EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Alan Burgess	v	**Berrygate Hill Nurseries Ltd**

Heard at: **Leeds via CVP** **On:** **17 & 18 November 2020**
Deliberations 20 November 2020

Before: **Employment Judge T R Smith (sitting alone)**

Appearance:
For the Claimant: **Mr D Vulliamy (Citizens Advice Bureau)**
For the Respondent: **Mr A Johnston (Counsel)**

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V-video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded.
2. The complaint of wrongful dismissal is not well founded.
3. The Claimant caused or contributed to his dismissal as to 100%.
4. Further, or in the alternative, there should be a 100% deduction from any compensatory award, applying the principles set out in **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** .

REASONS

The Issues.

1. Was the Claimant unfairly dismissed.
2. Did the Claimant cause or contribute to his dismissal?

3. What was the chance the Claimant would have been dismissed in any event if a fair procedure had been followed?

4. Was the Claimant wrongfully dismissed in circumstances where the Respondent could not establish the Claimant had committed an act of gross misconduct. It was agreed that if the Claimant was wrongfully dismissed the measure of damages was nine weeks pay.

Evidence

5. The Tribunal had before it an agreed bundle totalling 166 pages.

6. There was a further unpaginated, short, supplemental bundle which consisted of various plans and an agreed commentary on the CCTV evidence.

7. The Tribunal heard oral evidence from:

   - The Claimant, Mr Burgess.
   - Mr Mark Ransome, the Respondents company accountant,
   - Mr Angel Angelov, the Respondent's former general manager
   - Mr Peter Overvoorde, the Respondents managing director,
   - Mr William Overvoorde, the Respondent's then assistant general manager,
   - Ms Jane Overvoorde, director of the Respondent

8. The mere fact that Tribunal has not referred to each and every document or each or every element of evidence presented to it does not mean it did not give full consideration to that evidence.

Findings of fact

Background

9. On 12 October 2009 the Claimant commenced employment with the Respondent as a nursery manager.

10. He was subsequently issued with written particulars of employment (25/26).

11. The Respondent is a wholesale vegetable nursery. It operates over two sites.

12. The structure within the Respondent is that Mr Peter Overvoorde, the managing director runs the company with his wife Mrs Jane Overvoorde. Mrs Overvoorde spends on average approximately one day a week in the business.

13. Their son, William Overvoorde was at the material times, the assistant general manager. He started working with the Respondent full-time in January 2019. He had relatively limited experience in the business, particularly when compared with the Claimant and Mr Angelov.

14. Mr A. Angelov was the general manger.

15. Below Mr Angelov there had been three managers, although reduced to two in about September 2018. Those remaining managers were the Claimant and Mr Cross.

16. The Claimant reported directly to Mr Angelov.

17. The Respondent employs approximately 15 to 20 full-time staff supplemented, dependent upon workload, by up to 40 seasonal workers.

The Priva and shuttle system and their location

18. The Respondent uses a number of automated procedures.

19. One is known as the Priva environmental computer system (the "Priva system")

20. The Priva system controls a myriad of variables in the greenhouses including temperature and humidity. It operates 24 hours a day, seven days a week. It is vital to the Respondent's business as it ensures the plants are exposed to optimum growing conditions.

21. There is a master switch for the Priva system which is located in the Respondent's loading area.

22. The switch is protected by means of a plastic cover which must be lifted to gain access. The Tribunal concluded that the switch could not be dis-engaged by accident.

23. The nature of the Priva switch is that, even if the power was cut off, it, would remain in the on position. The Tribunal concluded therefore that any power outage could not explain subsequent events in respect of the Priva system.

24. The second system is known as the shuttle system and this, in effect is a form of robotic picking system in the greenhouses. Again, there is a master switch. The switch is located in the loading area. If there was a power outage, as with a domestic fuse box, the master switch would be thrown from the on to off position. It therefore differs in this respect from the Priva system.

25. The distance between the Priva and shuttle switch is approximately 34m.

26. There are CCTV cameras in operation at the Respondent's premises.

27. There was one operational camera that covered the entrance to the loading area. There was a second camera which covered the Priva switch. That camera was not operational at the time of the events set out below. The CCTV monitors are in the Respondent's office. The Claimant would use the office for up to 4 hours per day. The monitors were located immediately behind him. The Claimant accepted he was aware that the camera covering the Priva switch was not operational at the relevant time. The Tribunal found it was unlikely that none members of the office staff would be aware of this defect. None office members included the Romanian workers on site.

28. In the supplemental bundle there was a useful plan marked with numbers. From that plan the Tribunal concluded that the operational CCTV camera covered one entrance to the loading area. Close to the loading area door, but hidden from the camera, was the Priva switch. To the left of the Priva switch, looking from the outside, was a semi-Perspex loading door. The Tribunal was satisfied that movement behind the door would be visible, but given the distance from the CCTV camera it was unlikely anyone moving behind the Perspex loading door would be easily identifiable. A shadow would appear to show movement.

29. There are other entrances into the loading area which were not covered by CCTV.

The events of 27 and 28 March 2019

30. At about 5.50am, on the morning of 28 March 2019, Mr William Overvoorde discovered that the Priva system had been manually switched off.

31. Mr W. Overvoorde took a photo in respect of the Priva switch and sent that to Mr Angelov to enquire if for some reason he had turned off the system. The answer was in the negative. The picture was never shown to the Claimant.

32. Mr W. Overvoorde turned the switch back on and the system rebooted

33. On the same day it was brought to Mr W. Overvoorde's attention by another member of staff that the shuttle system was also switched off. Mr W. Overvoorde turned the shuttle system back on.

34. It was not challenged that on that same day Mr W. Overvoorde asked Mr Burgess and Mr Cross, both members of the management team, if they knew anything about the incident. The Claimant said he had no idea that the switches existed or where they were located. The Claimant was later to deny there was any such conversation. The Tribunal found on the balance of probabilities there was such a conversation. It did so because Mr W. Overvoorde was relatively new in the business and what had occurred was of considerable significance to the Respondent's business and it would not be unnatural that he'd want to discuss it with the two operational managers, having already raised it with the general manager. In addition, Mr W. Overvoorde was to repeat this in a statement to the disciplinary hearing, that was not challenged (see later). No one could remember both the Priva and shuttle systems being turned off at the same time. The incident was therefore very unusual. The Tribunal considered the Claimant was untruthful to Mr W. Overvoorde when he said he did not know of the locations of the switches. Whilst it is proper to record the Claimant denied there was any such conversation whatsoever before the Tribunal, he did accept that he knew the location of the switches.

The investigation

35. Over the previous seven years there was a history of acts of apparent sabotage at the Respondent's premises.

36. Mr W. Overvoorde decided to look into the incident of the 27 March in further detail, as he found them suspicious, having regard to the previous history of acts of apparent sabotage.

37. He viewed approximately 12 hours of CCTV footage. He concentrated on the camera that covered the door to the loading area.

38. Initially his attention was drawn to the fact that the security lights illuminated early in the morning of the 28 March 2019 and there was movement in the loading area. He knew that haulage drivers visited the premises day and night and therefore made enquiries with the haulage company.

39. This led to the identification of the driver. The information from the haulage company was the driver had worked for a number of years, was familiar with the layout of the loading area and had just followed his normal routine. Mr W. Overvoorde spoke to the driver personally some time thereafter, when he was

next at site and was satisfied he had no involvement in the alleged sabotage. He took no notes of the meeting.

40. The enquiries in respect of haulage drivers wasted a number of weeks.

41. By means of looking at graphs produced by the Priva system Mr W Overvoorde found he was able to identify exactly when the power was turned off (4.15 pm). This, in turn, led Mr W. Overvoorde to concentrate his examination of the CCTV evidence to a limited timeframe.

42. 4.15pm correlated with the Claimant, dressed in his motorcycle equipment, going briefly in to the loading bay and returning, and then leaving work. The CCTV showed the Claimant in the loading area for 77 seconds.

43. The CCTV video did not show anyone else in the vicinity of the loading area before the Priva system was turned off. Nor did it show anyone in the vicinity soon after it was deactivated.

44. Mr W. Overvoorde made no contemporaneous notes during the course of his investigation.

45. About six weeks after the incident Mr W Overvoorde suspected the Claimant was responsible for turning off of the systems.

46. Mr W Overvoorde then relayed the information he had found to his father, Mr Peter Overvoorde, and also the company accountant, Mr Mark Ransome. The Tribunal considers it is for this reason that in about the middle or late of May Mr P. Overvoorde spoke to the Claimant and asked if he had any knowledge of the incident in March. His evidence on this conversation was not directly challenged. The Claimant denied any such knowledge. The enquiry made by Mr P. Overvoorde was informal, again there was no documentation

47. On 04 June 2019 the Claimant was suspended by letter of the same date. He was suspended by Mr P. Overvoorde. The reason for the suspension was he maliciously turning off the Priva system on 27 March 2019 (33). No mention was made of the shuttle system.

48. Although the Claimant when suspended and was asked to hand over certain property, he was not asked for his keys. The Tribunal did not accept the invitation made to it by Mr Vulliamy that this was inconsistent with the seriousness of the allegation. The Tribunal concluded that the most likely explanation was that the Respondents simply forgot. The suspension letter made it clear the Claimant was not to attend the Respondent's premises without authorisation.

49. During this period of time the Respondent sought advice from an external HR consultant Mr Coates. The Tribunal found that although Mr Coates acted as an adviser throughout the disciplinary process, including the appeal, he was not a decision maker. It reached that conclusion on a careful study of the email traffic between Mr Coates and the Respondent.

50. Although Mr W Overvoorde had done much of the investigatory work it was actually the Respondents company accountant, Mr Ransome who was appointed the investigating officer.

51. It appears his role was relatively limited, mainly to carrying out an investigatory meeting and then recommending whether the matter should proceed to a disciplinary hearing. The only actual investigatory work that he undertook was to check the location of the Priva and shuttle switches, check how long it would take

to walk from the entrance door of the loading area to the furthest switch, the shuttle switch, and then exit, and also to verify the CCTV against the Priva graph and to check the clock cards to see if anyone else was on duty at the nursery at the time. He did not document any of this investigatory work.

The investigatory meeting.

52. The investigatory meeting was held on 13 June 2019. Present was the Claimant, Mr Coates, the HR adviser and Mr Ransome.

53. The Respondent appeared to have two disciplinary policies, one of which permitted representation at an investigatory meeting. However, Mr Ransome stated he did not use either and relied upon the general ACAS code of practice. It was not clear to the Tribunal throughout the disciplinary process which policy or policies were in practice applied and the Claimant was not advised, despite asking for the relevant policy.

54. Notes were taken of the investigatory meeting. Although there was some disagreement as to those notes, in the Tribunal's judgement nothing turns upon the same. The Claimant was told the investigation related to the turning off of the Priva and shuttle systems on 27 March 2019, that they were shut off at 4.15 and there was CCTV images showing the Claimant entering the loading area and then leaving, and the time he spent in the loading area was sufficient to turn off the switches. In essence therefore, the thrust of the Respondent's case was put to the Claimant.

55. The Claimant contended he could not recall if he had or had not been in the loading area, given the passage of time, but did say that the shuttle system did trip from time to time. The Claimant protested about the delay which impinged upon his ability to explain matters. He said it was possible there was a power cut. The Claimant said no real damage would have been done by the systems been switched off.

56. The Claimant stated he could not remember any discussion with Mr W Overvoorde on the morning of 28 March about both systems been off.

57. The Claimant was not supplied with any statement from Mr W. Overvoorde. He was not given a copy of the CCTV to comment upon. He was not shown the graph or photo in respect of the Priva system. He was not shown any clocking out cards as to the whereabouts of other employees.

58. He was told that, save for one other employee, everyone else had clocked off. No documented interview took place with that employee. Mr Ransome assumed that as he was an East European worker he would not be in the loading area.

59. Following the meeting, on 17 June 2019 Mr Ransome sent the Claimant a copy of a screenshot showing the Priva system going off at 4.15pm. He indicated he was unable to attach the CCTV footage due to the file size but confirmed it would be available at any subsequent meeting. He was also supplied a copy of his minutes, although it is proper to say the Claimant was not to agree them.

The disciplinary meetings.

60. Mr Angelov chaired the disciplinary meetings.

61. He discussed with others prior to the meetings the investigations that have been undertaken, but did not minute any of those discussions.

62. He also took advice from Mr Coates.

63. Initially a disciplinary hearing was arranged for 19 June 2019 (although the notes appear to suggest it was on the 20th which is an error) but that hearing was postponed when it was clear the Claimant had not agreed the notes from the investigatory meeting and Mr Angelov, who was chairing the meeting, wanted to refer the amendments to Mr Ransome for comment. The Claimant had still not received the CCTV footage and Mr Angelov promised that a copy would be sent out on a memory stick. It was agreed the meeting would be reconvened.

64. On 21 June 2019 (54) a letter inviting the Claimant to the reconvened disciplinary hearing was sent. There was a single allegation namely *"malicious behaviour intended to damage or prevent the operation of company systems, namely the shutting down of the Priva system and shuttle equipment on the evening of 27 March 2019 at 4:15 pm."*

65. The letter explained the Claimant's right of representation and that if the allegation was proven it could lead to dismissal.

66. The disciplinary hearing was finally held on 25 June 2019 although the statement of Mr Overvoorde was not supplied to the Claimant until two days later, on 27 June 2019.

67. Present at the hearing was Mr Angelov, the determining officer, Mr Coates along with the Claimant and his nominated work colleague Mr Cross.

68. Notes were taken of the disciplinary hearing and the Tribunal found those notes to be reasonably accurate (79 to 84)

69. The Claimant presented a statement. Without diminishing from the full contents of that statement, at the heart of matter the Claimant denied the allegation, complained as to delay and the processes already utilised by the Respondent.

70. During the Tribunal hearing Mr Angelov was asked how he excluded from the possible saboteurs those Romanian workers who had caravans on site. He said he had spoken to them but there were no notes of any such discussion. This was not directly raised with the Claimant.

71. The Claimant raised a discrepancy between the timing on the CCTV and the charge put to him. Mr Angelov promised to make enquiries and therefore the hearing was once again adjourned.

72. Mr W. Overvoorde was subsequently to produce a note of his investigation (63/64). The note was sent to the Claimant under cover of an email from Mr Angelov dated 27 June 2019 (53). Mr Angelov specifically asked the Claimant to read the statement and if he had any comments or questions to supply the same in writing by 01 July 2019.

73. Mr W. Overvoorde's note addressed the time difference between the timing on the CCTV camera and on the Priva system, essentially due to the difference between GMT and BST and an historic time differential between the Priva system and the CCTV. The Tribunal noted the explanation put forward for the time differential by Mr W Overvoorde was never challenged by the Claimant either in the internal proceedings or before the Tribunal. The Tribunal concluded that nothing turned therefore on the difference in the time stamp on the CCTV

and upon the Priva graph. Pausing at this juncture the statement also made reference to the conversation between Mr W. Overvoorde and the Claimant on the morning of 28 March 2019. As has already been noted, although the Claimant was to dispute there was any such conversation, he did not challenge the statement of Mr W. Overvoorde in any respect.

74. On 1 July 2019 the Claimant was dismissed by Mr Angelov for gross misconduct (90/91) He dismissed without reconvening the hearing. He reached the decision to dismiss primarily on the basis that looking at the CCTV evidence the Claimant was in the vicinity of the loading area when the Priva and shuttle system were turned off. No other person could be seen in the area. Whilst he accepted occasionally the shuttle system could trip due to an electrical fault, he never known both to fail. It could not in any event be an electrical fault because the switch on the Priva system was physically turned to the off position.

75. Mr Angelov considered given the nature of the alleged misconduct that only dismissal was the appropriate penalty and summarily dismissed the Claimant.

The Appeal.

76. On 02 July 2019 the Claimant appealed. (92). In essence he complained that the disciplinary process was flawed throughout, there was no concrete evidence to support the allegation and the sanction was too severe. He did not give particulars of what was flawed in the disciplinary process.

77. However, at the appeal the Claimant expanded upon matters and in particular criticised the fact that the statement of William Overvoorde was submitted after the disciplinary hearing had taken place, the timing of the CCTV evidence was disputed and it was not submitted prior to the initial hearing. The disciplinary hearing should not have been chaired by Mr Angelov and the police should have been called if the incident was as serious as alleged. Further there was a delay in suspending the Claimant and a failure to provide minutes of the dismissal hearing, disclose the name of a data controller and to request the Claimant's keys at dismissal were all relevant factors

78. The appeal hearing was held on 19 July 2019 chaired by Mrs Jane Overvoorde. The Claimant was present along with a trade union representative. Mrs Overvoorde was supported by Mr Coates. Again, notes were taken of the meeting and the Tribunal regarded those notes as reasonably accurate (100 to 113).

79. The appeal was rejected on 31 July 2019 and the reasoning is set out in a letter of the same date (131 to 134). The appeal officer did accept there were some procedural failings namely the failure to supply the Claimant with a copy of the CCTV evidence in advance of the initial hearing, the failure to supply the statement from Mr W. Overvoorde before the second disciplinary hearing and delay in providing a copy of the recording from the disciplinary hearing. However, the appeal officer did not find those matters sufficient to uphold the appeal. The Tribunal found the reasoning of Mrs Overvoorde to be logical. The Tribunal found she did approach matters with an open mind.

Submissions.

80. Both parties concentrated their submissions on matters of fact. The Tribunal means no disrespect to either advocate, both of whom were excellent, by not repeating those submissions.

81. The Tribunal should, however, briefly comment on matters of law that were raised.

82. Mr Vulliamy reminded the Tribunal of the well-known case of **British Home Stores Ltd -v- Burchall 1978 IRLR 379** and also made reference to **A -v- B 2003 IRLR 405**. He reminded the Tribunal that where there were serious allegations and they were disputed, the employer had to carry out a most careful investigation and the investigating officer should look for evidence that both supported the employer's contention but also evidence that assisted the employee.

83. For the Respondent Mr Johnston emphasised the approach to fairness and procedure is the standard of a reasonable employer at all three stages, **Sainsbury's Supermarket -v- Hitt 2002 EWCA CIV 158** and reminded the Tribunal of the importance of looking at the issue of fairness at the conclusion of the proceedings, **Taylor -v- OCS Group Ltd 2006 ICR 1602.**

Discussion

84. The first issue for the Tribunal to determine was whether the Respondent established the reason or principal reason for the dismissal of the claimant was a potentially fair one within the meaning of section 98(2) Employment Rights Act 1996 (ERA 96). This was explained in **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** that a reason for dismissal was a set of facts known to the employer or beliefs held by him which would cause him to dismiss the employee.

85. The Respondent has surmounted this hurdle. The reason or principal reason for dismissal was conduct. The highest the Claimant's case came to suggesting there might be another reason; the Claimant asked for a pay rise; in the Tribunal's judgement did not deflect from the consistent evidence of both the determining officer and the appeal officer. Conduct as the reason for dismissal was also consistent with all the contemporary documentation and evidence placed before the Tribunal.

86. The next question is to address is that set out in section 98 (4) ERA. There is no burden of proof on the Respondent, it is a question purely for the Tribunal. There is a myriad of case law in respect the question of fairness in a conduct dismissal but essentially the following fundamental questions must be asked by the Tribunal namely: –

- Was there a genuine belief in the alleged misconduct?
- Was there a reasonable ground to sustain that belief?
- Was there a fair investigation and procedure?
- Was dismissal a reasonable sanction open to a reasonable employer?

87. The Tribunal is satisfied that both the dismissing and appeal officer genuinely believed the Claimant was guilty of the offence as alleged. Neither had any form of reason to have a grudge against the Claimant and none was suggested by the Claimant. There was no cogent evidence that the Respondents wanted to terminate the Claimant's employment, and absent the incident on 27 March 2019, that his employment would not have continued.

88. The Tribunal is satisfied there was a reasonable belief by the determining officer and appeal officer in respect of in the Claimant's alleged misconduct.

89. The Tribunal is satisfied that there were reasonable grounds to support that belief. Reasons for that conclusion are set out below.

90. The Respondent knew the time the Priva system was turned off. It could not be turned off by accident. The CCTV evidence showed only the Claimant was in the vicinity.

91. It was perfectly possible, having regard to the timings on the CCTV for the Claimant to turn off the Priva system and the shuttle system.

92. No one had ever known both systems to fail at the same time.

93. It could not have been any form of power outage to explain the situation given the Priva switch had been physically put in the off position.

94. The Claimant had not been truthful when speaking to Mr W. Overvoorde when he said he did not know the location of the various switches.

95. Whilst during the course of the proceedings the Claimant did make a number of suggestions, for example that he may have left his keys or wallet in the loading bay the Respondent reasonably rejected that contention and found that it was more likely that such valuables would be kept in his office desk. Similarly, if he did not turn off the Priva or shuttle switch it was almost inevitable that he must have seen who done it, but failed to disclose that information. He never reported seeing anyone in the loading bay and indeed could not remember whether he did or did not go into the loading area.

96. The third question, whether there was a fair investigation and procedure is more problematic.

97. There are three separate and distinct questions firstly whether there was a fair investigation and fair procedure followed, secondly whether any failings had been "cured" by the appeal and thirdly, if not, whether any such failings would have made a difference in any event. For the purposes of brevity the Tribunal has addressed these questions together, but as already noted, the Tribunal has reminded itself they are separate and distinct questions.

98. The Claimant raised numerous issues as to the investigation and a fair procedure and it is proper the Tribunal deals with those principal matters.

99. The Tribunal does not find the Respondent remiss in not taking a statement from the lorry driver, because, once the Priva graph was examined, when combined with the CCTV imagery, the driver could not have been responsible, because the systems have been turned off for many hours before the driver visited the loading area.

100. There is then the issue of delay. Whilst the Tribunal accepted that there was a need for a proper investigation it took too long. All that was required was to look

at the Priva graph and then the CCTV and then to see which staff were on duty. This could have been done in days. It took over eleven weeks between the incident and the suspension of the Claimant. There is always a risk, where there is a delay, particularly when a person is asked to account for their activities that memories will fade. Whilst the Tribunal finds there was delay it does not find it caused significant prejudice to the Claimant because he was spoken to by Mr W. Overvoorde the day after the incident, and given the events that occurred had never occurred before, it would have stuck in his mind. He would have known whether he had or had not been in the loading bay.

101. The Claimant relied upon the failure of the Respondent to take his keys from him whilst suspended as showing the allegation was not serious. As the Tribunal has already noted it considers this was ineptitude. There was no unfairness.

102. The Claimant is on stronger ground in that he said he didn't know what disciplinary procedure was being used. The Tribunal found the Respondents didn't know which of their policies, if any, they were following. This continued right up to dismissal. That said a fair process was still undertaken, namely the investigating officer differed from the determining officer who differed from the appeal officer. Representation was allowed at the disciplinary and appeal hearing.

103. The Tribunal regarded as a procedural failing the failure to disclose the report of Mr W. Overvoorde before or at the disciplinary hearing. However, no substantial unfairness was caused to the Claimant because he was given a copy and the opportunity to comment upon the same before Mr Angelov made his decision. He also had the information before him prior to his appeal.

104. The Claimant was not told of the enquiries Mr Angelov made with the Romanian workers on site to see whether they could have been in the loading area. Even though the enquiries revealed nothing the Claimant should have been told of the nature of those enquiries so he could challenge them. That said given the Claimant never suggested that he'd seen anyone in the vicinity of the Priva and shuttle switches and it was mere conjecture that there might have been someone else in the loading area at the time, although this aspect of the procedure was unfair, it would have made no difference to the end result.

105. The Tribunal noted what Mr Johnston fairly termed as "chatter" between not only Mr Ransome, Mr Angelov but also Mr P. Overvoorde, the latter who had no direct involvement in the decision making during the process. The Tribunal did consider whether Mr P. Overvoorde opinion might have influenced the decision of Mr Angelov but was satisfied, having heard Mr Angelov's evidence that he applied his own mind to the matter and the decision was his own to dismiss the Claimant. The Tribunal found him to be a robust character.

106. At no point was the Claimant given the opportunity to review the clocking cards of various staff. In addition, he was unaware that Mr Angelov had spoken to the Romanians living on site. Again, the Tribunal finds that even if provided with this evidence it would not have influenced the decision to dismiss but it was yet another procedural failing.

107. Part of the grounds of the Claimant's appeal was that the sanction was too severe. There was no clear evidence that the appeal officer addressed her mind to this matter. That said the Tribunal found that Mrs Overvoorde had ample

evidence to conclude that the Claimant had acted as alleged and that an act of industrial sabotage would inevitably merit dismissal.

108. Pulling all these matters together the Tribunal did conclude there was procedural unfairness although for reasons set out above they did not impact at all upon the fairness of the decision to dismiss the Claimant. Whilst it could be said some of them were addressed by means of the appeal, not all were.

109. The Tribunal had to consider whether dismissal was within the bands of responses of a reasonable employer. The Tribunal reminded itself that the question was not whether it would have dismissed but whether a reasonable employer would have dismissed. Whilst the Tribunal must have respect for the opinion of the dismissing officer it is ultimately for the Tribunal and not for the Respondent to decide whether the dismissal fell within or outside the range of reasonable responses open to an employer in the circumstances.

110. The Tribunal concluded that dismissal was within the band of responses of a reasonable employer. This was an act of sabotage which had the potential to cause great damage. Despite the Claimant's long service, it was behaviour that was so serious that a reasonable employer was entitled to dismiss without notice.

Wrongful dismissal

111. The Tribunal reminded itself that there is a difference between unfair dismissal and wrongful dismissal. The Respondent must demonstrate more than a reasonable belief. The Respondent must establish on the balance of probabilities that what was alleged to have taken place took place and that it was a fundamental breach.

112. Gross misconduct occurs when there has been a fundamental breach of the contract by the employment. The focus is on the damage to the relationship between the parties and it must strike at the root of the contract of employment.

113. The Respondent has demonstrated on the balance of probabilities that the Claimant was responsible for turning off the Priva and shuttle systems. The video evidence and Priva place the Claimant at the correct location at the time of the incident. No other person is visible on the CCTV. All but one employee had already clocked off. The enquiries undertaken by Mr Ransome was such that the Claimant could, in the time, have switched both systems off. Whilst the Tribunal does not say it was impossible that someone else could not have entered the loading area by another door they would need to know where the switches were and the Tribunal found that was generally known only to office staff as opposed to manual workers and they would have had to have been able to avoid detection by the Claimant who was in the loading area at the time.

114. The Respondent has established on the balance of probabilities that the Claimant committed an act of misconduct and the Tribunal finds that act of misconduct was an act of gross misconduct going to the very root of the contract of employment.

115. It follows therefore the Tribunal concluded the Claimant was not wrongfully dismissed.

Contribution

116. Section 123 (6) ERA 96 states that *"[W] here the Tribunal finds that the dismissal was to any extent caused all contributed to by any action of the complainant, it shall reduce the….. compensatory award by such proportion as it considers just and equitable having regard to that finding."*

117. The wording in relation to any deduction from the basic award is set out in section 122(2) and differs from that in section 123 (6) ERA 96.

118. A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson-v- BBC (2) 1980 ICR 110** when three factors are satisfied namely: –

- The relevant action must be culpable or blameworthy
- It must have caused or contributed to the dismissal, and
- It must be just and equitable to reduce the award by proportion specified

119. In other words, the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of conduct.

120. The Tribunal concluded that there was contributory conduct such as to justify a reduction in both the basic and compensatory award (the Tribunal reminded itself of the slightly different statutory tests) of 100%.

121. The Tribunal reached his conclusion on the simple basis that the Claimant turned off the Priva and shuttle systems and that was an act of sabotage which had the potential to cause hundreds of thousands of pounds worth of damage to the Respondent's business. The fact that damage of that magnitude did not occur is not the point. All three elements in **Nelson** are satisfied hence a finding of contribution and given the particular facts of this case why 100% is appropriate.

Polkey

122. If the Tribunal was wrong as to its finding in respect of contribution it then went on to consider whether it would be appropriate to make a **Polkey** deduction.

123. Under Section 123 (1) ERA 96 the Tribunal must consider whether it would be "just and equitable" to make a reduction from any compensatory award.

124. The case of **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** held that a Tribunal must consider whether the unfairly dismissed employee could have been dismissed fairly at a later date.

125. The **Polkey** principal applies not only to cases where there is a procedural unfairness but also to substantive unfairness, although in the latter case it may be more difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred, see **King -v- Eaton Ltd (2) 1998 IRLR 686.**

126. The burden of proving that an employee would have been dismissed in any event is on the employer. Provided the employee can put forward an arguable case that he or she would have been retained were it not for the unfair procedure, the evidential burden shifts to the employer to show that the dismissal might have occurred even if a correct procedure had been followed, see **Britool Ltd -v- Roberts 1993 IRLR 481.**

127. The Tribunal looked carefully at the guidance given in **Software 2000 Ltd -v- Andrews 2007 ICR 825** on the application of **Polkey**.

128. In summary the guidance directs that the Tribunal must assess how long the employee would be employed but for the dismissal. If the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee (for example an intention to retire). There will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. The Tribunal must have regard to all material reliable evidence even if there are limits to the extent to which it can confidently predict what might have happened. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary namely that the employment would be terminated earlier is so scant that it can effectively be ignored.

129. The proper approach when applying the Polkey principle is not to look at what the Respondent would have done if it had not made an error, rather to look at what would have happened if the correct procedure had been applied.

130. The Tribunal has concluded that it can say with certainty that the Claimant would have been dismissed and therefore it is appropriate to allocate a 100% deduction.

131. Had the correct procedure been applied and the deficiencies highlighted by the Tribunal been addressed it would have made no difference whatsoever to the outcome. The Claimant would still have been dismissed.

Employment Judge T R Smith

25 November 2020