EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: S/4113404/15 & S/4100009/16

Held in Glasgow on 3, 4, 23, 24 May & 4 July 2016

Employment Judge: Paul Cape

1.	**Mrs Lorna Scott**	**1st Claimant** **In Person**
2.	**Mr Stephen Scott**	**2nd Claimant** **In Person**
The Richmond Fellowship Scotland		**Respondent** **Represented by:** **Mr D Hay - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

(1) The complaint of Mrs Scott that she was unfairly dismissed succeeds. Remedy is to be determined separately.

(2) The complaint of Mr Scott that he was unfairly dismissed succeeds. The respondent is ordered to pay to him the following monetary award:

(a) A basic award of £2503.38 (two thousand, five hundred and three pounds, thirty eight pence);

(b) a compensatory award of £18,367.07 (eighteen thousand, three hundred and sixty seven pounds, seven pence) made up of

(i) £14, 388.66 (fourteen thousand, three hundred and eighty eight pounds, sixty six pence) in respect of loss of earnings (ii) £500.00 (five hundred pounds) as compensation for loss of statutory rights (iii) £3478.41 (three thousand, four hundred and seventy eight pounds, forty one pence) being an increase in compensation in respect of failure to comply with the ACAS Code of Practice on disciplinary practice and procedure.

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply. The prescribed element is £14,388.66 (fourteen thousand, three hundred and eighty eight pounds, sixty six pence) and the prescribed period is from 8 August 2015 to 3 April 2017. The monetary award exceeds the prescribed element by £6481.79 (six thousand, four hundred and eighty one pounds, seventy nine pounds).

[Judgment section inserted by Judge Simon.]

REASONS

The complaints

1. In these proceedings the claimants complain of unfair dismissal.

The issues

2. In the case of Mr Scott, was the contract of employment tainted with illegality such that Mr Scott could not rely upon that contract so as to establish a right not to be unfairly dismissed?

3. It being admitted that both claimants were dismissed by the respondent, subject to Mr Scott being able to establish a right not to be unfairly dismissed, the issues before the Tribunal were these:-

(1) Has the employer proven the reason (or if there was more than one reason, the principal reason) for the dismissals?

(2) Is the reason (or, as the case may be, the principal reason) for each of the dismissals one of the potentially fair reasons for dismissal mentioned in Section 98(2) of the Employment Rights Act 1996 ("*ERA*") or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held?

(3) Whether, in accordance with equity and the substantial merits of the case and having regard to all the circumstances including the size and administrative resources of the respondent, the respondent acted reasonably in treating the reason (or as the case may be, the principal reason) for the dismissal as a sufficient reason for dismissing the claimant and, in particular:-

(a) whether adequate warning was given;
(b) whether the respondent conducted a reasonable investigation;

(c) whether hearings were conducted fairly;

(d) whether the respondent followed a fair procedure;

(4) Considering each dismissal separately, if the dismissal was unfair, did the claimant cause or contribute to the dismissal in such a way or to such an extent that the compensation that would otherwise be awarded should be reduced and, if so, to what extent should the basic and compensatory awards be reduced?

(5) Considering each dismissal separately, if the dismissal was unfair, does justice and equity require that the compensation that would otherwise be awarded should be reduced and, if so, to what extent should the basic and compensatory awards be reduced?

Issues that were not determined

4. Due to the ill health of Employment Judge Cape the compensation to be awarded to Mrs Scott was not determined: a separate remedy hearing will be fixed, if that is how parties wish to proceed, before another judge to deal only with that issue. In the alternative, if parties are able to agree upon an alternative method of determining remedy in the case of Mrs Scott this may be the subject of further procedure. [Para.4 inserted by Judge Simon.]

The evidence

5. The claimants gave evidence and called their former Area Manager Mrs Lilias McWilliams. Evidence was given on behalf of the Respondent by Mrs Karen Robertson, Area Manager, who conducted the disciplinary hearings and Michael Carroll, Executive Director who conducted the appeal hearings.

6. There were two bundles of productions.

The Claimants' case

7. The claimants' case was that the dismissal was unfair because at all times they acted in accordance with the instructions of an Executive Director of the respondent, Mr Frank White as conveyed to the claimants by their Area Manager, Mrs McWilliam. The claimants consistently gave that explanation but the respondent did not investigate the truthfulness of what was being said by the claimants, even when Mrs McWilliam came forward having heard of the dismissals. Mr Scott was not permitted to call Mrs McWilliam as a witness at the appeal hearing.

The Respondent's case

8. The respondent's case was that Mr Scott claimed and Mrs Scott authorised payments represented to be travelling expenses incurred in the course of the respondent's business, the claimants knowing that Mr Scott was not entitled to payment under the respondent's expenses policy and, further, that the sums paid ought to have been subject to income tax and National Insurance contributions but that the sums paid were received by Mr Scott but not accounted for **to** the HMRC. In the case of Mr Scott, the contract of employment was tainted by illegality as money was received as tax-free expenses which ought to have been taxed as income, so that the Revenue was deprived of the tax income to which it was entitled and, as a matter of public policy, Mr Scott cannot found the right not to be unfairly dismissed on the illegal contract. There was a fair disciplinary procedure involving a hearing and an appeal.

The Tribunal's findings of fact

9. Immediately prior to dismissal, Mr Scott was employed by the respondent as a Senior Support Worker. At the date of dismissal he had been employed for a little under seven years.

10. Immediately prior to dismissal, Mrs Scott was employed by the respondent as a Team Manager. At the date of dismissal she had been employed for a little over 13 years.

11. The respondent is a charity providing social care throughout Scotland including the provision of domiciliary care and residential respite care.

12. The respondent is headed by a Chef Executive Officer. Beneath him in the structure are five Executive Directors, four of whom have responsibility for a geographical region in Scotland and the fifth is Mr Carroll who is in charge of Finance and Systems, a remit that includes Payroll and Human Resources functions.

13. Beneath the level of Executive Director (insofar as is material to this case) are a number of Area Managers such as Mrs Robertson and Mrs McWilliams. At the tier next below the Area Managers were the Team Managers such as Mrs Scott and, below them, the Senior Support Workers such a Mr Scott. On the first rung of the ladder were Support Workers.

14. The uncontroverted evidence of Mrs McWilliam was that the claimants were very good at their respective jobs and that the areas of service for which they were responsible had attracted high praise on external inspection.

15. It was the excellence in the performance of his duties that led to the matters that resulted in Mr Scott's dismissal.

16. Immediately prior to the events resulting in Mr Scott's dismissal, the respondent employed two Senior Support Workers based in Newton Stewart. Mr Scott was responsible for the domiciliary care side of the

respondent's activities. The other Senior Support Worker managed a respite care residential unit. The respite care post fell vacant. There was, at that time, uncertainty around the continued operation of the respite care unit and there were discussions around that unit passing to the control of the local authority.

17. The future of the respite care unit was discussed between Mrs McWilliam and Mr White. Mrs McWilliam sought the appointment of a Senior Support Worker. Mr White had concerns about budget matters and, in particular, that the Ayrshire part of his command was running at a loss, even though the Galloway part was in surplus.

18. Between Mrs McWilliam and Mr White it was decided that Mr Scott would be asked if he would take on the management of the respite care unit in addition to his existing workload. The respite care unit added substantially to Mr Scott's responsibilities and workload. He was prepared to take on those additional burdens but, entirely understandably, sought additional remuneration to recognise and reward the additional efforts that would be required of him. He could not properly be required to take on the additional work without his consent. If Mr White's plan was to be carried into effect, it was necessary to procure Mr Scott's agreement.

19. Mrs Scott, Mrs McWilliam and Mr White were all in agreement that the extra work that Mr Scott was being asked to take on merited increased remuneration.

20. In Mrs McWilliam's presence, Mr White spoke to an HR Business Partner over the telephone. The gist of the conversation was that Mr White wished to increase Mr Scott's remuneration but Mr Scott was at the maximum point of his salary scale so he could not be advanced within the Senior Support Worker pay grade. Subsequently, there was discussion between Mr White and Mrs McWilliam about Mr Scott being promoted to Team Manager level but that came to nothing.

21. There came a time when Mr White presented Mrs McWilliam with a solution to the problem. Mr White proposed that Mr Scott take on management of the respite care unit in addition to his then responsibilities and, in return, Mr Scott would be permitted to claim £250 per month through the respondent's expenses system.

22. Mrs McWilliam informed the claimants of Mr White's decision. Mr Scott gave the matter some thought and concluded that he was prepared to take on the additional burdens of respite care management in return for £250 paid to him through the expenses system.

23. Mr White said nothing to Mrs McWilliam to suggest that he had given any thought to the tax and National Insurance implications of what Mr White proposed. It didn't occur to Mrs McWilliam that any issue arose in respect of tax or National Insurance. Neither did it occur to Mrs Scott or Mr Scott that there was anything untoward in what Mr White had proposed.

24. The arrangement was that Mr Scott would complete an ordinary travelling expenses claim form each month and record on it sufficient journeys from his home in Stranraer to his workplace in Newton Stewart to account for the payment of £250 of travelling expenses. Mr Scott was required to submit the completed form to Mrs Scott as his immediate manager and she was required to countersign the form to approve it for payment.

25. None of the arrangement was committed to writing. Ordinarily, the respondent's payroll and Human Resources systems require the completion of forms notifying changes in terms of employment. Those forms were not completed in this case. Neither the claimants nor Mrs McWilliam saw anything sinister in that.

26. Both Mr Scott in claiming expenses and Mrs Scott in countersigning the form well knew that the expenses being claimed were out-of-the-ordinary in

that, ordinarily, journeys recorded on the claim form were from one place of work to another and not from home to the base place of work. The expenses claim form included a declaration signed by Mr Scott that *"…the expenses detailed in this claim for have been incurred by me on the business of [the respondent]*".

27. Whilst Mr Scott knew that the expenses he was claiming were out-of-the-ordinary, he was content that he was entitled to make the claims that he made. Firstly, the arrangement had been proposed by Mr White an Executive Director of the respondent. Secondly, Mr Scott had considerable respect for Mr White and trusted that Mr White was in order in making the proposal that he did. Thirdly, Mr Scott's ordinary commute to work was 25 miles each way, so that, each month he travelled many more miles to and from work than he claimed for. In countersigning the expenses claims, Mrs Scott knew that the arrangement was one that came from Mr White; she, too, respected and trusted him and she knew of Mr Scott's commuting arrangements

28. There came a time when Mrs McWilliam told Mrs Scott that Mr Scott should not simply record "*Stranraer to Newton Stewart*" journeys on his claim form but that the journeys should be varied, albeit that the value of the claim was to come to the agreed £250. Mrs William did not recall this conversation but Mrs Scott did and Mrs McWilliam was clear that it mattered not what was the journey set out on the form, the overriding objective was to record expenses amounting to £250 each month. It occurred to neither claimant to question why the change in recording was put in place. The claimants simply and trustingly went along with what they had been asked to do.

29. In the Spring of 2015, Mrs McWilliam found work elsewhere and left the respondent's service. By that time, Mr White had also moved on.

30. Before Mrs McWilliam left the respondent's service, she wrote to the claimants by e-mail on 22 May 2015. The text of that e-mail appears at

page 112 of the bundle of productions. The e-mail began "*I'm sending this e-mail as confirmation of Stephens £250 each month additional payment that was agreed with Frank White and myself some time ago…"* The e-mail went on to explain the circumstances which led to the matter being agreed and to confirm it was agreed by the "*South Director and Area Manager*". Mrs McWilliam said that she would include the matter in her handover notes and raise the issue in her final supervision with the then current Executive Director.

31. Mrs McWilliam's e-mail was addressed to the claimants. The e-mail on page 112 does not appear in its original form, although it is in its original text. The chain of e-mails at pages 111 and 112 shows that, on 6 July 2015, Mrs Scott forwarded Mrs McWilliam's e-mail to Teresa Thomson, who was Mr White's replacement as Executive Director. Mrs Thomson's reply records her as saying that she knew nothing about this. The next e-mail in the chain is from Mrs Scott to Mr Carroll, although it is not clear why that should be the case. It is clear from the e-mail to Mr Carroll that on 7 July 2015, Mrs Scott set out the explanation that she has given all along, that is, that Mr White and Mrs McWilliam had approved the arrangement that Mr Scott had followed and which Mrs Scott had countersigned.

32. Mrs Scott's explanation for writing to Mrs Thomson as she did was that Mr White and Mrs McWilliam had both left the respondent's service and Mrs Scott required the comfort of confirmation that the arrangements that had been made were to continue.

33. There then followed what purported to be an investigation into the matters alleged against the claimants. Notwithstanding that the respondent was purportedly investigating what it ultimately labelled a gross misconduct, the claimants were not suspended in the period of over two months between these matters first coming to light and the decision to dismiss.

34. There is a note of an interview between the investigating officer and Mr Scott conducted on 16 July 2015. The heading of the note speaks volumes as to the mindset of the investigating officer "*Investigation into allegations of fraudulent mileage claims by Stephen Scott*."

35. It was not until almost the third page of the five-page note of the interview that the conversation turned to the claim that Mr Scott was making. When asked whether he was being paid his home to office mileage he frankly admitted that was the case. The investigating officer then asked who had agreed the arrangement and Mr Scott repeated the explanation that the arrangements had been approved by Mr White and Mrs McWilliam.

36. At the foot of page 118, the investigating officer returned to her theme as set out in the heading of the note "*Do you understand that these claims are fraudulent?*" The implication that the investigating officer had made up her mind that Mr Scott was guilty of fraud is reinforced in the third last question on age 119 "*Are there any mitigating circumstances that you wish me to consider?*".

37. The same heading appears on the note of the investigation meeting with Mrs Scott at page 153 of the productions. It was not until the fourth page of the six page note that any mention is made of how it was that the arrangements supposedly under investigation came to light. The prejudging of fraudulent action appears at the foot of the fifth page "*Would you say that Stephen would know then that the claims that he was making were fraudulent?*" and again on page 6 "*Do you understand that this is fraudulent?*"

38. Notwithstanding the explanation of what occurred consistently offered by the claimants, no attempt was made to contact Mrs McWilliam or Mr White to obtain their version of events.

39. Notwithstanding the claimants' position that it was Mr White, the Executive Director, who had initiated, the arrangements now being held against the claimants, there is scant acceptance of his involvement evident on the face of the letters conveying the decision to dismiss. In the penultimate paragraph of the second page of the latter to Mr Scott, the dismissing officer writes Mr White out of the action "*I find that Lil McWilliam did indeed 'offer' to pay you an extra £250 per month on top of your salary*". Quite why the word "offer" was put in quotation marks is not clear,

40. Between the decision to dismiss Mr Scott and the hearing of his appeal, Mr Scott made contact with Mrs McWilliam. Mrs McWilliam spoke over the telephone with the respondent's Head of Human Resources and gave the same account of what had occurred as had been given by the claimants. Notwithstanding the information provided by Mrs McWilliam, the respondent made no attempt to contact Mr White.

41. Mrs McWilliam expressed her willingness to attend the appeal hearings in order to repeat the account she had given over the telephone. She was not permitted to do so. She did, however, set out her account in writing.

42. In the respondent's note of the appeal hearing it is said that Mr Carroll said *"…the instruction issued by Lil and Frank is not disputed, that there was a belief that this instruction had come from these senior managers*." If that was said by Mr Carroll it was not truthful because in the course of his evidence Mr Carroll admitted that he harboured suspicions that Mr White had not, in fact, approved the arrangements. That evidence makes the more sinister words in the letter conveying the decision to dismiss the appeal: *"…there is no dispute that you had received an instruction from the Area Manager…"* The reference to it being Mrs McWilliam who had approved the arrangement is repeated in the letter setting out the decision to reject the appeal of Mrs Scott.

43. In the course of hi**s** evidence Mr Carroll, a qualified accountant, accepted that it is not unlawful for an employer to agree with an employee that the employee will be paid a sum of money in respect of the employee's home-to-office travelling expenses, albeit that such sums would ordinarily fall liable to be taxed.

44. Following the dismissal of Mr Scott, the respondent adjusted its payroll records to show that the sums paid to the claimant by way of expenses were wages with the result that a tax calculation was carried out. The respondent remitted the tax it calculated to be due to the Revenue and purported to render an invoice to Mr Scott. The nature or circumstances of the adjustment to payroll was not explained to the Revenue by the respondent.

The applicable law

45. It is for the respondent to prove the reason (or, if there was more than one reason, the principal reason) for the dismissal and that the reason for the dismissal was one of the potentially fair reasons set out in Section 98(2) ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held (see Section 98(1) ERA).

46. A reason for dismissal is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee (see *Abernethy v Mott, Hay and Anderson* [1974] IRLR 213.**)**

47. Conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. The character of the institutional employer, the role played by the employee in that institution and the degree of trust required of the employee vis-à-vis the employer must all be

considered in determining the extent of the duty of trust and the seriousness of any breach thereof (see *Neary v Dean of Westminster* [1999] IRLR 288.**)**

48. In considering fairness a finding that that a dismissal is in breach of contract is a factor relevant to the consideration of fairness but it is not decisive (see *Hooper v British Railways Board* [1988] IRLR 517.**)**

49. If a potentially fair reason for the dismissal has been shown it is for the Tribunal apply the test in Section 98(4) of ERA and consider whether in the circumstances of the case, including the size and administrative resources of the respondent, the respondent acted reasonably in treating the reason (or as the case may be, the principal reason) as a sufficient reason for dismissing the claimant. The fairness of the dismissal must be determined in accordance with equity and the substantial merits of the case.

50. Section 98(4) does not place the burden on the respondent to show or satisfy the Tribunal that the respondent acted reasonably in dismissing. There is no burden of proof on either party in respect of Section 98(4) (see *Post Office Counters Ltd v Heavey* [1989] IRLR 513).

51. In considering the question posed by Section 98(4), the starting point for the Tribunal is the words of the section itself:-

> *"(4) In any other case 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 determined in accordance with equity and the substantial merits of the case."

The Tribunal must consider the reasonableness of the respondent's conduct and not simply ask whether the members of the Tribunal consider the dismissal to be fair. The Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. The Tribunal must keep in mind that in many (but not all cases) there is a band of reasonable responses to an employee's conduct within one employer might reasonably take one view and another employer quite reasonably take another. It is for the Tribunal to decide whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted (see *Iceland Frozen Foods v Jones* [1982] IRLR 439).

52. In applying the test in Section 98(4), the Tribunal must consider whether the respondent has complied with such pre-dismissal procedures which a reasonable employer could and should have applied in the circumstances, whether any contractual appeals process has been carried out in its essentials, whether, following a reasonable investigation, the respondent entertained a reasonable belief in guilt and whether the respondent dealt fairly with the claimant during the disciplinary hearing and appeal process (see *Whitbread & Co plc v Mills* [1988] IRLR 501).

53. In determining the fairness of the dismissal, the Tribunal must have regard to the provisions of the ACAS Code of Practice on disciplinary practice and procedure (see *Lock v Cardiff Railway Company Ltd* [1998] IRLR 358).

<u>The application of the law to the facts</u>

54. I have to consider the claims of each claimant separately and make findings as to whether the respondent has in each case discharged the burden of proving a potentially fair reason for the dismissals before applying the test in Section 98(4) ERA to each of the claimants.

55. I will deal firstly, with the question of whether the dismissals were unfair and the remedy consequences that follow before going on to consider whether Mr Scott is able to rely on the right not to be unfairly dismissed by reason of the contract of employment being tainted with illegality.

56. I note and record my finding that the claimants and their witness, Mrs McWilliam, were credible and reliable witnesses. They gave a consistent explanation for what occurred throughout the internal proceedings and before the Tribunal. I had no doubt that I heard from them a truthful account.

57. I was not so impressed by the respondent's witnesses. Mr Carroll presented himself as someone who was uncomfortable with the evidence that he gave. His demeanour what not what might have been expected of a professional man operating at the level of Executive Director in a substantial enterprise. His credibility was harmed by the admission that he harboured suspicions about whether Mr White had approved the arrangement despite being recorded in the respondent's own appeal note as having said that he accepted that Mr White had approved the arrangements that were made. Certainly, the letters dismissing the claimants' appeals are couched in terms of Mrs McWilliam having approved the arrangement without any acknowledgement of Mr White's part.

58. I am troubled that the reasons given for the dismissals in the evidence of the dismissing office and appeal officer seek to extrapolate from the willingness of the claimants to work to the arrangement proposed by Mr White that the claimants could not be trusted to report some abuse of a service user, particularly, if that abuse involved the hand of a senior

manager. That evidence finds mention in the outcome letters in which it is said that what occurred calls into question the claimants' suitability for employment, not just with the respondent, but also in social services. There was, of course, not a shred of direct evidence that the claimants would turn a "*blind eye*" to any form of abuse of a service user.

59. The respondent's conclusions also include that Mr Scott should have raised the arrangement with the respondent's HR or payroll function as a whistle blower. There is no acknowledgement that the simplest course open to Mr Scott was to simply decline to shoulder the burdens of additional work and responsibility, as he was entitled to do, and leave the respondent to find a different and, probably, more expensive solution to its management problem. The reality is that Mr Scott displayed far greater loyalty and commitment to the respondent that than the respondent was prepared to show to him. Whilst Mr Scott was willing to take on difficult additional responsibility and workload which, by all accounts he did successfully, the respondent was willing to label him a fraudster for accepting the additional remuneration for that work proposed by the respondent's Executive Director, Mr White.

60. I have heard no satisfactory explanation for the failure of the respondent to ask Mr White for his version of what occurred. I accept that he was no longer employed by the respondent at the time these matters came to light and it is possible that an approach from the respondent would have been rebuffed. Those are no reasons to fail to make even the most perfunctory effort to attempt to engage with Mr White. It should have been obvious from the outset that a fair investigation required an approach to Mr White and Mrs McWilliam but the need to speak to Mr White became even more obvious when Mrs McWilliam came forward to echo the explanation offered by the claimants. The failure to even attempt to approach Mr White once Mrs McWilliam came forward moved what had been an inadequate investigation in the direction of something more sinister. The way on which Mr Carroll put it in the outcome letters – that Mrs McWilliam approved the

arrangements – when the only evidence was that the arrangement was approved by Mr White adds to my sense of unease that the respondent was consciously seeking to keep Mr White out of the firing line.

61. I am further troubled by the way in which the purported investigation set off with the mind-set that this was an investigation into fraudulent expenses claims. I infer that the dismissing officer was satisfied that Mr Scott had dishonestly obtained money from the respondent. I reach that conclusion on the basis of the sentence "*We have considered whether it would be appropriate to ask you to repay this money, however our view is that in this instance we will not do so given the sanction that we are imposing*." There is simply no recognition that on the available evidence Mr Scott was merely the hapless dupe of one of the respondent's Executive Directors who devised a cunning plan to lure Mr Scott into providing his valuable labour saving the respondent significant cost whilst leaving himself exposed to a disloyal employer. There was no recognition that Mrs Scott well-knew the arrangement that Mr White put in place was devised by Mr White as a mean of remunerating Mr Scott for his additional labours and that Mrs Scott's required part in the matter was simply to check that mileage to the approved value was recorded and then sign it off.

62. For the reasons set out I am left in some doubt as to whether I have heard a truthful explanation from the respondent as to the reasons or, if more than one, the principal reason for the dismissals. The burden of proof of the reason for a dismissal lies on the employer. The difficult question is whether that burden has been discharged.

63. Whilst I find the matter to be quite finely balanced, on the balance of probabilities, I am satisfied that the respondent has discharged the burden on it in the cases of both claimants. In reaching that conclusion, I remind myself that the standard to be applied is the balance of probabilities and that in asking whether that standard has been achieved, I should properly require more cogent evidence of deliberate wrongdoing than would be

required to establish inadvertence, carelessness or negligence. The reasons for dismissal, that Mr Scott claimed by way of expenses sums that were not to be regarded as ordinary business expenses and that Mrs Scott authorised payment of those claims knowing that sums claimed were ordinary business expenses, are made out and those reasons relate to the conduct of the claimants. The dismissals were for potentially fair reasons.

64. I am then required to apply the test set out in Section 98(4) of ERA in the case of each claimant taken separately.

65. The cornerstone of fairness in the handling of dismissals for reasons of conduct lies in the principle set down in the case of *Burchell*. Applying that test I have to ask whether the respondent entertained a belief in guilt on reasonable grounds and following such investigation as was reasonable.

66. I have to avoid looking at matters with the benefit of perfect hindsight. I have to recognise that there is often (but not always) a range of reasonable responses in which some employers acting reasonably will follow a different course to that chosen by other reasonable employers in the same or similar circumstances.

67. The essence of investigation is not merely a pursuit of lines of enquiry that will lead to establishing guilt. A fair investigation must look into matters raised by or on behalf of the accused employee that may be wholly or partly exculpatory. Even if the matters raised are, at best, only partly exculpatory reasonable steps must be taken to investigate those matters so that decisions can be taken understanding the material facts and circumstances and the context in which they arose.

68. It cannot go unnoticed that it was Mrs Scott that drew the matters that led to the dismissals to the attention of the respondent's Directors. When she and Mr Scott were asked about those matters they freely offered the same explanations that they gave in the course of their evidence, explanations

that I found to be truthful. A key part in those explanations was that Mr Scott agreed to provide labour in addition to that which could properly be required under his contract of employment. Moreover, the arrangement was not one initiated by Mr Scott or in combination with Mrs Scott, the claimants' explanation was that the arrangement had been proposed by Mr White.

69. The notes of the investigation, disciplinary hearings and appeals show that the entire focus was on establishing that which was not in dispute. There was no doubt that Mr Scott was making expenses claims for journeys that were not journeys that would ordinarily attract recompense. There was no doubt that the claims did not accord with the respondent's ordinary policy in the payment of expenses. There was no doubt that Mr Scott was being treated in a way that other employees were not. There was no doubt that Mrs Scott knew all of those things yet she signed off the claim forms.

70. What was in doubt was whether what was done by the claimants was part of a fraudulent scheme for Mr Scott to extract money from the respondent for his own benefit and to the detriment of the respondent or whether it was an irregular arrangement from which the respondent benefitted by obtaining additional skilled labour from Mr Scott and for which he received a modest increase in remuneration. In short, was Mr Scott defrauding the respondent or was he simply taking the additional remuneration he had earned in circumstances not merely approved by but proposed by his Executive Director? Having heard the evidence in this case, there can be only one answer to that question. If there was deceit in this case, the deceit was practiced by Mr White who proposed on behalf of the respondent an arrangement that Mr Scott accepted, it being implicit on the proposal that Mr Scott was being offered a legitimate arrangement which Mr White had the authority to put forward.

71. I readily conclude that the failure of the respondent to take any steps to contact Mrs McWilliam or Mr White prior to the disciplinary hearing is an

unreasonable failure to investigate material matters. That failure was aggravated by Mr Carroll's failure to fully accept the evidence offered by Mrs McWilliam when she came forward without making any attempt to ask Mr White for his account. Those failures of reasonable investigation were serious breaches of the duty to conduct a reasonable investigation set out in the ACAS Code and of general principles of fairness.

72. A belief in guilt cannot be reasonably entertained without a reasonably investigation to establish the facts on which that belief is based. That principle is called into focus by Mr Carroll's admission that he harboured suspicions that Mr White had not, in fact, even approved, let alone proposed, the arrangement. There was not a scintilla of evidence that Mr White had not proposed the arrangement. Mr Scott said that he had. Mrs Scott said that he had. Mrs McWilliam said that he had. No-one could say that he had not. All that could be said was that Mr White had not made a written record of his decision. Yet Mr Carroll was prepared to deal with the claimants on the basis that Mr White had not or, to put it in the way most favourable to Mr Carroll, may not have proposed the arrangement. If Mr White believed that Mr White had not approved the arrangement, that belief was based simply on Mr Carroll's supposition and conjecture: it was not based on evidence. Such a belief was not a reasonable belief.

73. The respondent's contention that the dismissals were not unfair fails the *Burchell* test. That is not the end of the matter.

74. A fair disciplinary procedure requires that employees are permitted to challenge the case put against them and to advance such evidence and argument as may reasonably be relied upon in support of the employee's position. Mr Scott should have been permitted to call Mrs McWilliam as a witness at the appeal hearing. She was willing to give evidence. It was no answer to say that it was not necessary to hear her as her evidence was not disputed because, as has been addressed Mr Carroll did not accept Mrs McWilliam's written account as a truthful account.

75. Mr Scott also wished to contact Mr White to ask him to confirm the truth of Mr Scott's position. I can well-understand the reluctance of an employer to provide the contact details of a former employee, particularly a senior level manager, to another employee. Plainly, issues of data protection and confidentiality, would arise. Those issues do not, however, justify a refusal to assist an employee in a case of this kind. Having regard to the disputed fact in the case, Mr White was an important witness. It would have been a simple matter for the respondent to have offered to forward a letter from Mr Scott to Mr White to Mr White's last-known address. It would have been a simple matter to permit Mr White to reply "*care of*" the respondent if Mr White was unwilling to disclose his home or business address. Fairness required that Mr Scott have the opportunity to approach Mr White and seek to enlist his assistance.

76. I have to consider in the case of each claimant whether dismissal was a sanction that lay within the range of reasonable responses of a reasonable employer acting reasonably. In considering that question I am faced with two very different positions. On the respondent's position, Mr Scott was a fraudster who submitted falsified expenses claims in cahoots with his immediate line manager, Mrs Scott. I have no doubt that dismissal for behaviour of that kind would be well within the range of reasonable responses. The difficulty for the respondent is that it did not have a reasonable belief that such was the situation.

77. On the basis of the evidence before the respondent, it was entitled only to conclude that acting in reliance of an arrangement proposed by an Executive Director of the respondent, Mr Scott agreed to undertake additional work in return for additional remuneration. He did the work and accepted the additional remuneration. Mrs Scott was fully aware of the arrangement and acted in accordance with the instructions of her superiors Mrs McWilliam and Mr White in signing off the expenses claims. It is undoubtedly the case that what was proposed was irregular. Mr White had

no business proposing an arrangement that would not meet with the respondent's business rules and policies. He had no business in putting an arrangement in place without completing all the necessary paperwork in place to make the arrangement "*official*". He had no business embarking upon a course that led two loyal and trustworthy employees to being exposed to the risk of dismissal and, worse, to be labelled as unfit to be employed in the social services.

78. I conclude that, on the basis of that which the respondent was entitled to believe, neither claimant behaved in a way that so undermined trust and confidence so that dismissal for a first offence came within the range of reasonable responses of a reasonable employer. The claimants acted as they did because they respected and trusted their Executive Director: they took him at his word. Their position was if it has come from Mr White, that is good enough. Whilst it might be argued that Mr Scott was in some way culpable because he received additional remuneration, the answer is that he earned the additional remuneration by the additional work that he performed.

79. That it was Mr White who had proposed the arrangement was a powerful piece of mitigation to which the dismissing officer and appeal officer closed their ears. An employer who fails to listen to evidence and argument by way of mitigation is in danger of being found to have acted unreasonably. I so find.

80. I applying the test in section 98(4), I have to take into account the size and administrative resources of the respondent. The respondent states in its response that it employs 2,500 people. It has an established management structure with a Chief Executive and five Executive Directors. The Executive Director in charge of the HR and Payroll functions is a qualified accountant. There is a Head of HR and a team of HR Business Partners. The respondent is plainly not a back-street, fly-by-night operation. It is a very substantial business. "*Trust and confidence*" is an essential component of

the employment relationship. The duty not to seriously damage or destroy trust and confidence is a mutual duty: employees are no less entitled to be able to trust their employer that the employer is entitled to be able to trust the employees.

81. I take those matters into account in this way. Had the claimants taken Mr White's proposal to an employment lawyer or an accountant or tax adviser, I have little doubt that they would have been advised, at best, to proceed with the utmost caution and only if the proposal was put in writing, or, at worst, not to touch it with the proverbial barge-pole. Outside the professions in which members are trained to recognise the smell of a rat, employees faced with a proposal from a member of top management which, on its face, appears to be reasonable are likely to take that proposal at face value, not seek professional advice and simply get on with the work. In my judgment, that is particularly so when the employer is a large, professional organisation and especially so where that large, professional organisation is a charitable body proving care to the vulnerable in society.

82. In all the circumstances, Mr Scott was unfairly dismissed and Mrs Scott was unfairly dismissed. I therefore turn to remedy.

Remedy

83. The claimants both sought compensation in the event that their claims succeeded. They both took the position that they could not return to the service of the respondent because they no longer had the trust in the respondent so as to enable the employment relationship to be maintained. I readily understand that position in light of the evidence I have heard.

84. Reinstatement is, of course, the primary remedy for unfair dismissal. It is a remedy that is rarely awarded. It is a remedy to which I would have given very serious consideration had it been sought by either claimant.

85. I shall deal, firstly, with whether to make a reduction in compensation for the extent to which the claimants caused or contributed to their dismissal. Again, I have to deal with the circumstances of each claimant separately. Unlike the application of Section 98 ERA, where I am concerned with assessing the reasonableness of the respondent's actions, whether the claimants caused or contributed to their dismissal is a matter for the Tribunal to determine on objective evidence on the balance of probabilities.

86. I am satisfied that Mr Scott made a wage-work bargain with Mr White, believing that Mr White was acting on behalf of the respondent. Mr Scott got the benefit of additional remuneration. The respondent got the benefit of additional work. There was nothing to suggest that the amount of the additional remuneration was disproportionate to the amount of additional work to be done. It was obvious that the respondent was to make a substantial saving in its wage-bill by securing Mr Scott's agreement to do the work of two people. If Mr Scott was at fault, it was that he was too trusting and not at all suspicious of his Executive Director.

87. It is often said that if something sounds too good to be true it probably isn't true. In my judgment, this is not in the "*too good to be true*" category. Mr Scott was offered an increase in remuneration of a little under 15% of his gross salary. Taking Mrs Scott's salary as the benchmark for the next level above Mr Scott in the hierarchy, what was proposed left him well-short of Mrs Scott's remuneration. In other words, Mr Scott was faced with a proposal to pay him at a level which was a little more than a Senior Support Worker but still substantially less than a Team Leader. In my judgment, there was nothing in that arrangement that should have caused Mr Scott to be so suspicious as to oblige him to raise the matter outside his own regional chain of command.

88. I am driven to the conclusion that Mr Scott was not at fault in accepting the arrangement as proposed. I have considered whether he ought to have become suspicious when he was asked to vary the journeys shown on his

monthly claim form. By the time that occurred, the arrangement of Mr Scott doing the extra work and receiving the extra remuneration was well-established. The matter came down to Mr Scott from Mrs McWilliam via Mrs Scott. It was simply a message passed to Mr Scott in a way that did not cause him to doubt that what he was being asked to do was in order. Like Mr White, Mrs McWilliam was a trusted senior manager.

89. In the circumstances, I am satisfied that Mr Scott did not cause or contribute to his dismissal such that I ought to reduce either the basic award or the compensatory award.

90. I am satisfied that at all material times Mrs Scott fully understood the bargain made by Mr White and Mr Scott and that Mrs McWilliam, as Mrs Scott's immediate line manager, not only knew of that bargain but approved of what was to be done. In my judgment, Mrs Scott was simply to attend to the paperwork that would give effect to Mr White's proposal. Far from Mrs Scott acting contrary to her employer's interests, she was doing the bidding of her Executive Director whom she trusted to act in a proper manner.

91. I am satisfied that Mrs Scott knew that she was acting in a way that was "out of the ordinary" but she was content to do as was requested without more for so long as Mrs McWilliam remained in post. It is entirely understandable that once Mrs McWilliam departed with Mr White having already left, Mrs Scott sought to confirm that she had continuing authority to do as she had been doing. I take Mrs Scott's actions at that stage not as evidence that she knew what had been done was improper but rather as evidence that she knew the arrangement had, and required, the approval of senior management and she reasonably sought to ensure that remained the case.

92. I conclude that Mrs Scott did not cause or contribute to her dismissal in a way that makes it just and equitable to reduce the basic or compensatory awards that would otherwise be payable.

93. I am asked to consider increasing the compensation on the grounds of the respondent's unreasonable failure to follow provisions in the ACAS Code.

94. I am satisfied that the ACAS Code was engaged in the case of both claimants. The dismissals were for alleged misconduct. I have set out in detail my findings as to what the respondent did, and failed to do, the conducting the disciplinary proceedings against the claimants and I need not repeat that analysis in detail.

95. The respondent failed to follow important provisions of the Code by failing to conduct a reasonable investigation (paragraph 5), failing to permit Mr Scott to call Mrs McWilliam as a witness and obstructing attempts to enlist Mr White as a witness (paragraph 12) and failing to follow a fair disciplinary process by failing to keep an open mind and to act on the evidence available (paragraph 23).

96. I consider the respondent's failure to be unreasonable failures. The respondent is a large professional organisation employing numbers of HR specialists. No good reason was advanced for the failures. Not only were the failures unexplained they were inexplicable.

97. I considered whether the respondent's failures are such that they should result in an uplift to the compensation that would otherwise be awarded. I am satisfied that there should be an uplift. I regard as particularly significant that the respondent expressed opinions not only as to the continuation of the claimant's employment with the respondent but as to the suitability of the claimants for employment in the wider social services. The respondent chose to report its findings to the Scottish Social Services Commission as the regulator with responsibility for the registration of those who work in the social services. When disciplinary proceedings have the potential to make findings that could result in the exclusion of an employee from his or her chosen career, there is a particularly sharply focussed need to ensure that

those findings are made in a process that conforms with the standards set out in the ACAS Code.

98. I have considered by what percentage compensation should be increased. The maximum permitted is 25%. In my judgment, the maximum uplift must have been intended to be reserved for the cases involving the worst breaches of the Code – a total or near total failure to follow anything resembling a fair procedure. In this case, the elements of a fair procedure can be found. There was an investigation, a disciplinary hearing and an appeal. Those elements are not enough. The investigation must actually investigate all the issue and not simply seek to establish guilt. A disciplinary hearing and appeal will not be properly conducted unless minds are kept open, evidence properly admitted and evaluated and a decision made based on the evidence. That was not done in these cases. I conclude that the respondent's failures are not at the very worst end of the scale but they are nevertheless serious breaches that should attract an uplift of 20%.

99. I calculate compensation in this way.

100. In the case of Mr Scott, having regard to his gross weekly wage, age and length of service, the basic award is six weeks' pay at £412.23 amounting to £2,503.38.

101. Mr Scott was unemployed between the date of dismissal and commencing new employment on 6 June 2016. That new employment is permanent and attracts a salary slightly greater than Mr Scott had with the respondent. Loss came to an end on 6 June 2016. The period of loss began on 8 August 2015 and amounted to a period of 43 weeks. Mr Scott's monthly take home pay was £1,450, which I calculate to be £334.62 per week. Loss of earnings amounts to £14,388.66. I allow the sum of £500 as compensation for loss of statutory rights. The uplift amounts to £3,478.41. Mr Scott was in receipt of benefit such that the Recoupment provisions apply.

102. In the case of Mrs Scott, I calculate compensation in this way.

103. Having regard to her age, length of service and gross weekly pay (which is subject **to** the statutory cap**. (*Note inserted by Judge Simon: This part of Employment Judge Cape's reasoning had not been completed. Accordingly calculation of remedy is deferred in the case of Mrs Scott, pending consultation with parties on whether a remedy hearing is required or some other method of calculating remedy is considered to be more appropriate.)***

104. I turn now to the question of whether the respondent is able to defeat Mr Scott's claim by reason of the doctrine of illegality of contract.

105. Mr Hay submitted a very carefully crafted skeleton argument seeking to identify the principles that can be drawn from the authorities. I am grateful for the very helpful submissions.

106. My starting point is that since the respondent seeks to avoid the liability that falls upon in the case of Mr Scott, the burden of establishing the defence upon which it seeks to rely.

107. What are the material facts? I am satisfied that Mr Scott received sum of £250 per month from about September 2013 until the termination of his employment and that sum was paid to him as reimbursement of expenses. The respondent reimburses travelling expenses at the rate of 40p per mile, so that the monthly sum represented payment for travelling 625 miles. Mr Scott's ordinary daily commute was a round trip of 50 miles so that his typical monthly home-to-office mileage would amount to in the region of 1000 miles. The proposal put to Mr Scott was that he would be permitted to claim for 625 of those 1000 miles in return for taking on additional work and responsibility.

108. Mr Carroll's evidence was that it is not *per se* unlawful for an employer to agree to pay to an employee travelling expenses incurred in respect of home-to-office travel. Mr Carroll is an accountant and his remit includes being in charge of the respondent's HR and payroll functions.

109. There is no evidence before me to shown that the slightest thought was given to whether income tax and or National Insurance contributions would fall due to be paid on all or any part of the £250 paid each month. I am satisfied that neither Mr Scott, Mrs Scott nor Mrs McWilliam gave any thought to the matter. Mrs McWilliam was able to say that the possible tax implications of the proposed arrangement did not feature in her discussions with Mr White. I have not heard from Mr White whom I find to be the person who proposed the arrangement. I am not prepared to infer that the arrangement was intended to avoid the proper payment of tax and or National Insurance, whether by the respondent or Mr Scott. Putting the matter at its highest, Mr Scott agreed to take on additional work for payment of part of his home-to-office travelling expenses without any thought being given to the tax implications of doing so. It cannot be understated that the arrangement was the proposal of an Executive Director of a substantial professionally managed organisation: such a proposal was not to be viewed with suspicion.

110. I do not attach significance to the change in the way journeys were recorded each month so that Mr Scott ceased to record travel between Stranraer and Newton Stewart and recorded, instead recorded purported journeys that came in total to the agreed 625 miles. The change was not instigated by Mr Scott. It seems the matter was initiated by Mrs McWilliam. There is no evidence that the change was connected with tax matters and, although Mrs McWilliam was not clear on the point, it may be that the change meant that she could more easily allocate the cost to the various cost centres for which she was responsible.

111. Payments in respect of expenses may or not be liable to income tax. If there is a "*profit*" in what is paid by way of remuneration of expenses in comparison with the expense incurred, that profit is taxable. In respect of travelling expenses, such a profit element is to be found if the rate per mile exceeds that which the Revenue regards as reasonable or if the payment is in respect of home-to-office mileage.

112. I have not been provided with any materials that show when tax should have been paid in respect of the sums paid to Mr Scott. I have taken judicial notice of the system of reporting income to the Revenue as it is known to me as a taxpayer.

113. The Self-Assessment tax return includes a section in which sums received as expenses are to be reported. Mr Scott began receiving the material payments in or about October 2013. Had he been required to complete a Self-Assessment tax return or requested an assessment form from completion (and I find that neither of those things occurred) the sums received in tax year 2013/2014 would have been required to be included in a form submitted not later than 31 January 2015. The sums paid in 2013/2014 amounted to £1750 suggesting that the income tax due on those sums amounted to £350. My understanding is that when consideration of a Self-Assessment tax form leads to the identification of a relatively small sum in under-paid tax (and £350 would fall into that category) a Notice of Coding is issued giving a tax code that allows for the recovery of the under-paid tax in the following tax year. In this case, that would be in tax year 2015/2016. as I have already set out, the respondent adjusted its payroll so that the whole of the sums paid to Mr Scott was paid in 2015 (tax year 2015/2016), even though, on my analysis, Mr Scott was not due to report the payments in 2014/2015 until 31 January 2016 and the payments in 2015/2016 until January 2017. (***Note inserted by Judge Simon: The reasoning of Employment Judge Cape ends at this point. However he has confirmed in writing that he reached the conclusion that Mr Scott's contract of employment was enforceable)***

Signed by the President in the absence: Shona MN Simon
of Employment Judge Cape
Date of Judgment: 03 April 2017
Entered in register: 03 April 2017
and copied to parties