant initially denied having either seen, or sent, the offending email.

43. At the initial meeting further concerns were raised that the claimant was forwarding work related emails to a private email account, which could be a contravention of the respondent's ICT policy. The claimant explained immediately that he only forwarded emails because he worked remotely and it was easier to deal with them when sent to his personal account.

44. By a letter dated 23 November 2017 the claimant was sent a copy of the council's disciplinary procedure. The claimant was then on a period of pre-booked annual leave from 27 November until 8 December 2017. The claimant was informed by letter dated 5 December 2017 who would be the investigating officer, Ms D Stanley-Smith.

45. Ms Stanley-Smith wrote to the claimant on 14 December 2017 setting out the allegations of misconduct against him and inviting him to attend an investigation meeting on 20 December 2017. The letter included information about the allegations that was redacted, to protect the personal information of Mr H, who had been identified as a local resident. The letter from Ms Stanley-Smith explained the reason for this redaction as "*due to the information being about a third party*".

46. The claimant contacted Ms Stanley-Smith on 18 December 2017 to state that he would be unable to attend the investigation meeting scheduled for 20 December 2017 because he had been given too little time to prepare and consider the material sent to him. He further stated that there was additional information he needed before he could attend the meeting and that he had a heavy schedule of meetings and interviews seeking work given his forthcoming redundancy. The claimant indicated that he would be available to attend a meeting in the week commencing 8 January 2018, subject to getting the additional information he required.

47. The investigation meeting was accordingly deferred by Ms Stanley-Smith to 8 January 2018. The new date for the investigation meeting was confirmed to the claimant in a letter dated 20 December 2017. This letter stated that should the claimant not be able to attend that meeting, the process would have to proceed on the basis of the evidence and information currently available.

48. The claimant subsequently wrote to Ms Stanley-Smith on 2 January 2018 enclosing a statement of unfitness for work provided by his GP, covering the period from 20 December 2017 until 1 February 2018. Despite this, the claimant stated he would be willing to attend the investigation meeting on 8 January if the respondent complied with a number of conditions. These included:

(a) that he receive a response to his request for information;

(b) that the respondent ensure that a colleague nominated by the claimant was available to assist him at the meeting; and

(c) that he was provided with copies of any witness statements to allow him to prepare for the meeting.

49. Given the statement of unfitness for work, the respondent decided to refer the claimant to their Occupational Health department for a review prior to proceeding with the disciplinary process. Accordingly, the scheduled meeting for 8 January 2018 did not occur.

50. The claimant attended the respondent's Occupational Health on 9 January 2018. They provided a report to the respondent confirming that the claimant was fit to attend a disciplinary hearing, but recommending that he should be given a week's notice before any meeting took place. It was also recommended:

(a) that the claimant should be allowed to be accompanied by a work colleague;

(b) the claimant should be given documentation in advance of the meeting; and

(c) that any meeting should allow frequent breaks for the claimant.

51. This report was sent to the claimant by email on 11 January 2018. The email at that time sought to rearrange the investigatory meeting for 17 January 2018. The investigation meeting with Ms Stanley-Smith took place on 17 January 2018. The claimant attended this meeting.

52. Following this the claimant was emailed confirmation that he would have to attend a formal disciplinary hearing. The email noted the date of 2 February 2018 as a potential date for the hearing. The need to refer to a potential date for the hearing was explained to the claimant as being because of the "*proximity of your leaving date*". This hearing date was not, in the end, used.

53. On 24 January 2018, in the late afternoon, the respondent arranged for the posting of a letter through the claimant's letterbox. This letter scheduled a disciplinary hearing for Wednesday 31 January 2018, which was the following Wednesday. The letter enclosed a hard copy of the investigation report and a bundle of documentation.

54. The claimant noted in evidence that the respondent's disciplinary procedure required five working days' notice to be given of any disciplinary hearing. The

disciplinary procedure was before the Tribunal at page 75 of the bundle and at paragraph 5.8.1 it states:

> "*Employees will be given a minimum of **five working days' notice** prior to the date of the hearing. However shorter notice periods may be agreed with the employee*."

The bold emphasis on "*five working days*" is within the contractual document. There was no suggestion that there had been any specific agreement to shorter notice. There was no part of the disciplinary procedure which explains whether, when calculating five working days' notice, the date of delivery of the notice is included as one of those working days to be counted.

55. The claimant responded to this letter, requesting information and clarification prior to 29 January 2018 to enable him to prepare for the meeting on 31 January 2018. The evidence before the Tribunal was that at this stage there were two strands to the disciplinary charges against the claimant:

(a) the first related to the creation and sending of the email to Mr H;

(b) the second relating to the forwarding, apparently on a routine basis, of emails to a private non work email address.

56. This second strand to the disciplinary charges had been identified by an individual within the IT department, Mr Ashworth, who had been tasked to investigate the source of the offensive email sent to Mr Blott. The claimant confirmed in cross examination that this individual was not, as far as he was aware, part of the alleged vendetta against him.

57. The claimant conceded in evidence that at this time he had received, in response to a freedom of information request, confirmation that emails were being routinely forwarded by multiple persons within the respondent organisation, contrary to the respondent's ICT policy. This confirmation had been received from a Ms Paterson on 21 December 2017, and stated specifically:

> "*Further to your freedom of information request, Wirral Council can confirm that electronic messages from Wirral Council's email account are routinely forwarded to personal or other email accounts in a lower classification domain (e.g. an internet email account such as Hotmail) by Wirral Council officers, elected members and independent advisers.*"

There was no suggestion from any party that Ms Paterson had forwarded this information to those dealing with the claimant, or that Ms Paterson was even aware that the claimant was subject to ongoing disciplinary proceedings.

58. The claimant further conceded under cross examination that, despite having this confirmation in response to his freedom of information request, he had deliberately chosen not to disclose this to those persons who were handling his disciplinary procedure. When asked why this was the case the claimant answered to the effect that he believed that if he disclosed this exculpatory evidence to the respondent too early they would seek to find a way to discredit or discount the

evidence. In the claimant's letter of 25 January 2018, regarding the disciplinary hearing scheduled for 31 January 2018, the claimant continued to insist upon the disclosure of information and evidence regarding the forwarding of emails by Mr Wallach in breach of the respondent's ICT policy.

59. The claimant at this point had legal advisers. They wrote to the respondent on 29 January 2018 raising numerous issues regarding the disciplinary process and procedure. This letter raised concerns regarding the claimant's health, regarding the period of notice that had been given for the disciplinary hearing, regarding the relevant witnesses at that hearing, the documentation required for that hearing and making assertions regarding relevant mitigation that needed to be taken into account. A request was formally made that the disciplinary hearing be postponed as a result of the claimant's ill health and in relation to the lack of formal notice. The response of the respondent was that the hearing would proceed in any event.

60. On 29 January 2018 the claimant raised grievances with the respondent, alleging:

(a) that Mr Blott, Mr Wallach and other directors and senior officers of the respondent had colluded in conducting a dishonest, deceitful and ultra vires redundancy exercise. The claimant alleged that this followed a "*consistent course of action by Wirral Council to terminate my employment due to my bringing to their attention a number of significant irregularities in corporate Government issues which Wirral Council has covered up by a systematic failure to comply with conditions of their own promulgated policies*".

(b) that Mr Wallach had been dishonest at a meeting,

(c) that the redundancy process had been a sham in which Mr Wallach and other directors and senior officers of the respondent were actively complicit, in an attempt to secure his dismissal; and

(d) that Mr Blott had made an offensive and racist comment regarding the claimant, specifically using the word *"wog".*

61. The disciplinary hearing on 31 January 2018 proceeded, but did no more than consider whether to adjourn in the light of medical evidence provided by the claimant at the hearing. This was a letter from the claimant's GP.

62. The hearing adjournment was confirmed in writing to the claimant by letter dated 31 January 2018, from Ms Saleemi. In this letter the claimant was asked to provide answers to a number of written questions. Following a further letter from the claimant on 1 February 2018 the respondent wrote to the claimant on 2 February 2018 to confirm, notwithstanding his health issues, his disciplinary hearing would proceed on 6 February 2018 unless the claimant was willing to agree to an extension of his notice period and redundancy termination date to 2 March 2018. The letter confirmed to the claimant that if he did not attend the hearing on 6 February, and did not choose to make any written representations or send further information, the matter would be determined in his absence, and that the result may be dismissal for gross misconduct.

63. The claimant responded by email dated 5 February 2018 to confirm that he did not agree to the extension of his redundancy date. The claimant sent a further more detailed email to Ms Saleemi on 6 February 2018 at 1.45am raising a number of concerns regarding the timing of the disciplinary hearing and making a number of submissions regarding the disciplinary charges against him. In addition the claimant confirmed that he had arranged meetings with a view to finding alternative work following his redundancy and would be, as a result of these commitments, unable to attend on 6 February. In addition the claimant referred to the advice from his GP that he was not well enough to attend the hearing without proper notice at that time. The claimant also raised concerns that his grievance, which the respondent had proposed to treat as a separate private matter, was not separate. He believed his grievance was closely related to the disciplinary issues and should be considered alongside them.

64. In the event the respondent proceeded with the disciplinary hearing in the claimant's absence on 6 February 2018. At that disciplinary hearing all of the allegations relating to the routine forwarding of council emails to a private email address were dismissed as unfounded, on the basis that this was an activity undertaken by large numbers of officers and employees of the respondent. The disciplinary charges regarding the offensive email sent were upheld. The dismissing officer, Mr Murphy, in the letter confirming the outcome of the disciplinary hearing confirmed his decision that the claimant's grievance was not relevant. He was of the view that even if the matters raised by the claimant in his grievance were found to be true, they would not excuse the claimant's conduct in any way. This would render the determination of the claimant's grievance prior to the disciplinary process unnecessary. He stated:

> "*For the avoidance, as I have explained, even if Mr Blott had made such a comment, it does not justify your actions in writing and sending the email of 25 October 2017 and I would consider your conduct still to amount to gross misconduct and I would terminate your employment by reason of your conduct.*"

65. Mr Murphy went on to conclude that the claimant should be summarily dismissed with effect from 6 February 2018. Accordingly, the claimant was dismissed prior to redundancy taking effect, and was not dismissed by reason of redundancy.

66. Following this dismissal an appeal hearing was convened. The appeal was heard by Mr Satoor on 21 March 2018. The claimant covertly recorded the appeal hearing. This covert recording was disclosed to the respondent in preparation for this hearing, and a transcript of the recording prepared. The Tribunal had the benefit of a copy of this transcript.

67. The claimant's evidence regarding this transcript was that, with the exception of two points, it was broadly accurate. The two points in contention were:

(a) that at the outset of the hearing there had been a discussion regarding whether the claimant could be represented by a solicitor; and

(b) that at the conclusion of the hearing there was some brief discussion which was not captured by the recording; however, it was not of direct relevance to the matters before the Tribunal.

Accordingly, the Tribunal has had the opportunity to see a verbatim record of the relevant discussion at the disciplinary appeal hearing.

68. The evidence of Mr Satoor, under cross examination, was that the appeal hearing had taken the format of a review of the disciplinary hearing rather than a full re-hearing. This evidence was given in response to a leading question skilfully put to Mr Satoor, something which the claimant's representative was entitled to do. However, in the light of reading the transcript of the disciplinary appeal it is clear that the appeal process amounted to much more than a mere review of the disciplinary hearing and process.

69. At the appeal hearing the disciplinary officer, Mr Murphy, is recorded as having explained what he had done at the disciplinary hearing. Included in this he referred to the rationale for proceeding with the disciplinary hearing on 6 February and the outcome of the hearing, including the conclusion that the claimant was guilty of gross misconduct and to summarily dismiss the claimant. Mr Murphy referred to his dismissal letter in relation to these points.

70. The claimant was afforded and took the opportunity to make detailed representations regarding the only disciplinary matter which remained, namely in relation to the offensive email. The claimant gave a detailed account of the circumstances which led to the drafting of the email, including that it was intended by him to be a private joke between friends, and the unfortunate circumstances in which the email had come to be sent to Mr Blott. The claimant invited Mr Satoor to view the Peter Cook and Dudley Moore sketch which was available on YouTube. The claimant agreed that the email should not have been sent and conceded that it was inappropriate. The claimant was afforded the opportunity to, and did, explain his view regarding his dismissal, including his relationship with Mr Blott and the fact that Mr Blott had allegedly sought to dismiss the claimant on multiple occasions in the past on the basis of vexatious charges which were then quashed. The claimant further raised his concerns that the respondent had failed to follow the appropriate disciplinary policy.

71. The outcome of the appeal was that the claimant’s dismissal was upheld.

Findings

Redundancy Payment

72. It is clear that the claimant was not made redundant. Accordingly, the claim for a redundancy payment cannot succeed. Submissions from the claimant's representative did not seek to pursue a claim for a redundancy payment. The claimant’s representative instead sought to argue that any compensation for unfair dismissal must, given the fact that the claimant would have been made redundant

the following day and been entitled to such payment had he not been dismissed on 6 February, should reflect the loss of the redundancy payment.

Reason for dismissal

73. The respondent argues that the claimant was dismissed for misconduct. The respondent explained that the misconduct was the sending of the offending email. The claimant contends that the dismissal was for a different reason, the email being latched onto as an excuse for dismissing him. The burden of proof is upon the respondent to establish the reason for the dismissal.

74. The evidence from the respondent's witnesses was that the email sent by the claimant was in their opinion extremely offensive and threatening. Mr Murphy in his dismissal letter stated:

> "*I cannot recall having read a more abusive and unacceptable email. The email is abhorrent and totally unacceptable, especially given it concerns a fellow colleague, never mind a senior officer of the council*".

75. The respondent's representative submitted this conclusion was compelling. The claimant's representative submitted that the email was so clearly excessive that it was obviously a joke, and further the fact that it was not intended to be received by Mr Blott should be taken into account.

76. Having had the benefit of sight of the email it is clear that, regardless of whether it was intended as a joke, it is deeply offensive and inappropriate. The claimant occupied a senior position with the respondent.

77. The evidence clearly shows the respondent did dismiss the claimant in response to the email he sent. The claimant has sought to show by reference to the fact that the respondent initially sought to discipline him in relation to wider disciplinary charges, and the past history between himself and various officers of the respondent, that the principal reason for dismissal was not, in fact, the email. The claimant's arguments in this regard are not compelling.

78. The additional disciplinary charge arose as a consequence of an investigation conducted by the IT department into the offensive email which the claimant sent. The claimant's own evidence was that he was aware of nothing that would suggest that the individual at the IT department who did this was in any way involved in a conspiracy against him.

79. The claimant accepts that he obtained evidence which showed that the practice of routinely forwarding emails was commonplace in the respondent's workforce, including amongst senior staff, but deliberately withheld that evidence. It is noted that this evidence came from a different department of the respondent organisation, and that therefore, in principle at least, criticism could be levelled that the respondent as a whole was, therefore, aware of this exculpatory evidence. The respondent is, however, a large organisation with widely divergent departments and responsibilities. It is not realistic to suggest that different departments will communicate information to each other unless they are specifically aware that communication is needed. No evidence has been presented which suggests that the

person who responded to the claimant's freedom of information request was aware that he was being disciplined for related matters.

80. The reason the claimant gives for having deliberately withheld this exculpatory evidence lacks credibility. The fact that the respondent pursued disciplinary action against the claimant until the claimant revealed the exculpatory evidence is not in any way indicative of improper intent by anyone within the respondent organisation.

81. In relation to the historic background and relationship between the claimant and individuals from the respondent, the claimant's case is not supported by evidence. The dismissing officer and the appeals officer do not appear to be individuals which the claimant identifies as having any vendetta against him. Accordingly, the claimant is relying upon an argument that individuals within the respondent organisation were able to exert influence over these persons to pressurise them into dismissing him. The claimant has not produced evidence that the individuals concerned have entered into a wider conspiracy to dismiss him, or, critically, that they had the theoretical power and influence to do so.

82. In the alternative, the claimant suggested in evidence that the position may be that a biased case had been presented to the independent dismissal and appeals officers, who were then left with no choice but to dismiss on the case presented. Given the claimant admitted the conduct he was dismissed for, and having read the transcript of the disciplinary appeal, this submission does not appear to reflect the events. At the least, at his appeal, the claimant was given ample opportunity and did set out in some detail his concerns.

83. Accordingly, the evidence presented supports the respondent's contention that the reason for the dismissal related to the claimant's admitted conduct. It does not support the claimant's contention that it was the culmination of a vendetta.

Fairness of the Dismissal

84. The claimant challenged the fairness of his dismissal on procedural and substantive grounds.

Procedural Fairness

85. It is clear that there were procedural defects leading up to the decision to dismiss. These can be summarised as follows:

(1) The claimant was only notified on 2 February 2018 of the 6 February 2018 hearing. The notice on 2 February was conditional; it was to be deferred to a later date if the claimant agreed to extend his employment beyond his forthcoming due redundancy date.

(2) The claimant had notified the respondent that he was unwell. The respondent had obtained evidence from their own Occupational Health team which had concluded that he should be given at least one week's notice of any hearing.

(3) The respondent's own disciplinary process requires the claimant to be given five days' notice of a hearing. The period from 2-6 February 2018 cannot be five days.

(4) The claimant had confirmed to the respondent that he was unable to attend on 6 February 2018 as he had other meetings which he was committed to attend as part of his search for alternative work following redundancy. This is something the claimant is entitled to do, both under general employment law and under the respondent's specific practices and policies.

(5) The respondent had adjourned the disciplinary hearing on 31 January 2018 to obtain medical evidence regarding the claimant's fitness to attend a hearing, but then proceeded to relist the hearing without having obtained such evidence.

86. Proceeding with the disciplinary hearing on 6 February 2018, knowing that the claimant could not attend, having given insufficient notice, and being aware that the claimant, because of his ill health, required more than the minimum notice, is clearly a material procedural defect.

87. It is noted that the claimant's employment was due to end the following day by way of redundancy. The result of delaying the hearing would have been that the redundancy would have taken effect prior to any disciplinary hearing, rendering the impact of any disciplinary hearing (if one could sensibly proceed post dismissal) as of limited relevance.

88. In relation to the other procedural defects referred to by the claimant these are not found to be substantive defects for the following reasons:

(1) <u>The investigating officer was not appointed by the correct person</u>

It is difficult to conclude that this could have had any material impact on the outcome of the investigation. The claimant admitted the conduct which resulted in his dismissal. A large part of the investigation related to the disciplinary charges which were dismissed. No suggestion has been made as to how a different investigating officer could have, or would have, made any difference to the disciplinary charge for which the claimant was dismissed.

(2) <u>The investigation was too slow</u>

The evidence shows that the disciplinary investigation and process took far longer than should have been the case under the respondent's policy. There was a period during which the email in question was referred to the police. There were delays caused by the claimant's ill health and the respondent's agreement to adjourn and delay matters at the request of the claimant. There was a period when the claimant was on pre-booked leave. Whilst a delay to a disciplinary process is not ideal, the claimant's representative was unable in submissions to point to anything arising out of that delay which prejudiced the fairness of the decision to dismiss the

claimant. But for that delay it appears likely that the claimant's disciplinary hearing would have been convened on proper notice on a date when he was or should have been available.

(3) Inadequate notice for the 31 January 2018 disciplinary hearing

The notice which the claimant was given for the disciplinary hearing on 31 January 2018 cannot have had a substantive impact upon the fairness of the decision to dismiss him. It is not necessary to engage with the debate which occurred between the parties regarding the meaning of "*five working days' notice*" and how that would be calculated. The disciplinary hearing on that date did not, in substance, proceed. All that occurred was that the hearing was adjourned due to the claimant's ill health. Accordingly, any failure to give five days' notice had no actual impact on the process.

(4) Failure to consider procedural grounds at the appeal

There was in evidence a transcript of the appeal hearing, covertly recorded by the claimant. In this transcript the claimant sets out his procedural concerns, including concerns regarding the timing of events during the disciplinary process. Nothing in that transcript suggests any refusal or failure to consider the claimant's comments. Accordingly, the claimant's assertion that the appeal failed or refused to consider grounds of appeal that he wished to raise is simply not supported by the evidence.

(5) Failure to progress the grievance

The claimant complains that the respondent's treatment of his grievance regarding Mr Blott making racist comments about him renders his dismissal unfair on the basis that it was related to the disciplinary issue and should have been considered either alongside or prior to the disciplinary process. It is clear that the grievance raised concerns that there is animosity between the claimant and the person whom he described in his offensive email. That said, it is clear that the dismissing officer addressed his mind to that fact and concluded that the claimant's actions, irrespective of any alleged racist comment by Mr Blott, were unacceptable. The dismissing officer explicitly sets out, in his decision letter, that even if the claimant's grievance were to be ultimately upheld it would not have changed the outcome of the disciplinary hearing.

On this basis the decision not to deal with the grievance either at the same time or prior to the disciplinary process did not amount to a procedural defect.

(6) Not being permitted to have a solicitor at the appeal hearing

The claimant complains that at the appeal hearing he was not permitted to have a solicitor represent him or present with him. This complaint is on the basis that the respondent did have a solicitor present. The claimant's

submission was that the fact one side had a solicitor and not the other demonstrates a clear inequality of arms.

Firstly, it is relevant that there is no general entitlement to have a solicitor present. Secondly, the respondent policies do not give persons attending a disciplinary hearing such a right. Reading the transcript of the appeal hearing it is clear that the claimant was afforded, and took, the opportunity to fully set out the grounds of his appeal. The claimant has identified no particular point within his appeal hearing where he suggests the presence of a solicitor would have materially benefitted him, or where the absence of a solicitor has materially prejudiced him. Accordingly, the decision not to allow the claimant to have a solicitor present with him at the appeal hearing is not found to be a procedural defect in the disciplinary process.

Procedural Defects Remedied by the Appeal

89. The respondent submitted that, if there were procedural defects in the claimant's disciplinary procedure, these were remedied by his appeal process and hearing. This submission is on the basis that the claimant had a full and fair appeal hearing, which amounted to a rehearing.

90. It is noted that the Chair of the appeal hearing, Mr Satoor, stated under cross examination that the hearing was by way of review of the disciplinary outcome and hearing, not a full re-hearing. This was in response to questions skilfully put to him by the claimant's counsel. This initially appears to be conclusive, coming from the chair of the appeal hearing. He is not, however, a lawyer. It was clear from his evidence that he was not certain what the terms "*re-hearing*" and "*review*" may mean in a disciplinary appeal context. He was just following the process he was advised to follow by HR and the respondent's policies.

91. In evidence the claimant provided a full, verbatim transcript of the relevant parts of the appeal hearing. It is clear from this that the hearing was not a mere review of the previous process. The claimant was given the opportunity to make full submissions to the hearing, and did so.

92. The only material procedural defect up to and including the disciplinary hearing was proceeding with the 6 February 2018 hearing without giving proper notice, being aware that the claimant could not attend and failing to properly consider the claimant's ill health. The appeal hearing was 21 March 2018. The claimant had ample notice of this hearing, attended this hearing and did not suggest that he was too ill to properly engage with the appeal hearing. The claimant at his appeal hearing made full and detailed submissions regarding his grounds of appeal. Accordingly, the fact that the first hearing went ahead on 6 February 2018, whilst a procedurally flawed step, is not a flaw that was repeated with the appeal hearing. On the basis that the appeal hearing was convened in a procedurally proper way, and amounted to a rehearing of the claimant's disciplinary hearing, it remedied the material procedural defects which the claimant identified as present in the initial disciplinary process.

Substantive Fairness

93. The claimant contends that the email which he sent was clearly a joke and was so excessive and ludicrous in its nature that Mr Blott could not have felt apprehensive on receipt of it. The claimant accepts that the email was offensive. The claimant submits that the email was sent privately by him to a third party and he had no part in the forwarding of that email to Mr Blott.

94. The respondent submits that the email is deeply offensive and that it makes no difference who the claimant sent it to and whether it was intended to be offensive or a private joke. At no point in the evidence was the suggestion made by any of the respondent's witnesses that they had not accepted that there was no intent by the claimant for the email to ever be seen by Mr Blott.

95. The claimant's representative made repeated and detailed references to the various policies of the respondent relating to pertinent matters. There was a detailed cross examination and some discussion regarding the content and scope of these policies.

96. Whilst on a literal construction of the policies there is potentially scope to argue that the claimant's conduct in sending that email is not specifically expressly prohibited, this is not itself a compelling argument. The claimant, as with all employees, has implied duties regarding his conduct. The argument that the claimant's conduct was not strictly contrary to the contractual policies in place does not materially assist the claimant. In this case an employee has sent an email to a third party which is deeply offensive and threatening regarding a senior colleague. There is no requirement for an employer to put into writing that an employee will not send such deeply offensive and threatening emails, using such language, about senior colleagues to third parties. It is a matter entirely covered by implied contractual terms which exist within all contracts of employment.

97. The claimant also submitted that the fact he did not send the email to Mr Blott, but to a third party, renders the conduct such that dismissal is not a sanction reasonably available to the respondent. The situation is the digital version of a private conversation being unintentionally overheard. It does not make a substantive difference that what was said was not intended to be overheard, once it has been overheard.

98. The respondent made persuasive submissions to the effect that the organisation in question is a public body, and that the claimant was a very senior employee. Whilst at the time of his dismissal, the email had not entered into the public domain, and that there was nothing at that time to specifically suggest that it would, the respondent has to be in a position to defend its decisions if it ever did become known. The claimant's submission that the email could not enter the public domain appears to be predicated on assumptions as to the conduct of many other persons within the respondent organisation, both deliberate and inadvertent. The email clearly could be leaked. If it was, the respondent would have to be prepared to explain any decisions taken.

99. The claimant further submitted that the email, whilst offensive and unpleasant, was not credibly threatening. In essence, summary dismissal for writing such an

email lay outside the range of reasonable responses. Having the benefit of sight of the email it is clear that it is, given the context of the claimant's role and seniority, completely unacceptable. Any respondent public authority could reasonably conclude that the sending of such an email, by such a senior member of staff, accordingly, summary dismissal in response to the claimant's conduct is clearly fully within the range of reasonable responses open to the respondent.

Employment Judge Buzzard

Date: 20 November 2018

REASONS SENT TO THE PARTIES ON

23 November 2018

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FOR THE TRIBUNAL OFFICE