

December 2019 which claimed time for "office", a timesheet for 27th December 2019, claiming time for "office", timesheets for 30th and 31st December 2019 and 3rd, 6th, 9th and 10th January 2020, which claimed time for "office", timesheets for 13th, 17th and 20th January 2020, which claimed time for "office" and timesheets for 18th, 19th, 20th and 21st February 2020, which claimed time for "office".

9. also produced a copy of an email dated 28th February 2020 (and timed at 7:44 pm), in which wrote to the Complainant and said -

"There is way too much time on your timesheets marked "office" that occurs when [redacted] is doing spreadsheet work, quotes, and admin (which you don't want to do, and that's completely fine by me) when you could be doing client work on your own. This has to change and it has to change now. There is plenty of client work that does not require two people (testing, labelling, and whathaveyou). I want you to start doing this. I will review this on all timesheets going forward. There will be no more "office" on the timesheet that is going to be paid hours when no one knows what you are doing. That is over."

10. also produced timesheets subsequently submitted by the Complainant, including those for 11th, 13th, 17th and 18th March 2020, which then claimed time for [redacted] "or [redacted]" and timesheets for 9th, 10th, 11th and 12th June 2020, which claimed time for [redacted] (the 9th, 11th and 12th for full 8 hour days and the 10th for 2 hours)

11. In response it seems to these timesheets and in particular it appears in response to the June 2020 dates, [redacted] wrote to the Complainant by email dated 17th June 2020 (and timed at 6:39 pm) and said -

*"I see you had 3 days on your timesheet listed as [redacted]
Please explain what this was asap."*

Going forward, "warehouse" will not be payable unless I have 110% clarity on what is being done. I still don't have an inventory count after days being spent in the warehouse.

There is tons of shit to be done, and "warehouse" is not acceptable. "Warehouse" will not be paid hours going forward.

There won't be another email on this."

12. This email was followed by a letter from [redacted] to the Complainant, dated 26th June 2020, where said -

"This letter is to formally document my email of 17 June 2020.

In March you and I discussed outside the front door of [redacted] offices the timesheets that you were producing where days of time were spent on an item called "warehouse" or similar. This amount of time far exceeded the time taken for an inventory count.

In June, the "warehouse" again appeared on your timesheet. I sent you an email warning on 17 June 2020 advising that this is not acceptable and there won't be any further warnings.

The above is nothing more than unaccounted time where you are not contributing to the business while getting paid and this is not acceptable. This behavior is demotivating to other team members who are doing their job.

Should there be any repeat of the above or other performance issues I will have no choice but to dismiss you from [redacted] for cause.

We have worked together for a long time and I have always liked you as a person, we have invested training in you, and I think you have much to offer. It is my hope that you can refocus and perform at the level that I know you are capable of."

13. In his letter to the Department dated 8th July 2022 (hereafter referred to as "the Response Letter") [redacted] also said -

"No doubt [the Complainant] will say that there were times we did not have work for [redacted] (was paid anyway). Occasionally that was true. [redacted] could have come to the office and asked how [redacted] can assist? This never happened. Just timesheets with bogus entries. [The Complainant]'s desired outcome is to be paid and not to work."

14. [redacted] also produced time sheets submitted by the Complainant for 25th February 2021, claiming time for [redacted] for [redacted] for 23rd, 24th and 25th August 2021, claiming time for [redacted] for 26th August 2021, claiming time for [redacted] for 27th August 2021 for [redacted] for 31st August 2021 and 1st September 2021, claiming time for [redacted] for [redacted] timesheets for 20th, 21st, 22nd and 23rd September 2021, claiming time for [redacted] for 24th September 2021, for [redacted] for 27th, 28th, 29th, and 30th September 2021, again claiming time for [redacted] for [redacted] and a timesheet for 31st December 2021, claiming time for [redacted]

15. So, apart from one day in February 2021, during 2021 the Complainant claimed 14 days or parts of days for [redacted] from 23rd August 2021 to 1st October 2021, and three days or parts of days for being in the [redacted]

16. Then on 18th March 2022 an employee of [redacted] ([redacted]) sent an email to [redacted] (timed at 8:53 am), which said -

"Just letting you know I just had a brief conversation with [the Complainant] 30 minutes ago, at 8:15 am.

Thought you should know that [the Complainant] and I were speaking on the [redacted] job that was coming soon to a close, aside from a proposed [redacted]

[The Complainant] mentioned the following to me in our conversation: 'I hope more work is coming up...otherwise, I will have to try and look for work elsewhere.'"

17. Then on 29th March 2022 [redacted] sent another email to [redacted] (timed at 9:52 am), where [redacted] said:

"In March of 2022, [the Complainant] did a very poor job on a and someone else had to rescue work. This was not the first time this happened as [the Complainant] is clever about burying the problems... A person with of experience in this field does not make mistakes like this.

In April and May of 2022, the blatant false entries on the timesheets returned again (for which was already on a written dismissal notice). There was also significant proof of [the Complainant] reporting way more time on jobs than was the case.

...7 hours are listed as ' on 19 April 2022 in [the Complainant]'s timesheet. This is a joke as there is no such thing. If we are , we load the in the van with the also has 24 hours indicated on this timesheet for 19th, 20th, and 21st 2022 showing work on the job that colleagues believe was 12 hours at most.

I decided at this point that I had enough and there was no point in reviewing and talking about all this with [the Complainant] yet again and that was going to be leaving 'for cause."

23. In his Complaint the Complainant says -

"There was no notice, no conversations about my performance at work at all. On May 17th, 2022, [] invite me to for a conversation which said was to catch up. , who was employed as a salesperson end up being a manager (which didn't inform of). told I that I was not reporting job status to which was a lie. I have written proof that [I] did up to May 13, 2022."

24. The Complainant did not provide any further details in Complaint concerning the 17th May 2022 meeting, nor did in the Response Letter. However, the Employer's "Outline Submissions" dated 12th October 2023 say "...on 17th May 2022 the employer called a meeting with the employee and dismissed for dishonesty and poor performance"¹.

C. The Law

25. The Labour Act (2021 Revision) ("the Labour Act") provides that-

51(1). Subject to subsections (2) [redundancy] and (3), a dismissal shall not be unfair if the reason assigned by the employer for it is -²

(a) misconduct of the employee within section 52(1);

(b) that it is under section 52(3), namely misconduct following the receipt of a written warning;

¹ See the 'Appellant's Outline Submissions' submitted by the Employer's attorneys and dated 12th October 2023 ("the Employer's Outline Submissions") at paragraph 5.

² Section 51 of the Labour Act is premised on the fact that there must be a reason for a dismissal. An employer cannot dismiss an employee capriciously. And whilst the Labour Act simply says that the reason is that assigned by the employer, and in many cases the reason will be self-evident, in those cases where it is not self-evident, a primary question may arise as to what the reason was.

- (c) *that it is under section 53(2), namely failure of the employee to perform that person's duties in a satisfactory manner following the receipt of a written warning;*
- (d) *that the employee was redundant;*
- (e) *that the employee could not continue to work in the position that person held without contravention (on that person's or on the employer's part) of a requirement of this or any other law; or*
- (f) *some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held,*

and under the circumstances the employer acted reasonably

(2) *[redundancy]*

(3) ***The question whether an employer has acted reasonably for the purposes of this Part shall be determined in accordance with equity and the substantial merits of the case having regard to all the circumstances.***³

52.(1) An employer may terminate forthwith the employment of an employee where the employee has been guilty of misconduct in or in relation to that person's employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has-

(a) *conducted themselves in such a manner as clearly to demonstrate that the employment relationship cannot reasonably be expected to continue, ...*

2) Where an employee commits misconduct in or in relation to that person's employment that is not sufficiently serious to justify that person's employer terminating that person's employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of any further misconduct.

(3) Where an employee has been given a written warning under subsection (2), if that person, within twelve months following the receipt of the written warning, commits misconduct of any kind in relation to that person's work, the employer may terminate the employment of the employee, or take such other action as may have been specified in the written warning, without further notice.

53. (1) Where an employee is no longer performing that person's duties in a satisfactory manner, the employer may give the employee a written warning which shall describe in what manner that person's performance is unsatisfactory and state the action the employer intends to take in the

³ Broadly section 51 of the Labour Act reflects for present purposes the provisions of the equivalent statutory provisions in the UK, which are currently to be found in section 98 of the Employment Rights Act 1996 but when considering UK case law, reference is also made to section 98 of the Employment Rights Act 1996 in its previous incarnations, primarily section 24 of the Industrial Relations Act 1971 and section 57 of the Employment Protection (Consolidation) Act 1978.

event of continuance.

(2) Where an employee has been given a written warning under subsection (1), if that person does not, during the period of one month following the receipt of the written warning, commence performing that person's duties in a satisfactory manner, the employer may terminate that person's employment at the end of that one month period, or after the end of that period take such other action as may have been specified in the written warning without further notice."

(emphasis added)

26. The fairness of any dismissal falls to be judged on the basis of the facts known to the employer at the time the decision to dismiss is taken (W Devis & Sons Ltd v Atkins [1977] ICR 622⁴).
27. In British Homes Stores Ltd v Burchell [1978] WL 57387 IRLR 379 at [379 and 380], a misconduct case, the UK Employment Appeals Tribunal (per Arnold J) said -

"The case is one of an increasing familiar sort in this Tribunal, in which there has been a suspicion or belief of the employee's misconduct entertained by the management, it is on that ground that dismissal has taken place, and the tribunal then goes over that to review the situation as it was at the date of the dismissal. The central point of appeal is what is the nature and proper extent of that review...

What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question...entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element.

First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances."

28. It is clear from the words in Burchell that "*It is not relevant... that the tribunal would itself have shared that view*" that when adjudicating on the reasonableness of an employer's decision, a Labour Tribunal must not simply substitute its own views for those of the employer and decide whether it, the Tribunal, would have dismissed on those facts. It must make a wider enquiry to determine whether a reasonable employer could have decided to dismiss on those facts. In Iceland Frozen Foods v Jones [1983] ICR 17 Brown-Wilkinson J said at [24F] -

⁴Per Viscount Dilhorne at page 676 "It [the reason for the dismissal] must refer to the reason shown by the employer and to the reason for which the employee was dismissed. Without doing very great violence to the language I cannot construe this passage as enabling the tribunal to have regard to matters of which the employer was unaware at the time of dismissal, and which therefore cannot have formed part of his reason or reasons for dismissing an employee".

“Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by sections 57(3) of the Act of 1978 [section 51(1) of the Labour Act] is as follows; (1) the starting point should always be the words of section 57(3) themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer’s conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view, another quite reasonably take another; (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstance of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band, it is unfair.”

D. Discussion

29. In this case the Complainant submitted time sheets on the morning of Monday 2nd May 2022. saw the time sheets and asked I what thought of the time claimed by the Complainant and I said that thought the time claimed was “*more than a little inflated*”. asked how many hours thought the Complainant had actually spent at in the last two weeks and whilst does not appear to have answered that exact question, did say “*I’m guessing 12 hours on the Tues/Wed/Thurs at most (not 24 over 3 days as reported).*”
30. says “*I decided at this point that I had enough and there was no point in reviewing and talking about all this with [the Complainant] yet again and that was going to be leaving for cause*”.
31. In Response Letter to the Department I said there was “*significant proof*” that the Complainant was claiming time inappropriately and that the time claimed by the Complainant for 19th, 20th and 21st April 2022 in time sheets were “*blatant false entries*”⁵ but the only “*proof*” had of the Complainant engaging in theft (as subsequently termed it) was saying that “*guessed*” that the time claimed was inflated.
32. In cases of suspected misconduct, whilst an employer does not need to prove an employee’s guilt beyond all reasonable doubt, or even prove it on the balance of probabilities, the employer must demonstrate a genuine belief in the misconduct.⁶ This is a subjective matter and says that genuinely believed that in April 2022 the Complainant was engaging in misconduct. Given the history of the interactions between and the Complainant, as set out above, and appreciating’s view of the Complainant’s history of claiming time for being in the warehouse and office, the Appeals Tribunal has no difficulty accepting that genuinely (albeit subjectively) believed in the Complainant’s misconduct.

⁵ and in the Employer’s Outline Submissions (at paragraph 11) the attorneys for the Employer say “*the employee fraudulently claimed for 12 hours work which had not been done and for doing fibre prep when there was no such work*”

⁶ Weddel & Co Ltd v Tepper infra

33. However, [redacted] also has to show that he had reasonable grounds to sustain that belief and the Employer being able to satisfy this element of the Burchell test is less clear. Again [redacted] points to the Complainant's employment history and the warnings given to [redacted]. However, previously the Complainant had claimed to be in the office or in the warehouse, when [redacted] says [redacted] should have been working, or have been otherwise occupied, but in April/May 2020 the Complainant claimed [redacted] was working. [redacted] just believed that [redacted] was either not working at all, or taking too long to do what should have taken less time.
34. The point is arguable (and was strenuously argued on the Employer's behalf before the Appeals Tribunal) but even if [redacted] could satisfy the Appeals Tribunal that [redacted] had a genuine belief and had good grounds for that belief, fatally for the Employer's claim that the Complainant's dismissal was fair is its failure to satisfy the third limb of Burchell, since [redacted] is unable to show that at the time [redacted] arrive at the conclusion that there was misconduct, he had made as much investigation into the situation as was reasonable in the circumstances. Apart from asking [redacted]'s opinion and [redacted] guessing that the Complainant may have inflated [redacted] hours, [redacted] had not made any investigations at all.
35. The Employment Tribunal and the Employment Appeals Tribunal decisions in Burchell were considered by the Court of Appeal in Weddel & Co Ltd v Tepper (1980) ICR 286, which concerned another situation where an employee had been dismissed for misconduct. The Employment Tribunal had found that, although the employer genuinely believed on reasonable grounds that the employee was guilty of dishonesty, it had not given the employee a sufficient opportunity of refuting the allegations against him and that his dismissal was therefore unfair. Having cited with approval the passage from the formulation of the principles set out by Arnold J in the Burchell case (already referred to at paragraph 27) in Weddel Stephenson LJ said, at page 297 -

"Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case.

They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And, it seems to me, they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the industrial tribunal in this case, 'gathered further evidence' or, in the words of Arnold J in Burchell's case, post, p 303 carried out as much investigation into the matter as was reasonable in all the circumstances of the case.' That means that they must act reasonably in all the circumstances and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds, and they are certainly not acting reasonably."

36. Here, the Employer pointing to historic examples of the Complainant making entries on time sheets, which the Employer found unsatisfactory, may possibly satisfy that part of the Burchell test that requires an employer to show that it believed in the employee's guilt and that it has reasonable grounds on which to base that belief but it will certainly not satisfy the third limb of the test, which requires an employer to

show that it had carried out as much investigation into the matter as was reasonable in all the circumstances.

37. At the very least the Employer should have made enquiries of the Complainant. In Gallacher v Abellio Scotrail Limited UKEATS/0027/19/55 Choudhury J. said -

“43. The fact that no procedure is followed prior to dismissal would in many cases give rise to the conclusion that the dismissal was outside the band of reasonable responses and unfair. Such procedures, including giving the employee an opportunity to make representations before dismissal and to appeal against any dismissal, are fundamental to notions of natural justice and fairness and it would be an unusual and rare case where an employee would be acting within the band of reasonable responses in dispensing with such procedures altogether.”

38. Such enquiries were particularly necessary in this case. In A v B [2002] UKEAT 1167011411 Elias J said at [58] and [59] –

“...the relevant circumstances do in fact include a consideration of the gravity of the charges and their potential effect upon the employee..[and] what would be expected of a reasonable employer carrying out, say, an investigation into a disciplinary matter leading at worst to a warning would not be as rigorous as would be expected where the consequences could be dismissal”.

39. And in this case the matter was very serious, since a finding of guilt would, and indeed did, lead to a summary dismissal.

40. In A v B Elias J went on -

60. ...it is unrealistic and quite inappropriate to require the standards of a criminal trial but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.”

41. dismissed the Complainant without carrying out an investigation and so the dismissal was unfair. The case really is as simple as that. There may be a class of case where the need for an employee to be of complete and unimpeachable reliability is so great, that a dismissal purely on grounds of suspicion or speculation may be fair but that does not appear to be the case here. There was no apparent reason why the Complainant should not at least have been given the opportunity to explain why [redacted] had claimed 8 hours a day for 3 days, particularly given that the only “evidence” of misconduct that [redacted] had was [redacted] own gut feeling and the “evidence” of one of the Complainant’s coworkers, who was not present at the material location at the material time, and who it appears was not employed to undertake the operations undertaken by the Complainant⁷, but who simply “guessed” that the work should only have taken 4 hours a day and not 8.

42. In the circumstances the Appeals Tribunal agrees with the Labour Tribunal that the Complainant was not dismissed in accordance with the provisions of the Labour Act and so the Complainant was unfairly dismissed. By failing to give the Complainant the opportunity of explaining [redacted], the Employer had

⁷ was the Employer’s ‘Head of Sales/Client Liaison’ - see the Employer’s Outline Submissions at paragraph 33.

not acted reasonably in all the circumstances, having regard to equity and the substantial merits of the case.

E. The Labour Tribunal Hearing

43. However, although an uncomplicated case, matters were not as straight forward as perhaps they could have been when the case was dealt with by the Labour Tribunal and the Appeals Tribunal now turns to that aspect of matters. But given the above conclusion of the Appeals Tribunal, upholding the Labour Tribunal's finding of unfair dismissal, the following remarks are incidental and observational only.

44. Many of the Employer's grounds of appeal concern matters which the Employer describes as "preliminary objections" and the Appeals Tribunal will deal with those objections below. As far as the Employer's "substantive objections" are concerned, the Employer's 'Notice of Appeal' states that -

"C. The errors by the Tribunal

Dismissal on grounds of "performance" - not being pursued.

19. *While the Appellant sought to raise before the Tribunal issues with [the Complainant]'s "performance" for which he was given warnings, the Appellant recognizes that for the purposes of s.53 of the Act, those "performance" related warnings had effectively expired as of the date of the Appellant's termination of [the Complainant]'s employment on 17 May 2022. These submissions will therefore ignore issues of [the Complainant]'s performance including poor [redacted] and will focus on the nub of the Appellant's reasons for dismissal of [the Complainant] which was gross misconduct in submitting false and fraudulent time sheets.*

20. *It remains that in the Decision the Tribunal has evidently conflated the two independent and separate issues of "performance" on the one hand, and "misconduct" on the other, and failed to recognize that misconduct grounded in dishonesty and theft from the employer/the Appellant can and must be considered on its own grounds."*

45. Although in its Notice of Appeal the Employer criticises the Labour Tribunal for conflating the separate issues of performance and misconduct and for failing to recognise that misconduct grounded in dishonesty and theft can and should be considered on its own grounds⁸ the transcript of the 4th May 2023 hearing indicates that in oral evidence [redacted] said that "unfortunately we had to part ways because the gentlemen just doesn't do [redacted] job properly"⁹ and when the Labour Tribunal Chair suggested that "I think you have two issues with [the Complainant]. One is that [redacted] was giving in false time sheets and the other of [redacted] poor quality of work" [redacted] answered "Correct"¹⁰.

46. [redacted] also said " [redacted] performance continued to be unsatisfactory and I reached a point where ... would no longer be working for us...and so I terminated [redacted] on the basis of that warning [the 29th March 2022 warning]"¹¹ and [redacted] also said "The man lies on [redacted] time sheets to me. [redacted] was on a warning from that previously. [redacted] puts in time sheets saying [redacted] is working when [redacted] isn't. In addition to that, [redacted] performance was sub-standard, and [redacted] was put on dismissal notice for that. [redacted] performance didn't

⁸ At paragraph 20 of the Notice of Appeal

⁹ The Opus 2 Digital Transcription of the 4th May 2022 proceedings (the "Transcript") page 2 line 2

¹⁰ Transcript page 3 lines 25 -27

¹¹ Transcript page 5 line 19, 20 and 22

improve and [redacted] was terminated... [redacted] was released from employment because [redacted] lies on time sheets and [redacted] wasn't doing [redacted] job"¹²

47. The Labour Act provides a number of potentially fair reasons for a dismissal and since the Employer did not confirm the Complainant's dismissal in writing, the first task of the Labour Tribunal was to make a finding as to the real reason for the dismissal and if there was any question of the matter being in dispute, the Labour Tribunal had to make a finding as to the facts known to the Employer, and the Employer's state of mind, at the time the decision to dismiss was made. ¹³
48. Although on appeal the Employer wishes to put to one side the question of the Complainant's performance, as one can be seen from the above, in [redacted] evidence before the Labour Tribunal was clear that the reason for the dismissal was both the alleged misconduct and the poor performance and so it is perhaps understandable why the Labour Tribunal said in its Ruling (at page 2 of 8) that -

"The Respondent wasn't able to ..provide documentary evidence that would clearly define what sections of the Labour Act (2021 Revision) that the Complainant was dismissed under and not being absolutory clear in his oral arguments on what grounds/possible reasons ...lead to the .. Complainant[s] dismissal."

49. The Labour Tribunal's finding (at page 4 of 8 of the Ruling) that [redacted] *"mentioned, [redacted] had dismissed the Complainant for both offences "performance & misconduct" as [redacted] had enough and would no longer tolerate the Complainant's fraudulent claiming of hours and [redacted] poor work performance"* appears to be an accurate reflection of the facts, as related to the Labour Tribunal by [redacted]
50. The Employer's contemporaneous documentation also appears to support the Labour Tribunal's conclusion along these lines. When [redacted] wrote to the Complainant on 26th June 2020, as a result of the Complainant recording time for being in the warehouse, [redacted] referred to this conduct as *"unaccounted time"*¹⁴, said it was behaviour that was *"demotivating to the other team members who are doing their job"* and the Complainant was warned against a repeat of this *"or other performance issues"* and was encouraged to *"refocus and perform at the level that I know you are capable of"*.
51. The Labour Tribunal referred to the *"lack of up to date written warnings"* and the *"lack of proper written performance records"*¹⁵ and in the Labour Tribunal's Ruling¹⁶ the Labour Tribunal referred to the fact that the warning letters the Employer sought to rely on were *"outdated and unusable"*.
52. It is perhaps academic if the 26th June 2020 formal warning letter constituted a warning for misconduct, which would remain "live" for 12 months¹⁷ or a warning for poor performance, which would remain "live" for one month¹⁸. Either way, the warning will have expired by the time [redacted] wrote to the Complainant on 29th March 2022. So when [redacted] said that *"we have a problem with your time*

¹² Transcript page 8 lines 18 -20 and 22

¹³ Per *W Devis & Sons v Atkins* supra

¹⁴ As opposed to "theft"

¹⁵ At page 2 of 8 of the Labour Tribunal's Ruling and at page 5 lines 23 to 28 of the Transcript

¹⁶ At page 4 of 8

¹⁷ Labour Act section 52(3)

¹⁸ Labour Act section 53(1)

keeping ...and you are currently on dismissal notice regarding that matter” that was not correct.¹⁹ The 26th June 2020 warning had expired and was of no warning effect.

53. The result of this was that the 29th March 2022 warning e-mail made the Complainant subject to a warning for poor work but it was incorrect for [redacted] to say in that email that “you are subject to be dismissed for cause for poor work and for false time sheets”. The Complainant was then only subject to a warning for poor work and that warning expired after one month.

54. Given that there were no live warnings in existence when the Complainant was dismissed, then the only potentially fair reason for dismissing the Complainant on 17th May 2022 was for serious misconduct pursuant to section 51(1)(a). The Appeals Tribunal agrees with the Employer that if the only reason, or the real reason, for the Complainant’s dismissal was [redacted] misconduct in submitting “false and fraudulent timesheets” then the “misconduct grounds in dishonestly and theft ...can and must be considered on its own grounds”. Irrespective of the existence or otherwise of written warnings, the Employer could have fairly dismissed the Complainant if the Complainant’s conduct was such that the Employer could not be expected to take any course than to summarily terminate.

55. In that regard the Employer’s Notice of Appeal says -

“ Misconduct - false and fraudulent timesheets.

21. *As appears from the Appellant's Response, the thrust of the Appellant's position and the reason for [the Complainant]'s dismissal was for misconduct in submitting false and fraudulent timesheets.*

22. *It cannot be overstressed that this is dishonesty/theft which goes to the very heart of the employment relationship and the trust and confidence which must underlie that relationship.*

Submission of false and fraudulent timesheets, and deceitfully receiving pay for work not performed i.e., "obtaining property by deception" contrary to s.247 of the Penal Code, is gross misconduct within s.52(1) of the Act, entitling the Appellant to dismiss [the Complainant] summarily/forthwith under the Act.

23. *For the avoidance of doubt, dishonesty/theft is not a "performance" issue, it is unquestionable (sic) gross misconduct meriting summary dismissal, and while the Appellant had historically chosen to make it the subject of "warning", it remains that upon recurrence of such misconduct the Appellant was entitled to dismiss [the Complainant] summarily as it did."*

56. Assuming for present purposes that the Employer had carried out reasonable investigations into the alleged April/May 2022 “false and fraudulent timesheets” and found that the Complainant was guilty of misconduct, it would have established a potentially fair reason for dismissal but it still had a responsibility to act in accordance with equity and the substantial merits of the case, so the matter would not end there. It still had to have regard to all the circumstances.²⁰

57. In Paul v East Surrey District Health Authority [1995] IRLR 305, Beldam LJ said at [35]-[36];

¹⁹ The Employer’s attorneys sought to argue that the misconduct warning was somehow “renewed” on 29th March 2022. See the Employer’s Outline Submissions at paragraph 46.

²⁰ Labour Act section 51(3)

"I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified.

58. And in Thames Water Utilities Ltd v Newbound [2015] EWCA Civ 677, 2015 WL 3953030 Bean LJ said at [63] -

"There are two types of disparity argument. The first is where the employer has previously treated similar behaviour less seriously; if such behaviour has on previous occasions not even been treated as a disciplinary offence, this is often described as condonation. The second is where two employees involved in the same incident are treated differently..."

(emphasis supplied)

59. In its Notice of Appeal, the Employer refers to the submission of questionable time sheets as "theft". It says -

24. *The Appellant's position as to [its] reasons for [the Complainant's] dismissal for misconduct and the facts, which the Tribunal has failed to grasp or ignored are very simple, and summarized below.*

(a) [The Complainant] had made practice of submitting bogus and fraudulent claims for hours worked in timesheets submitted with entries variously under hearing (sic) " ... As documented in ...the Appellant's Response, review of timesheets by for the period January 2019 - September 2021 disclosed some 407.5 hours of false entries, i.e. 407.5 hours for which was paid for time didn't actually work.

(b) These complaints...were of course historic, as the Appellant recognizes, but they cannot be ignored completely in light of the events of March and April 2022.

(c) As was explained by to the Tribunal, the timesheets in question are submitted by each of the Appellant's employees bi-weekly - every two weeks and are entered into its timekeeping system in calculating each employee's wages and overtime.

(d) As of 29 March 2022, however there was a recurrence of misconduct on the part of [the Complainant] in submitting further falsified and fraudulent timesheets.

(e) Again, the Appellant elected generously perhaps to treat misconduct warranting summary dismissal as a matter for a warning only."

60. What an employer considers to be serious misconduct in one situation might not be considered serious misconduct in another. It is often argued before Labour Tribunals that certain language or conduct may be more acceptable in one working environment than in another. The test is whether the misconduct in question is so serious that a particular employer reasonably believes that it cannot be expected to take any course other than termination.
61. So, examples of such serious misconduct might be a breach of trust, where an employee discloses an employer's sensitive company information, or breaches of safety protocol, or other behaviour including wilful misconduct, if it puts fellow employees, or the company at risk. Such acts may warrant immediate termination to protect the wellbeing of the company and/or its employees and/or its customers. The employer has no choice but to dismiss.
62. At common law an employer may summarily dismiss an employee for gross misconduct but for any other reason it must be by notice. In Pepper v Webb [1969] IWLR 514 an employee was summarily dismissed and whilst Pepper v Webb preceded the Industrial Relations Act 1971, and so preceded the legal concept of unfair dismissal, it is helpful in this case because it illustrates that misconduct can be so serious that it goes to the root of a contract (that is, that it expressly or impliedly is a repudiation of the fundamental terms of the contract). Therefore, in an unfair dismissal context, such conduct would leave an employer with no other course that to terminate. The question is "at the material time did the employer believe that the employee's conduct went to the root of the employment contract?"
63. The Labour Act says that an employer "*may terminate forthwith the employment of an employee where the employee has been guilty of [serious] misconduct*". In Sameen v Abeyewickrema [1963] AC 597 Lord Dilhorne LC considered the meaning of the word "forthwith" (albeit in the context of the filing of a legal document, rather than in an employment context) and found that whilst the word "forthwith" might defy definition, an act that should be carried out forthwith is an act that should be carried out as soon as practicable.
64. So, if an employer may terminate forthwith, that is, when it becomes aware of the misconduct in question, it does not necessarily have to do so. But if it does not terminate forthwith, it is clearly accepting that the misconduct is not so serious. It will then be hard for it, some weeks or even months later, to argue that it may terminate summarily for the same reason (in the absence of written warnings), because it has to protect its business, or staff, or customers. It has lost the chance to do so.
65. If the Complainant's previous behaviour had really been considered by the Employer to amount to theft, then the Employer had condoned this behaviour over a period of years. There came a time when "enough was enough"²¹ but the Labour Tribunal found, as it was entitled to do in accordance with section 51 of the Labour Act, that in the absence of any warnings, to summarily dismiss the Complainant in those circumstances was not a decision in accordance with equity and the substantial merits of the case.

²¹ Notice of Appeal paragraph 35

66. Therefore, whilst some of the Labour Tribunal’s language may leave something to be desired²² and some of the terminology can be criticised²³, if read in the round²⁴ the Appeals Tribunal is hard put to fault the gist of the Labour Tribunal Ruling when it provides in its Tribunal ‘Findings’²⁵ that -

“The Tribunal after deliberating on the tangible evidence on record and from the verbal evidence submitted by the Respondent, hereby finds the Complainant was unfairly dismissed. The Tribunal also found that the Respondent failed in his moral duties of the Labour Act (2021 Revision) under Section 52(1), (2) & (3) and Section 53 (1) &(2) that deals with grave misconduct, potential misconduct and job performance respectfully. The Tribunal carefully noted the Respondent failed to clearly follow the proper procedures upon and before terminating the Complainant’s gainful employment.

The Tribunal equally considered the numerous offenses that the Respondent stated in submitted evidence over the numerous amounts of challenging times that the Complainant had reluctantly filed fraudulent hours for wage payments. However it was equally apparent to the Tribunal that the Respondent possessed all belligerents rights to have permanently terminated the Complainant contentious years ago for such grave offences under Section 52(1). However, this never transpired and continued to remain an ongoing employer/employee issue up until the time of the Complainant’s termination.”

67. When the Complainant handed in time sheets for the “pay period end date 29-Apr-22” decided that enough was enough. Once an employer suspects misconduct and has carried out all the investigations it should carry out in the circumstances, the Labour Act requires an employer either to dismiss for gross misconduct if the circumstances permit, dismiss in light of written warnings, such as they exist and are current, or terminate the employee’s contract of employment for “some other substantial reason”, pursuant to section 51(1)(f) of the Labour Act (which can assist employers if the particular facts of a case do not otherwise fit neatly into sections 51(1)(a), (b) or (c)).²⁶

68. The Labour Tribunal decided that the Employer could not reasonably dismiss summarily for gross misconduct pursuant to section 51(1)(a) and in the absence of live written warnings, could not dismiss pursuant to section 51(1)(b) or (c). The Appeals Tribunal recognises that it is sometimes the case that the correct procedure to have followed only becomes clear to an employer when a matter is fully considered, often during the course of a tribunal hearing. Before the Labour Tribunal hearing took place clearly believed that the Complainant was subject to Labour Act warnings, when was not. But even if the warnings the Complainant had received had become stale dated, still believed that the fact of these historical notices allowed to summarily dismiss the Complainant without having to make any further enquiries.²⁷ They did not.

²² In particular the Labour Tribunal mentions the Employer’s “moral duties” and whilst section 52 of the Labour Act does mention “immorality” it is hard to see questions of morality being relevant in this day and age.

²³ For example, the Labour Tribunal refers to there having been a constructive dismissal when there was clearly an actual dismissal.

²⁴ See Fuller v The London Borough of Brent infra.

²⁵ At page 6 of 8

²⁶ Dismissing for some other substantial reason must still be reasonable in all the circumstances and since a dismissal for SOSR will not qualify as a dismissal “for cause” it will entail the employer paying the employee severance.

²⁷ His attorneys relying on Airbus UK Limited v M.G Webb [2008] EWCA Civ 49 see paragraph 41 of the Employer’s Outline Submissions

69. Ignorance of, or a mistaken belief in, the provisions of the law is no defence. But mistakes happen. Particularly so when organisations do not have the benefit of Human Resources departments or in house legal advice. Mistakes happen even when they do. To err is human.
70. And in this case mistakes were made and these mistakes were identified by the Labour Tribunal, which then applied the facts it had ascertained and applied those facts to the law.

F. The Labour Tribunal Ruling

71. Under the heading “C. The errors by the Tribunal” the Employer’s Notice of Appeal also mentions that the Labour Tribunal Ruling is “*in part incomprehensible and indecipherable as to intent and meaning.*” The Employer also says –

27. It is the case that no-where in its decision, does the Tribunal address this cogent evidence [the submission of the “false and fraudulent timesheets”]. The Tribunal either overlooked or ignored this clear and unequivocal evidence of misconduct on the part of [the Complainant] which, particularly in light of the previous warning given on 29 March 2022, fully and reasonably entitled the Appellant to dismiss [the Complainant] summarily as it did on 17 May 2022 upon discovering this repetition of dishonesty.

28. The Tribunal's reasoning on page 6 of the decision as to its "Findings" with reference to s.52 and s.53 is very difficult to understand. Significantly it seems clear from its Findings that the Tribunal accepted that [the Complainant] had "filed fraudulent hours for wage payments", but to the extent the reasoning can be followed, seems to relate this to historic events and ignores the evidence of [the Complainant]'s fraudulent submission of timesheets in April 2022. In this regard the Tribunal clearly fell into error and failed to take into account the evidence before it of misconduct falling squarely with s.52(1) (a), (b) and (c) of the Act.

29. The Tribunal's statement at page 6 that it "was impossible to apply [s. 52(2)] since no records were submitted into evidence" is completely wrong and unsustainable. The Tribunal had before it Exhibits M, N, P, and Q, supported by the evidence of. as to the false and fraudulent timesheets submitted in April 2022, following the 29 March 2022 warning.

30. The Tribunal at page 7 focuses again on performance, ignoring the misconduct of April 2022 in the submission of the fraudulent time sheets. That the Appellant had purported to terminate [the Complainant] for both non-performance and for misconduct, does not mean that each ground is not and to be considered on its own independent merits (sic), which it seems the Tribunal failed to do. While it is unclear from the reasoning at page 7 of the Decision, it seems to be the case that the Tribunal considers the fraudulent and dishonest submission of timesheets and obtaining payment by deception from the employer is a "performance" issue for which "improvement targets" should be set.

72. For the reasons given in the previous sections of this Decision, the Appeals Tribunal does not believe that the Labour Tribunal’s decision shows it to have erred in law, or if technically it did, the Appeals Tribunal is satisfied that the Labour Tribunal’s decisions was not perverse. However, reading the Ruling can be a challenge and the Employer says -

31. It remains that having found that [the Complainant] had "filed fraudulent hours for wage payments" the Tribunal on the evidence should properly have found the Appellant was entitled to dismiss [the Complainant] forthwith as it did.

The Tribunal's "Decision" - page 7

32. The Tribunal's reasoning in its "Decision" at page 7 is difficult to understand, and the basis for the reference to "constructive dismissal" is unclear, since this is not a constructive dismissal case.

33. The Tribunal goes on to say that [the Complainant] "portrayed a negative role". If by this the Tribunal is referring to his "fil[ing of] fraudulent hours for wage payments", then this characterization is a gross understatement of the position. An employer who has been subject of repeated and persistent fraud and deceit by an employee is fully and lawfully entitled to dismiss that employee forthwith for that fundamental dishonesty. This is not the employee merely acting in a "negative role"; it is theft and gross misconduct inimical to the employment relationship and for which the employer is lawfully and reasonably entitled to terminate that relationship...

36. What "standard procedure" the Tribunal is referring to or suggestion should have been followed is again unclear. Summary dismissal for dishonesty/theft does not require any formal procedure. Again there seems to be a confusion with performance issues."

73. Given that there was no investigation by the Employer into the alleged "filing of fraudulent hours" in April/May 2022, the facts before the Labour Tribunal did not allow it to make a finding that fraud existed. Therefore, the Appeals Tribunal reads "the numerous offenses that the Respondent stated in submitted evidence over the numerous amounts of challenging times that the Complainant had reluctantly filed fraudulent hours for wage payments" as referring to the fraudulent hours for wage payments that the Complainant had allegedly filed. If the Labour Tribunal did not mean "alleged" but meant "as proven", then it appears to have made a mistake in doing so.

74. But in Fuller v The London Borough of Brent [2011] WL 722292 Lord Justice Mummery said-

"31..The ET [Labour Tribunal] judgement must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernicky critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round; those are all appellate weaknesses to avoid".

75. Ideally, a Labour Tribunal Ruling will identify all the issues the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law and state how that law has been applied to those findings, in order to decide the issues. In the UK this is specifically what is required of the Employment Tribunal²⁸. However, in the UK the Employment Tribunal is presided over by a specialist employment judge, whereas the Cayman Islands Labour Tribunal is presided over by,

²⁸ Rule 62(5) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

essentially, volunteers, some of whom are legally qualified and some of whom are not. Only a small number are practising employment lawyers.

76. Whether Labour Tribunal hearings, involving ring binders of witness statements, authorities and other documents, where parties are represented by Counsel, should be dealt with by non-lawyer Chairpersons and members, is open to question but in any event, one cannot expect such non-lawyer Chairpersons of these Labour Tribunals to spend many hours preparing detailed Rulings, that can then withstand the subsequent scrutiny of specialist employment lawyers, who do have the time and resources to cast a critical eye over every word and phrase.

77. Given the personnel involved, Rulings of the Labour Tribunal do not always provide all the detail expected of an Employment Judge in the UK but then again, nor necessarily do the Rulings of Employment Judges. In JP Morgan Securities plc v Ktorza [2017] WL 02610563 the Employment Appeals Tribunal found that the Employment Judge's 'Reasons' were "disappointing" and those Reasons "difficult to analyse". Nevertheless in the JP Morgan case Richards J said that –

" I have taken some time to review the Employment Judge's Reasons. It is, I think, necessary to consider them in some detail to see whether, despite their lack of structure, they may be free from legal error²⁹ and whether "he [the Employment Judge] was where he needed to be by the end"³⁰.

78. In this case, although the Labour Tribunal may or may not have been alive to the basic unfairness of the Complainant's dismissal (the failure to afford him the opportunity of explaining himself), in light of the provisions in sections 52 and 53 of the Labour Act (which sections the Labour Tribunal set out in full in its Ruling), the Labour Tribunal did identify that since the Employer said that it dismissed the Complainant for misconduct and for poor performance, which it said the Complainant was on warnings for³¹, the Labour Tribunal was where it needed to be in the end by finding that the dismissal was unfair in all the circumstances .

79. In UCATT v. Brain [1981] I.C.R. 542, Lord Justice Donaldson (as he then was) said (at page 551) -

"Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law ... The reasons are then recorded, and no doubt tidied up for differences between spoken English and written English. But their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win, I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."

G. The Other Grounds of Appeal

80. The Employer does raise other issues with the proceedings before the Labour Tribunal (thr preliminary objections), and having heard from _____, the Appeals Tribunal suspects these other reasons are

²⁹ At paragraph 27

³⁰ At paragraph 34

³¹ See page 5 of the transcript "I terminated him on the basis of that warning [of 29th March 2022]

probably those which have caused _____ most frustration and which the Appeals Tribunal accepts made _____ experience before the Labour Tribunal less than ideal. The Employer says that -

“A. The Appellant was not afforded a "hearing" by the Tribunal.

3. *The Appellant, represented by its director, _____ attended the hearing which was held by Zoom on 4 May 2023. [The Complainant] did not attend.*
4. *The hearing was before the Tribunal ...It is the case the Chairperson, ...failed or refused to turn on _____ video camera, and to the best of the recollection of _____, the other members of the Tribunal did likewise. As a result while the Tribunal could both see and hear the _____ (sic) in making _____s submissions, _____ could only hear the Tribunal and could not visually see certainly the Chairman, and _____ believes neither of the other two members of the Tribunal were visible either...*

5. It is a fundamental [principle] to natural justice that a party to a quasi-judicial hearing such as that before the Tribunal must reasonably be able to both see and hear the tribunal. It is not otherwise a hearing. There was to the knowledge of the Appellant no reason for the members of the Tribunal to not turn on their cameras or any obstacle to doing so. In the circumstances the manner in which the hearing was conducted was more Orwellian and appropriate to an authoritarian state than a British common law democracy. The Appellant takes the position that it was not afforded natural justice and denied a full and proper "hearing" to which it was entitled by the Act, the Cayman Islands Bill of Rights, and common law."

81. It is perhaps hyperbolic to characterize the Labour Tribunal hearing on 4th May 2023 as akin to proceedings in an authoritarian state but the Appeals Tribunal does note that in addition to the criticisms of the proceedings made by _____ : and which have already been mentioned, at various stages the Secretary to the Labour Tribunal and _____ were not able to hear the Chairperson, who at one stage said *“My internet is not that great this week”* ³².

82. The Appeals Tribunal does not know why these proceedings were conducted by Zoom and why _____ was not allowed, or at the very least not able, to see the Tribunal members. There may have been technical or other reasons. But generally speaking, it is important that the technical constraints of remote hearings are minimized as much as possible, so the parties to proceedings are not prejudiced by connectivity problems, the inability to view documentation and the absence of the usual visual clues that are given when particularly good (or bad) points are made. All these issues and more will be avoided if Labour Tribunal hearings are in person, which should be the default position, unless one or more of the parties or one or more of the Tribunal members are unable to appear in person. Now that the 2020 pandemic is in our rear view mirror, it should be a rare occasion that a hearing is fully remote.

83. Another of the Employer’s criticisms of the Labour Tribunal was that -

“18. While the Tribunal correctly recognized that it lacked jurisdiction to entertain the [Complainant’s] complaints at (b) [the allegation that the Employer owed the Complainant vacation pay] and (c) [that the Complainant was owed wages] the Appellant’s contention is that these spurious and fallacious claims advanced by [the Complainant] should have at the very least gone to _____ credit, i.e. _____ credibility in _____ claims of unfair dismissal.”

³² Transcript page 3, lines 23 and 24

84. In his Response Letter, also said that -

“The Fact that [the Complainant] states that worked for us uninterrupted since 2004 in written and signed submission to your department is a false statement of which is perfectly aware.

[The Complainant] claims [a] negative balance on vacation allotment...This claim is false just like employment tenure.

I am shocked and dismayed that in return for act[s] of kindness by providing full regular pay during the lockdown that [the Complainant] now wants more regular and vacation pay... knows perfectly well that claim of pay deprivation concerning both vacation pay and final pay is false. claim that is owed final pay is also a violation of [the Labour Act section] 82 (1) a, b and c.”

[The Complainant]’s statement that never received any warnings is false and is again a violation of 82(12) of the Labour Act...

Prior to this event I used to believe that [the Complainant] was an honest I cannot say that any longer based on the false claims has made regarding regular wages and vacation pay, length of tenure at and claiming there have never been job performance issues. All false statements of the Labour Act.”

85. Section 82 of the Labour Act provides -

“82(1) A person who –

(a) willfully makes a false entry in any register, notice, certificate or document required by, under or for the purposes of the Act or any regulations made hereunder to be kept, serve or sent:

(b) willfully makes or signs a false declaration required by, under or for the purposes of this Act or regulation or order hereunder: or

(c) knowingly makes use of any such false entry or declaration as aforesaid,

commits an offence and is liable on summary conviction to a fine of five thousand dollars and to imprisonment for twelve months.”

86. The Labour Act provides that employers shall keep, for example, accurate work accounts in respect of each employee and statements of wages and gratuity accounts and the Appeals Tribunal views section 82 in light of these requirements.

87. As regards the Complainant’s complaint of not receiving written warnings and claiming that there were no job performance issues, in a way ... was right. Before being dismissed was not subject to any current written warnings, either for conduct or performance.

88. As far as continuity of employment was concerned and the Complainant's claim to be owed regular pay and vacation pay, the validity of these claims may have gone to ... creditability, had creditability been in issue. But so too could claim that the Complainant's April/May 2022 time sheets "were not examined ... immediately upon submission [but] ... when discovered and considered by the [Employer] were the basis and grounds for [the Complainant's] summary dismissal on 17 May 2022"³³ when it is clear from the relevant e-mails set out earlier in this Decision that reviewed the material time sheets within 90 minutes of their being submitted.
89. Again, to err is human and as soon as he was asked to review ... claim for vacation pay and outstanding wages, the Complainant confirmed that I was no longer pursuing those claims.³⁴ In any event, the Labour Tribunal's remit is restricted to a consideration of claims of unfair dismissal and severance and it is the role of the Director of Labour to ensure the proper observance of the provisions of section 82 of the Labour Act and if those provisions are not complied with, to take steps to ensure that any offences that may have been committed under it are brought to the attention of the Office of the Director of Public Prosecutions.
90. Such steps would not appear applicable or appropriate here.
91. Finally, the Employer says that the Labour Tribunal's decision is a nullity because it did not comply with section 75 of the Labour Act. The Employer says -

B. The Tribunal's decision dated 29 May 2023 following the hearing on 4 May 2023 was notified to the Appellant on 7 June 2023 outwith the 28 days for doing so under s. 75(7) of the Act.

10. The hearing in this matter was held on 4 May 2023. Section 75(7) of the Act provides as follows:

"(7)A Labour Tribunal shall give a reasoned decision in writing within twenty-eight days of the conclusion of the hearing. A copy of its decision shall be delivered to all parties invited to attend under subsection (6)."

[emphasis in the Notice of Appeal]

11. By s.8 of the Interpretation Act (1995 Revision) in the absence of a "contrary intention", and there is none here, a period of "days" is calculated excluding, the day on which the act or thing is done, and the last day of the period, where the last day falls on a Sunday or public holiday. Accordingly the mandatory 28 days prescribed by s.75(7) for delivery of the Tribunal's decision expired on Thursday 1 June 2023.

12. For the avoidance of doubt, while s.85(1)(b) of the Act contemplated that Cabinet might make regulations varying the time periods under the Act, the 28 days has not been varied, by regulation, nor does the Tribunal as a creature of statute have jurisdiction itself to extend that 28 days.

³³ Notice of Appeal paragraph 24(g)

³⁴ See the email from the Department to Mr Vasic dated 13th July 2022 and timed at 11:38 am

13. *The Appellant's submission is that the Decision delivered on 7 June 2023 is a nullity being outside the mandatory 28 days for doing so.*

92. The Appeals Tribunal has mentioned the volunteerism involved by those that sit on Tribunals and seek to assist parties to Tribunal claims. In the circumstances, it may be best for this Appeals Tribunal to rely on a previous Appeals Tribunal decision that pointed out that whilst these time limits are mandatory, the Labour Act does not provide any sanction for non-compliance.³⁵

93. Also, unlike section 75(7), as far as the Appeals Tribunal is concerned, the Labour Act provides that –

“78(8). Within twenty-eight days from the conclusion of the hearing of the appeal the [Appeals] Tribunal shall reach a decision upon the appeal and shall deliver a notification of that decision, together with written reasons therefor, to every party who appeared at the hearing of the appeal.”

94. It is perhaps best if the Appeals Tribunal says no more on this subject than that.

H. Generally the role of the Appeals Tribunal

95. When the Employer says that the Labour Tribunal’s decision *“is in part incomprehensible and indecipherable as to intent and meaning”* it goes on to say that *“The LAT is invited to review the decision carefully”*.³⁶

96. Since the question of “review” has been raised, it may well be an opportune occasion for this Appeals Tribunal to set out what it believes is the correct role of the Labour Appeals Tribunal, vis a vis appeals from the Labour Tribunal.

97. On appeal to the Appeals Tribunal and indeed, when Complaints are heard before the Labour Tribunal, UK case law is often cited and is usually of persuasive authority. However, in the UK appeals from Employment Tribunals to the Employment Appeals Tribunals are governed by the Employment Tribunals Act 1996 and appeals lie to the Employment Appeals Tribunal *“on any question of law arising from any decision of, or arising in any proceedings before, an employment tribunal... ”*³⁷.

98. However, whilst the Labour Act provides that appeals from the Labour Appeals Tribunal to the Grand Court may be made on a point of law only³⁸, there is no such restriction on appeals from the Labour Tribunal to the Labour Appeals Tribunal. Rather -

“78(7). The Cabinet may prescribe the procedure to be followed at the hearing of an appeal [to the Appeals Tribunal] but in default of such prescription the procedure shall be at the discretion of the Chairperson of the [Appeals] Tribunal.”

99. As far as this Appeals Tribunal is aware, there are no relevant prescriptions concerning procedure but more fundamentally, neither is there guidance as to the extent of the Appeals Tribunal’s jurisdiction. The Appeals Tribunal understands that when the then Labour Bill 1987 was being debated in the Legislative Assembly, it was envisaged that the Director of Labour (prior to the existence of Labour Tribunals)

³⁵ See *RB v Caribbean Marine Services* LAT reference 3/13[2015]

³⁶ Notice of Appeal paragraph 15

³⁷ Section 21 Employment Tribunals Act 1996

³⁸ Section 79 Labour Act (Revision).

would hear Complaints and take evidence, and that if a decision of the Director was appealed, the Appeals Tribunal “*can also look into those facts and if it wants[,] can reopen the issue and again decide what the facts are*”.³⁹ This appears to suggest that the Labour Appeals Tribunal could conduct a *de novo* hearing (*de novo* “from the new”), so would start from the beginning, without any reference to the Labour Tribunal’s decision, or the proceedings before the Labour Tribunal.

100. The Director’s role at first instance was replaced by the Labour Tribunal when the Labour Law was amended in 1995⁴⁰ and given that hearings before Labour Tribunals would by definition thereafter be more judicial in nature, the procedure before the Appeals Tribunal appears to have developed so that appeals from the Labour Tribunal to the Appeals Tribunal were not treated as *de novo* appeals.
101. Rather, the practice appears to have developed that the primary concern of the Appeals Tribunal was to review the decision of the Labour Tribunal to determine whether the Labour Tribunal made any errors of law and if no error of law was established, the appeal ends there.
102. If there was legal error, then the Appeals Tribunal’s discretion as to how it can proceed is wide, and how it proceeds will depend on the nature of the error established.
103. So, for example, if the Labour Tribunal misdirected itself on the law but made clear factual findings (usually findings of the facts known to the employer at the time the decision to dismiss was made), the Appeals Tribunal can apply those findings of fact to the law, to reach a conclusion.
104. If the Labour Tribunal misdirected itself on the law and its factual findings are insufficient for the Appeals Tribunal to rely on them, the Appeals Tribunal can review the Labour Tribunal’s transcript and any documents that were before the Labour Tribunal, to enable it to reach its own decision.
105. If the Appeals Tribunal cannot make a decision without its own fact-finding, due to any prejudice in the Labour Tribunal’s proceedings (e.g., the Labour Tribunal proceeding without a witness, or failing to give witnesses an opportunity to be heard), then a new hearing before a Labour Tribunal may be necessary, in which case the matter could be remitted back to the original Labour Tribunal, or to a freshly constituted Labour Tribunal, although given the Appeals Tribunal’s wide discretion, it would seek to avoid the need to remit wherever possible.⁴¹
106. In this case, although the Labour Tribunal got there in the end, it is arguable the Labour Tribunal may have made its decision based on the wrong application of the law and/or may have made findings of fact that the evidence did not allow and so it may be a case of the Labour Tribunal reaching the right result for the wrong reason. However, the Appeals Tribunal has a transcript of the Labour Tribunal hearing that took place on 4th May 2023 and has to hand all the relevant documents and facts and so does not have to rely on any findings made by the Labour Tribunal.
107. Given the particular issues that arise in this case and the fact that it does not have to rely on any findings made by the Labour Tribunal, the Appeals Tribunal is satisfied that it does not have to remit this matter

³⁹ Hansard 9th December 1987 (page 6).

⁴⁰ Labour (Amendment) Law 1995 G5/1995/s4e

⁴¹ “Quite generally sending a case to a tribunal or court below should be used only as a last resort. “Ping pong” as some call it, generally serves litigants badly – prolonging things and increasing costs” Buckland v Bournemouth University [2010] ICR 908 Jacob LJ at paras 57 -58.

to another Labour Tribunal but instead it can make its own decision, based on the information that was before the Labour Tribunal on 4th May 2022.

108. And whilst not carrying out a *de novo* hearing as such, the Appeals Tribunal did allow [redacted] and [redacted] attorney the opportunity to ensure that the Appeals Tribunal had before it all the necessary information (and in particular all the relevant documentation), which they were concerned might not have been before the Labour Tribunal (or had not been considered by the Labour Tribunal)⁴².

109. This is a lengthy Ruling for what the Appeals Tribunal considers to be a straightforward case but the Appeals Tribunal has sought to ensure that all and any criticisms of the Labour Tribunal have been addressed and that the Employer has been afforded a hearing that satisfies it as its expectations and recognises the rights it believes it is entitled to and are conferred on it by the Cayman Islands Constitution Order 2009 and the Cayman Islands Bill of Rights.⁴³

I. Awards

110. After the conclusion of the hearing before the Appeals Tribunal the attorneys for the Employer wrote to the Appeals Tribunal wishing to raise the point that since the question of a full investigation had not been raised by the Labour Tribunal at its hearing on 4th May 2023, [redacted] was not given an opportunity to address what transpired at the meeting on 17th May 2022, that is, at the time the Complainant was dismissed. Those attorneys say that had [redacted] been given the opportunity, [redacted] would have been able to call further evidence.⁴⁴

111. In particular, the Employer's attorneys say that had the issue been raised before the Labour Tribunal, [redacted] would have given evidence to the effect that the Complainant did not dispute the assertion that [redacted] had put in false time sheets after the written warning on 29th March 2022 and [redacted] would have called [redacted] on whose report [redacted] had relied.

112. However, the Appeals Tribunal is satisfied that [redacted] made up [redacted] mind to dismiss the Complainant in advance of the 17th May 2022 meeting. Indeed, [redacted] made up [redacted] mind on the morning of 2nd May 2022. That was [redacted] evidence and no evidence [redacted] could have called after the event would be as probative as [redacted] concession in [redacted] Response Letter to the Department that [redacted] had decided at the point when [redacted] received the time sheets that [redacted] had enough of the Complaint and there was no point talking to the Complainant further.

101. That said, the Appeals Tribunal's confirmation of a finding of unfair dismissal means that had the Complaint not been unfairly dismissed (but dismissed fairly, say, by notice and with the Employer relying on the Some Other Substantial Reason – the section 51(1)(e) ground), [redacted] would have been entitled to severance pay of one week's wage at [redacted] latest basic wage for each completed year of service.⁴⁵

102. As far as compensation for unfair dismissal is concerned, section 55, subsections (1) and (2) provides -

⁴² See the Employer's Outline Submissions at paragraphs 4, 10 and 52 for the Employer's concerns in this regard.

⁴³ The Employer's Outline Submissions at paragraph 64

⁴⁴ See the letter from Hampson and Company dated 16th October 2023

⁴⁵ *Labour Act section 41(1)*.

55. (1) *Where, upon a complaint of unfair dismissal, a Labour Tribunal has determined that the dismissal was unfair it may order the payment by the employer to the person dismissed of a sum of money by way of compensation for unfair dismissal.*

(2) *In making an award of compensation under subsection (1), a Labour Tribunal shall have regard to –*

- (a) *The length of the continuous employment of the person dismissed immediately preceding the dismissal;*
- (b) *The likelihood of the person dismissed finding other comparable employment;*
- (c) *The salary of the person dismissed immediately preceding the dismissal;*
- (d) *The period up to the likely retirement age of the person dismissed and any entitlement to a pension which that person may then have;*
- (e) *The degree of unfairness of the dismissal; and*
- (f) *Such other matters as may be prescribed.*

(3) *The amount of an award of compensation under subsection (1) shall not exceed one week's wages for each completed year of service.*

(Emphasis supplied)

103. The Labour Tribunal ordered “*the Respondent to pay severance to the Complainant the sum of KYD\$ [redacted] for nine years of continuous employment, and further orders the Respondent to pay half of the sum for unfair dismissal (due to the aggregating factors on the part of the Complainant's continuous blunt misconduct) to the Complainant the sum of KYD\$ [redacted] to total CI\$ [redacted]*”

104. The award of severance is merely a mathematical calculation but with unfair dismissal, the Labour Tribunal has a discretion and it decided to award only half the amount it could award. In its decision the Labour Tribunal said that it “*could humbly perceive how the Respondent inevitably came to the conscious decision to wrongfully break off the gainful Complainant employment*”.

105. The basis upon which the Employer came to the decision to dismiss is clear and it is equally clear that that basis was incorrect in law. Arguably then the Complainant should have been awarded damages for unfair dismissal of a full weeks pay for each year of continuous service but having concluded that the Labour Tribunal's decision on the issue of unfair dismissal was correct, the Appeals Tribunal is not minded to interfere with the Labour Tribunal's award of half a week's pay and so affirms the award in the total amount of CI\$ [redacted]

J. Appeals to the Grand Court

106. Appeals against any decisions of the Labour Appeals Tribunal are governed by section 79 of the Labour Act and such appeals are to the Grand Court (pursuant to the Grand Court Rules (2023

