EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Denver Tilstone	**v**	**Virgin Media Limited**
Heard at: Watford		**On**: 7 and 16 February 2017

Before: Employment Judge Bedeau

Appearances

For the Claimant: Mr C Hadgill, Counsel
For the Respondent: Nr D Northall, Counsel

JUDGMENT

1. The claimant's unfair dismissal claim is not well-founded and is dismissed.

2. The claimant's unauthorised deductions from wages claim is dismissed upon withdrawal by the claimant.

REASONS

1. By a claim form presented to this tribunal on 27 October 2017, the claimant claimed that he was unfairly dismissed from his employment on 6 July 2016 and that there had been unauthorised deductions from his wages.

2. In the response presented to the tribunal on 28 November 2016, the respondent averred that the claimant was dismissed for acts of gross misconduct and a fair procedure was followed. Dismissal fell within the range of reasonable responses and if there were procedural errors, the claimant would have been dismissed in any event. In addition, he contributed to his dismissal.

The Issues

Unfair dismissal: the following were agreed as the issues in the case.

3. The burden of establishing the reason for the dismissal is on the respondent, per the Employment Appeal Tribunal in Boys and Girls Welfare Society v McDonald [1997] ICR 693.

4. "Conduct" is a potentially fair reason for dismissal?

5. What was the real reason for the dismissal?

6. Was the real reason for the dismissal founded on the misconduct of the claimant?

7. Per British Home Stores Ltd v Burchell [1980] ICR 304:

    7.1 Did the respondent entertain a reasonable suspicion amounting to the belief in the claimant's guilt of the alleged misconduct at the time of the dismissal?

    7.2 Did the respondent have reasonable grounds upon which to sustain that belief?

    7.3 By the time at which the respondent had formed that belief, had the it carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

8. Did the respondent's decision to dismiss the claimant fall within the band of reasonable responses of a reasonable employer?

    8.1 Was the dismissal proportionate to the alleged misconduct?

    8.2 Was the dismissal proportionate, consistent and equitable to the sanctions imposed on other employees accused of similar misconduct?

    8.3 Were there other sanctions available to the respondent, such as retraining, warning, withdrawal of commission earned, which would have been fairer to adopt?

    8.4 Was the dismissal a fair sanction, taking into account the claimant's disciplinary record, work record, experience, length of service, training and mitigating factors relating to the alleged misconduct of the claimant?

9. Did the respondent follow a fair procedure in reaching the decision to dismiss the claimant?

10. If the dismissal was unfair, what amount of compensation by way of basic award and compensatory award ought to apply to this case?

Unauthorised deductions from wages

11. Did the respondent make unauthorised deductions from the claimant's wages?

12. If the respondent did make such deductions, what is the amount of compensation for the loss sustained?

The Evidence

13. I heard evidence from the claimant who invited me to have regard to the witness statements of Mr Stephen McLean, a former sales executive; Mr Pritesh Vyas, work colleague; Mr Darren Chatfield, work colleague; and Mr Lukasz Towgin, sales executive. I was invited to give whatever weight I considered appropriate to the evidence in their statements.

14. On behalf of the respondent evidence was given by Mr Kunal Shah, regional sales manager and by Mr Peter Law, head of commercial sales.

15. In addition to the oral evidence the parties adduced two bundles of documents comprising, in total, of 920 pages. References will be made to the documents as numbered in the joint bundles.

Findings of Fact

16. The respondent provides fixed and mobile telephone, television and broadband internet services to businesses and personal customers in the United Kingdom. It has a disciplinary policy which provides for misconduct and gross misconduct. In relation to the examples of gross misconduct, the non-exhaustive list includes:

> "Doing or giving us reasonable grounds to think that you have done anything dishonest, including theft, fraud, insider trading or accepting a bribe or unauthorised commission, or taking a gift or hospitality that could be seen in that way."

and

> "Deliberate or serious misrepresentation or falsification of facts on reports, accounts, expense/commission/overtime claims, or any documents relating to sickness procedures or to a colleague's application for employment with the company." (48-49 of the joint bundle)

17. The significance of the examples of gross misconduct is also stated in the policy.

> "Gross misconduct means a series of acts of misconduct or a single act of misconduct that means you're fundamentally breaching company rules or your contract of employment, or is so serious that it totally breaks the trust between you and us. In these cases, the likely disciplinary action would be to dismiss you straight away, without notice or pay in lieu of notice." (48)

18. The "Goneaway" policy states that where a customer calls for a service or services but there is an active account at the address, the sales executive is required to carry out checks and if satisfied that everything is in order, then must ask the customer whether they would like to transfer responsibility to a family member. If yes, the sales executive would refer the customer to the respondent's customer care service to arrange for a transfer of responsibility form to be completed. That is the extent of the sales executive's role in

relation to the transfer of an account to another member of the family but within the same household. In such a case the sales executive would not be entitled to a commission as it is not classed as a new sale but a transfer of responsibility. (63)

19. The claimant said in evidence that the Goneaway policy only applies to telephone calls and not in a case where a sales executive deals with the customer directly in their own home. He described this as the door-to-door Goneaway process. In such a case, he was required to call the Sales Order Entry "SOE" line to load an order for a new customer. He had to give the address and the SOE would inform him whether there is an active order at that address or not. An order cannot be loaded while one is still active at the address. The SOE would take the details of the new customer and forward it on to the Customer Underwriting Team who would carry out credit checks on the proposed new customer. The sales executive is required to call back the SOE team within 24 to 48 hours later. He said the SOE team would say one of two things, either that the account has been disconnected and the order could be loaded or ask for a new tenancy agreement to be faxed to the Customer Underwriting Team to ensure that the tenancy details matched the moving in date. If so, the sales executive could then load the new order.

20. The account of the door-to-door Goneaway policy given by the claimant, had neither been acknowledged nor admitted to by the respondent. Its position is that where a member of the same household wishes to take over the contract, the sales executive is required to contact customer care who would then make arrangements for a transfer of responsibility "TOR" to be completed.

21. Both the Goneaway policy and the TOR procedure features prominently in this case

22. The respondent has its own compliance team to ensure compliance with its policies, procedures and the law.

23. On 8 October 2012, the claimant commenced employment with the respondent working as a full-time field sales executive or advisor based in the respondent's Direct Sales Team in Hemel Hempstead. As a sales executive, his role was to acquire new customers to achieve his target. He was paid a basic salary and commission on achieving his target. He worked in Direct Sales which is door-to-door sales referred to as "door knocking". Commission is paid on new customer contracts with the respondent for the provision of its services.

24. A "spotter" is a sales advisor who works from data information and leads and who has a higher target than a sales executive or a "door knocker".

25. On 5 January 2016, the claimant raised an informal grievance with Mr David Hudson, field sales manager and his line manager, complaining about the changes in his targets and other aspects of the work of the sales executive. He also alleged that Mr Hudson asked him to state, allegedly untruthfully, that he, Mr Hudson, went out on field visits when he did not.

26. On or around 11 January 2016, following a discussion with Mr Hudson in respect of the claimant's informal grievance, the claimant sent an email on the same day stating the following:

> "Hi Dave,
> As discussed I am happy with the outcome of our discussions and hope we can move forward ongoing.
> Thank you for your help and support.
> Regards
> Denver" (70)

27. I was, therefore, satisfied that the informal grievance had been resolved at that stage. He was, however, to raise a formal grievance in March 2016.

The Compliance report

28. On 5 February 2016, Mr Rajiv Hassan Manjunath, working in Compliance, wrote a sales compliance report on the claimant. He stated that the claimant was referred for investigation by an unidentified internal source. Following the referral, he had reviewed all sales entered by the claimant between October 2015 to January 2016 to determine whether there were any evidential patterns or trends. His review involved the use of customer based systems and credit reference bureau data. He highlighted five issues which needed to be investigated.

> "The customer's application details match a previous customer or applicant – 1 case.
>
> Transfer of Responsibilities Procedure not followed – 4 cases
>
> Direct Sales Move and Transfer Procedure not followed – 7 cases
>
> No POR (Proof of Residence) registered on the account – 3 cases
>
> Customers that were not traced by credit reference bureau – 17 cases
>
> Action:
> As part of our Sales Compliance process we undertake regular reviews of outstanding cases and need to ensure we are not omitting details of any action we may have taken, therefore we need to ensure we are kept up to date with the progress of this investigation. Please provide me with an update within 14 days." (71-82)

The investigation

29. The report was sent to Mr Roy Stark, regional sales manager of the sales management team, who instructed Mr Hudson to conduct an investigation. Mr Hudson interviewed the claimant on 1, 2 and 3 March 2016 in the company of the claimant's work colleague, Mr Pritesh Vyas. Notes were taken of the meetings. At 1 March meeting, the claimant asked for an adjournment as he was not in the right frame of mind and the meeting was adjourned to the following day with the same people present when the claimant admitted that he had cancelled the service of an existing customer and re-booked it under that person's partner's name as a new contract resulting in potential commission for him. He should have followed the

Goneaway procedure, in that the new customer should have been referred to the respondent's customer care department and a transfer of responsibility would then have been sent out for completion. Mr Hudson informed the claimant that customers who were looking for a better deal should have been advised to call customer relations instead of cancelling their contracts and re-signing in their partner's name allowing the claimant to get commission as a new sale.

30. At the reconvened meeting on 3 March, Mr Hudson found 3 cases of untraced customers with different names and with the same dates of birth, contact details and numbers as the previous debtors at the same addresses. Two of the applications were supported by electricity bills. As the compliance team were not able to provide copies of the bills, Mr Hudson requested archived PORs up to July 2015. Upon reviewing the archived documents, he noticed that with regard to Npower bills, there were some with identical meter readings for different addresses and there were identical Sky bills for different addresses with the customers ordering Sky box office movies on the same date and time. The claimant had dealt with these customers and submitted the PORs. In Mr Hudson's view, it was much more than coincidences that these similarities would feature in different accounts. He considered the matter as serious and suspended the claimant on full pay. (111, 343-351)

31. The claimant maintained that he had not been trained on the TOR process and raised the fact that he had lodged a grievance against Mr Hudson on 7 March 2016. He, therefore, objected to him continuing with the investigation. (130)

32. The claimant having raised his concerns, Mr Mark Tommis, field sales manager, was instructed to continue with the investigation and he met with the claimant on 18 March 2016. During the meeting Mr Tommis outlined the concerns raised by Compliance and questioned the claimant on the TOR procedure not having been followed by him from 9 November 2015 to 20 January 2016. The claimant responded by saying that he had been asking for the spotter disconnect process in order to verify whether it had been breached. He confirmed that he was not a spotter, therefore, he should not have called in to ask for a spotter disconnect as it was not within his remit as a door sales executive and should not have represented himself as a spotter to SOE.

33. In relation to customers' application details matching a previous customer, Mr Tommis referred to account numbers 206897004 and 206897003 and an untraced Kevin Daniel with an Npower bill as proof of residence. The names were different but the password and contact number were the same and the signatures were similar. In Mr Tommis' view the claimant did not provide a satisfactory explanation in relation to these concerns.

34. With regard to another customer, Mr David Okwah, there was a similar signature to the one on a previous account in the name of Ms Florence Ukpabi. Mr Okwah was signed up 5 days later. Mr Tommis was not satisfied with the claimant's explanation.

35. In relation to the 6 customers who could not traced by the credit reference bureau. In relation to the Npower bills submitted as POR, 2 had the same estimated meter readings, namely that from Mr Scott Rothwell and Mr Luke Murray. In one case the new and previous customer had the same date of birth. In a further 2, Ms Natalie Morris and Mr Mark Curtis, Sky bills were submitted as POR but had the same amount of money as well as the same payment due date. The names and addresses on both bills were in different fonts. On one the figures were added up incorrectly and put in a different place. Another unusual feature was that both customers ordered 2 on demand films on 2 occasions but on each occasion they were exactly the same film and were ordered at the same time and within a minute of the other. Mr Tommis was not satisfied with the claimant's account. (336-342)

36. Having regard to the remit of his investigation set by Compliance, Mr Tommis' decided that only, "The customer's application details match a previous customer's detail"; the "Transfer of responsibility procedure not followed"; and "Customers that were not traced by credit reference bureau," should be the subject of disciplinary proceedings. (343-344)

37. The investigation in relation to Movement and Transfer, Mr Tommis did not find evidence in support and it was not referred to the disciplinary manager.

Disciplinary hearing

38. On 19 April 2016, the claimant was invited to a disciplinary hearing by Mr Kunal Shah, Virgin Venue regional sales manager, which was scheduled to take place on 25 April 2016. The purpose was to discuss the following:-

> " - Allegations of gross misconduct made against you, specifically demonstrating fraudulent and dishonest behaviour in that we have found 7 instances of you being dishonest when calling our booking line (SOE) in order to disconnect active accounts then rebook on a partner or other person at the same address. *This is not the correct process.* You gained commission from these transactions.
>
> - Allegation that you deliberately booked on an order with false or inaccurate credit check details in order to avoid linking a potential customer to a previous debt. In addition, allegation you falsified proof of residency documents and submitted said documents to support this untraced application and previous untraced applications specifically amended Npower and Sky bills.
>
> - Allegation submitted pre-contract for David Okwoh 09 account with same signature as pre-contract submitted for Florence Ukpabi declined 08 account. Concern Florence signed on behalf of David."
>
> This action contravenes the company Dismissal and Disciplinary Policy under the following terms:
>
> *"Doing or giving us reasonable grounds to think that you have done anything dishonest including theft, fraud etc.." "*

39. The claimant was warned that one possible outcome may be his dismissal for gross misconduct and was advised that he had the right to be accompanied at the hearing. Copies of the documents obtained during the

investigation together with the Disciplinary Policy and Procedure were sent along with the letter. (414-415)

40. On 10 June 2016, both the claimant's formal grievance and disciplinary were scheduled to be heard but as the grievance overran, the disciplinary hearing was re-scheduled to 20 June.

41. The claimant attended the hearing and was again accompanied by Mr Vyas. Ms Catherine Wilson, case manager, was the note taker. The claimant said that on spotter disconnects he was never told that he was not allowed to do them. He had, earlier, asked for evidence of the procedure but did not receive a copy. He said that if the process did not exist he could not be in breach. He admitted to disconnecting 6 customers but said that he never saw the TOR policy and it was not for personal gain as he had achieved his targets.

42. In relation to the Sky proof of residence, he said that he could not recall what was provided by way of documents 12 months previously but if he provided them all he was required to do was to provide the information at the top of the bill, namely the name, address and the date of the bill. He accused Mr Hudson of lying and questioned the process leading up to his suspension as he was asked about spotter disconnect but when he asked for a copy of the procedure he was told to go home and was later accused of gross misconduct. He accused Mr Tommis of not being impartial as he and Mr Hudson were inside a room engaged in a discussion. Two days later Mr Tommis asked to speak to him.

43. The claimant compared his treatment with that of Mr Steve McLean, who, in September 2014, engaged in a spotter disconnect in relation to a customer and had provided his girlfriend's credit card as POR over 20 times but was given a final written warning. The claimant asserted that he had been treated differently after he lodged his grievance. (544-551)

44. Mr Shah wrote to the claimant on 21 June 2016, to inform him that he would be on annual and that he would be returning on 30 June but hoped to get the outcome to him by 1 July. (552)

45. Following the disciplinary hearing Mr Shah then conducted an investigation into the matters raised by the claimant. He spoke to Mr Hudson in relation to the claimant's allegations that he had been the subject of a witch hunt by him who went in search of evidence going back several years. Mr Hudson explained about the compliance changes after 13 July 2015. He was asked whether he had instructed the sales agents to call SOE to tell them to disconnect existing customers or cancel existing customers' services and to say that they had moved abroad, as the claimant had alleged. He responded by saying that he would never encouraged anyone to behave in that way as it would be a breach of procedure amounting to serious misconduct.

46. Mr Roy Stark, regional manager, was also spoken to by Mr Shah. He was asked whether Mr McLean had been disciplined. He responded by saying that the landlord of the property had called the respondent to cancel the

services of the previous tenant who had moved out. Mr McLean then signed up the new tenant who moved into the property as a new customer. In the claimant's case, he had called SOE to disconnect the services of existing customers on the basis that they were moving abroad. In his view the claimant was being dishonest and had conducted himself in such a way for financial gain.

47. Mr Stark was asked whether a communication had been sent out in relation to the POR changes in the compliance process since July 2015. In response he emailed Mr Shah on 4 July 2016 and attached a 10 day POR process which showed that the new procedure was issued to all direct sales staff with effect from 13 July 2015. It outlined the procedure to be followed in obtaining a POR for all untraced customers. (571-574)

Disciplinary outcome

48. Mr Shah met with the claimant on 6 July 2016 to deliver his outcome. In relation to the transfer of responsibility procedure not being followed, in that the claimant had disconnected existing customers and re-connected them in their partners' names or that of another member living in the same household, Mr Shah found that customers contacted the claimant looking for a better deal. The claimant actively advised the customers to cancel their services and to put the orders in their partner's name rather than contacting customer care or re-signing the same customer using the same details. He was satisfied that where a customer wishes to transfer their service to another person in the same household, they are advised by the sales executive to contact customer care who would then speak to both the existing and new customers. He was further satisfied that the claimant had gained financially in engaging in such behaviour.

49. He found that there were 7 instances of the claimant calling SOE in order to disconnect active accounts then rebook in a partner or other person's name at the same address. Mr Shah, however, acknowledged that there was no formal process regarding spotter disconnects and who were allowed to do it but by calling SOE to advise them that customers have moved abroad in order to get their services disconnected, was dishonest. In some cases, he was satisfied that the customers the claimant had advised had moved abroad still lived at the same address. As a result, he had gained financially.

50. In respect of the fraudulent use of PORs, Mr Shah said that the investigation involved matters over a year old because the process had changed. Up to 13 July 2015, a POR was required for any untraced customer and that this would be sent together with the contract to the department administration office. From the 13 July, a POR is only required if requested by the compliance team. As Mr Hudson had tried to obtain evidence from the compliance team but the information could not be provided, he went back to a period in time when that information could be accessed.

51. Mr Shah noted that POR checks were conducted having regard to the compliance report. When the electricity bill pertaining to Mr Kevin Daniels as a POR, was examined there were discrepancies which triggered a further

investigation. The PORs prior to 13 July 2015 bore similarities with what the claimant provided. He wrote,

> "It is my belief therefore that you did submit orders with fraudulent POR and have not provided reasonable or acceptable explanation for this. Had this been an isolated incident then it may have been reasonable to assume that it was a genuine error, however, as this is one of a number of questionable pieces of identification submitted by you, I do not accept that this is an error and again this should have been checked by you prior to submission. Therefore, it is clear from my investigations that you did knowingly falsify the facts relating to Sky and Npower POR provided in order to make a sale and obtain a commission payment.
>
> Further to your concerns about when Mark Tommis was given the case has no relevance to the outcome of the disciplinary meeting. Dave Hudson initially started the investigation meeting and once the case was handed over to Mark Tommis a handover meeting would be required. However, the investigation is a fact-finding exercise, so it makes little relevance when the case was handed over and/or what was discussed during the handover. With regards to your comments about Dave Hudson being "hidden away in his office", this has no relevance with the case. Apart from a witness statement you provided there is no evidence to suggest what was being discussed.
>
> In summary, I do accept that there have been some areas which could have been improved upon in terms of the procedural management of the investigation and disciplinary processes. As a result, I investigated a number of issues to establish whether these points affect the allegations. I am satisfied that the procedural issues do not impact on my decision. There is no dispute that you have submitted fraudulent POR for the sales highlighted and it is my belief that you did this knowingly.
>
> Having considered the allegations against you and the information put forward by both the Company and by you, my decision is that you are to be summarily dismissed from the Company as a result of gross misconduct. I am therefore terminating your contract of employment, which will be effective immediately and without notice. When summarily dismissed, you are not entitled to a notice period or Payment in Lieu of Notice. Your employment with Virgin Media will therefore end on Wednesday 6 July 2016 and all terms and benefits associated with your employment will cease from this date."

52. The letter advised the claimant that he had five working days to appeal against his dismissal. It also dealt with his final payment and other matters consequential upon the dismissal. (584 – 588)

<u>The appeal hearing</u>

53. The claimant appealed against his dismissal on the day of the disciplinary outcome by challenging Mr Shah's findings in respect of the TOR and POR processes. He also compared his treatment with Mr McLean's. He accused Mr Tommis of lying during the meeting on 18 March 2016 and asserted that the disciplinary proceedings against him was suspicious. (597-598)

54. The appeal was heard on 27 July 2016 by Mr Peter Law, head of commercial sales. In attendance were: the claimant and Mr Vyas; Ms Lindsey Smith, case management; and Ms Victoria Martindale, note taker.

Mr Law read prior to the hearing, all of the disciplinary hearing documents. The claimant was asked to clarify his grounds of appeal. He said that there was a "massive cover up" because on the day he received his grievance outcome Mr Shah returned from his leave. He denied that he had admitted during the disciplinary hearing to the TOR not having been followed and referred to the absence of such an admission in the notes. He said that his managers were trying to find a reason to discipline him as he was first investigated for spotter disconnects but there was no such policy. He was then told to return to work only to be investigated for gross misconduct for payment in respect of 6 sales. It then moved on to the TOR process. He submitted a grievance on 5 January but Mr Hudson asked him to retract part of it. Since that day he had been treated differently. He said that the customer, Mr Chris Missing, signed up in 2015 and was disconnected, then Mr Kevin Daniels was signed up in 2016. No electricity bill was provided. The mobile phone number was the only thing that was the same. He again asserted that Mr Hudson and Mr Tommis colluded as they were sat in an office with the blinds down prior to Mr Tommis taking over the investigation. From September 2015, the policy in respect of PORs changed as they were to be sent from a ipad but Mr Hudson and Mr Tommis went in search of PORs prior to the change. All of which were kept in Mr Hudson's office. The sales executives were only required to give as POR, the name, address and date but not the whole document. He alleged that the PORs were doctored by Mr Hudson and denied that the Daniels and Missing passwords were the same. He again said that in December 2015, Mr Hudson called him and asked him to lie about attending field visits as field service manager. He said that after putting in his formal grievance **on** 7 March 2016 about being treated differently because of the investigation, it changed to fraudulent PORs by Mr Hudson and Mr Tommis who colluded with each other to frame him. He said that part of his grievance was upheld in respect of Movements and Transfers.

55. He then went on to say that all of his spotter disconnects followed advice from SOE that he should say that the customer had either moved abroad or had moved to a non-serviceable area. This was also supported by Mr Hudson who told him to do a spotter disconnect. He said that customers would contact him after speaking to customer services who did not help them. They wanted to change the name on the account and get a new deal. He admitted that the customer would approach him and he would contact SOE to ask for a disconnect and would re-sign the customer's partner up as a new deal. He did it 6 times over 4 years and it was wrong but the payments should be taken off him. He had no idea about a TOR. In hindsight, he should have spoken to customer care.

56. He again raised the position of Mr McLean who had, allegedly, engaged in, what he said were, 10 spotter disconnects without being disciplined and had used his girlfriend's credit card as POR on 1 September 2014 but was given a final written warning. He said that he was given the information by Mr McLean.

57. The claimant also said that Mr Shah did not question the witness, Mr Darren Chatfield about Mr Hudson being locked in his room for 2 days. He only spoke to Mr Hudson about it.

58. At the conclusion of the hearing Mr Law informed the claimant and Mr Vyas that he would be conducting an investigation into some of the matters raised but the process would take some time as he was due to go on a 2 weeks' holiday. 9714-726)

59. He interviewed Mr Shah, Mr Hudson and Mr Tommis. He also spoke to Ms Clare Shiladay, area administrator for direct sales and checked with customer accounts on the respondent's computer system. (813-817, 831-839, 854-862)

Appeal outcome

60. Following on from his investigation, Mr Law wrote to the claimant on 30 August 2016, setting out his decision and reasons for rejecting the appeal. He summarised the grounds of appeal and dealt with each in turn. In relation to the disciplinary outcome letter which referred to the claimant's admission to not having followed the TOR procedure, he wrote that although the investigation and disciplinary notes made no reference to his admission, there were discussions around disconnecting and reconnecting accounts in different names. In his meeting with Mr Hudson, he said that he would only disconnect when asked by the customers to do so. Mr Law also bore in mind the 6 accounts which the claimant told the SOE, wrongly, that the account holder had moved abroad. He, therefore, partially upheld this ground of the claimant's appeal, in that the notes did not refer to his admission but he held that by disconnecting and reconnecting the accounts in different names in relation to the same address, he had "knowingly and deliberately misrepresented the facts." He benefited financially and improved his performance. He concluded that although the wording in Mr Shah's outcome letter could have been clearer, it did not alter the outcome.

61. In relation to Mr McLean's case, Mr Law was satisfied, after having investigated the matter, that due process was followed and dismissed this ground of appeal.

62. With regard to the failure to refer to the TOR procedure in the suspension letter, Mr Law was satisfied that the suspension letter made reference to 6 instances of the claimant being dishonest when he called SOE to disconnect active accounts and then rebook them in "a partner or other person at the same address." He wrote,

> "Whilst a TOR process is not specifically noted, I am comfortable that the subject of transferring responsibility of an existing account, along with the fact that you misrepresented facts in order to process sales, was discussed during the investigation and as a result, I believe you were aware of the allegations put to you.
>
> I, therefore, partially uphold the point of your appeal insofar as the TOR process was not specifically stated, but you were aware of the allegation as it was discussed with you during your investigatory meetings. It is my belief that the failure to detail the TOR process in your suspension letter would not have altered the disciplinary outcome."

63. Mr Law did not uphold the claimant's appeal in relation to the apparent changes in the allegations during the investigation process. He was of the view that,

> "any changes to the specific allegations were related to the overall theme of questionable conduct and as such it was appropriate for the investigating managers, once prompted by the initial compliance report, to consider other relevant material and to put any new allegations to you."

64. In relation to management collusion and the managers' belief that the Missing and Daniels passwords were the same, Mr Law stated that he was satisfied that Mr Hudson used the cash office in the Hemel Hempstead building to ensure privacy and confidentiality in his investigation. There was no evidence of management collusion. As regards the passwords being the same, Mr Law could not explain why the investigation managers took that view as they were not. He surmised that there may have been a misinterpretation of the information on the respondent's computer. He partially upheld this ground of appeal but was comfortable that it did not affect the outcome of the disciplinary hearing.

65. Mr Law was also satisfied that POR was reviewed and discussed with the claimant by Mr Tommis at the meeting on 18 March 2016 and he was provided with copies of relevant documents at the meeting although outside the date referred to by compliance. This ground of appeal was, therefore, not upheld.

66. In relation to alleged lack of impartiality by the investigating and disciplinary managers, Mr Law stated,

> "I have interviewed all of the managers involved in both the investigations and the disciplinary meeting and find no evidence to suggest a lack of impartiality. When you raised a grievance against Dave Hudson, it was appropriate that the investigation be moved to another manager (Mark Tommis). The subsequent disciplinary meeting was then conducted by a more Senior Manager from another Department. Therefore I am comfortable that the necessary action was taken to ensure that impartial managers conducted your meetings.
>
> I therefore, do not uphold this point of your appeal." (907-910)

67. Mr Law was cross-examined for 20 minutes and he impressed me as witness. His thought processes were clear. He wanted to explore some of the matters raised by the claimant before deciding on the appeal. His investigation was thorough and independent of the disciplinary process that had preceded it. His outcome letter was well-reasoned and detailed. Although he partially upheld the claimant, overall he dismissed the appeal.

68. In Mr Mclean's case, I was referred to a letter produced by the respondent and dated 8 September 2014. He was issued with a final written warning for using a credit card to make upfront payments on multiple accounts done to bypass the respondent's traced and untraced policy or what is described as its Quick Start policy. He also provided incorrect previous address details on a single account. The sum of £2249.24 he received in commission he was required to pay back. (R3)

69. I was satisfied from the documentary and oral evidence that Mr McClean did not disclose false information to SOE. The tenants had left without the landlord's knowledge and the landlord instructed him to issue a new contract to the new tenants.

70. Although Mr McLean prepared a witness statement he was not called as a witness to be cross-examined. In my view his statement carried very little weight and I took the same view in relation to the other statements produced on the claimant's behalf.

71. During the hearing I was referred to a number of documents in support of the action taken by the respondent. Of interest was a pre-contract form completed by the claimant in respect of a Mrs Saunders and dated 9 December 2015. The claimant requested a disconnect and stated that the customer was moving abroad. In cross-examination, he acknowledged that it was a false statement he made to SOE. The same applied in relation to a Mr Kerrigan. (366-367, 369-370)

72. In relation to PORs, customers, Mr Rothwell and Mr Murray, had identical meter readings. The name, address and energy statement were in the same font but different from the rest of the bill. The claimant acknowledged in evidence that it looked suspicious but said that it was not his job to check the details. In relation to Ms Morris' Sky bill, her name and address were in a different font from the rest of the document. When the Sky rental box office package, being the movies purchased, was compared with a Sky bill submitted in relation to another customer, Mr Curtis, they were the same. Even the bills were similar in content. (378-387)

73. The claimant acknowledged that he knew that for the Goneaway procedure to apply the customer had the leave the property.

74. There was no dispute that the claimant was a hard worker without a disciplinary record and had worked for the respondent since 8 October 2012. I was satisfied that these matters were taken into account by Mr Shah and Mr Law in arriving at their outcomes.

Submissions

75. I have taken into account the detailed submissions by Mr Hadgill, counsel on behalf of the claimant and by Mr Northall, counsel on behalf of the respondent. I do not propose to repeat their submissions herein having regard to rule 62(5), schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. I have also taken into account the relevant authorities.

The Law

76. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by

the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and 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 employees 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."

77. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

    77.1 First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

    77.2 Second whether that genuine belief was based on reasonable grounds,

    77.3 Third, whether a reasonable investigation had been carried out,

78. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

79. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

80. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

81. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

82. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer.

Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

83. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.

84. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

85. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

86. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was in an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, the comment made. The employment tribunal found by a majority that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677.

87. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. "At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

88. In the case of Hadjioannou v Coral Casinos Ltd [1981] IRLR 352, a judgment of the EAT. It was held in that case that in order for disparity in treatment to apply, there must be truly "parallel" circumstances in the cases.

Conclusions

89. What was the reason or reasons for the claimant's dismissal as shown by the respondent? The reasons were in Mr Shah's outcome letter supported by Mr Law. The claimant had not followed the Goneaway policy in respect of a transfer of responsibility and had provided fraudulent proofs of

residence. The reasons given relate to conduct, therefore, the guidance in the case of Burchell applies.

90. Had the respondent followed a fair procedure? I am satisfied that it had. Compliance raised concerns about certain areas of the claimant's work. He was spoken to by Mr Hudson. Further evidence emerged which led to his suspension. He was informed about the allegations he had to meet at the disciplinary hearing and was given the documents to assist him in preparing his case. He was not inhibited in presenting his case before the disciplinary and appeal hearings. He raised matters during the appeal which were investigated. I have, therefoe, concluded that a fair procedure had been followed.

91. At the time of making the decision to dismiss the claimant and to reject his appeal, did Mr Shah, in particular, and Mr Law, as well, entertained a genuine belief on reasonable grounds in the claimant's guilt? There was no evidence that they had any ulterior motives in arriving at their respective decisions. In relation to the TORs, the claimant had stated to SOE that the customers had gone abroad when they had not and, in the process, he gained commission on allegedly new sales. The PORs showed that the documents the claimant supplied had been doctored with suspicious fonts, electricity meter readings and similar Sky packages. The claimant's accounts of collusion between the managers was not borne out from the evidence. Both Mr Hudson and Mr Tommis investigated matters which were the subject of the compliance report. It was reasonable for Mr Shah and Mr Law not to believe the entirety of the claimant's account to them. I was satisfied that there were reasonable grounds upon which both had a genuine belief in the claimant's guilt.

92. Was the dismissal within the range of reasonable responses? The respondent relied on its disciplinary policy in respect of gross misconduct. It also took into account the claimant's length of service and his clean disciplinary record. The claimant was in a trusted position representing the respondent at customers' premises. In that regard the respondent relies on its sales executives to be open, honest and transparent. Engaging in the conduct which Mr Shah and Mr Law found to have been the case, brought into sharp focus the issue of trust in the claimant. It was a serious matter which the respondent could not ignore.

93. The case of Mr McLean could be distinguished from the claimant's case as there were material differences. In his case the tenants had left without the landlord's knowledge. The landlord then instructed Mr Mclean to issue a new contract to the new tenants. Mr McClean did that by using his girlfriend's credit card details to assist in the process. He received a final written warning and was required to repay to the respondent the commission paid to him. In the claimant's case, there was evidence that POR documents were altered in more than one case and he had given false information on more than one occasion to SOE.

94. Following the case of Hadjiaonnou, I have come to the conclusion that the claimant's and Mr McLean's cases could not be described as parallel cases

as he facts are different. The claimant is, therefore, unable to establish inconsistent treatment

95. I do not put myself in the position of the reasonable employer as that would be for me to engage in the "substitution mindset" approach. I do, however, conclude that a reasonable employer possessed of the evidence which was in the respondent's knowledge, would not have taken the view that dismissal was outside the range of reasonable responses. Accordingly, dismissal of the claimant was not unfair.

96. The effective date of termination was 6 July 2016.

97. The claimant's unfair dismissal claim is, therefore, not well-founded and is dismissed.

98. Mr Hadgill, during the course of the hearing, withdrew the claimant's unauthorised deductions from wages claim. I, therefore, dismissed upon the claimant's withdrawal.

99. At the conclusion of the hearing the parties agreed that I should tell them my judgment with written reasons to follow. I gave just the judgment at the time and I have incorporated it in these written reasons.

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Employment Judge Bedeau

Date: 8 May 2017

Sent to the parties on: .....

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For the Tribunal Office