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EMPLOYMENT TRIBUNALS

Claimant: Mr T McHenry

Respondent: Linfix Limited t/a TeamSport

Heard at: London Central **On:** 21 and 22 March 2017

Before: Employment Judge Auerbach

Representation

Claimant: In person

Respondent: Mr M Howson, Consultant

REASONS

Introduction

1. The Claimant presented his claim form on 5 July 2016. He was employed by the Respondent as a Duty Manager and it was common ground that he was dismissed with an effective date of termination of 13 April 2016. His gross earnings were £18,750 per annum. Following his dismissal he found other employment starting on 1 May 2016 at £19,000 per annum.

2. In his original claim form the Claimant claimed unfair dismissal, wrongful dismissal, notice monies, holiday pay and wages claims in respect of bonus and overtime. During the hearing before me, the bonus and overtime claims were withdrawn and I dismissed them upon withdrawal. The claim for holiday pay had not been properly particularised and the Respondent did not have a fair opportunity to prepare and possibly marshal witness evidence for this to be dealt with at this present hearing. After discussion it was agreed that the holiday pay matter should be postponed so that the parties could properly exchange information and evidence. That might well lead to a resolution, but if not, there could be a further, separate, one-hour hearing to adjudicate the holiday pay claim. At the end of this present hearing I gave directions accordingly.

3. The Claimant is a litigant in person. We discussed at the outset the fact that there was no witness statement prepared by the Claimant because, although the Tribunal's directions required it, the Claimant had misunderstood them.

However, it was agreed that the fair way forward would be to treat the Claimant's particulars of claim as his witness statement, on the basis that, if, as his evidence unfolded, Mr Howson considered that any prejudice to the Respondent arose, he could raise it. In the event no such concerns arose, on either side.

4. The witnesses for the Respondent were Christophe Hardy, Russell Martin and Robert Watts. I had statements for each of them. I took time to read the papers and witness statements before hearing live evidence from all the witness. I had a single bundle of documents before me. I heard oral closing submissions from Mr Howson and from the Claimant in his own behalf. It was agreed that I would, in the first instance, decide liability in respect of the unfair dismissal and notice money claims; but, depending on the outcome in respect of unfair dismissal, I would also determine the question of contributory conduct and possibly any issues that lawyers refer to under the label *Polkey* – a term which was explained to the Claimant.

5. Towards the end of the morning on day two I gave an oral judgment with reasons. The claim for unfair dismissal succeeded, but with further findings, as set out below, in respect of contributory conduct and *Polkey*. The claim of wrongful dismissal failed. The Claimant then confirmed that he was not seeking reinstatement or re-engagement. When we reconvened after a lunch break the parties had agreed the calculations of the basic and compensatory awards, which I then made. The Respondent also agreed that the Claimant should be awarded as costs the Tribunal fees that he had incurred, and I so ordered. The Claimant then made a further costs application, which was opposed. After hearing argument I gave an oral decision refusing that application.

6. The written judgment was subsequently promulgated. Mr Howson applied for written reasons. These are now provided.

The Facts

7. The Respondent runs an indoor go-karting business at various locations around the country. The Claimant's employment with the Respondent began in April 2012. In his claim form he gave the start date as 3 April; the response gave it as 30 April. However, documents in the bundle referred to him having started on 26 April, and in evidence the Claimant accepted that 3 April might have been the date on which he had some induction before his employment actually began. In closing submissions Mr Howson said the Respondent now agreed that his start date was 26 April 2012; and I so found.

8. At the relevant time in 2016, the Claimant worked as a Duty Manager at the Respondent's Acton site, having previously worked at their Tower Bridge site. The Respondent had, at the relevant time, around 26 or so employees working at Acton on various shifts.

9. In February 2016, the site manager at Acton, Lee Hackett, made Christophe Hardy, a Regional Operations Director, aware of an issue concerning the Claimant's alleged conduct when on shift on Sunday 31 January. Mr Hackett was, at that time, the acting site manager for Acton, having been moved there to provide cover for the usual site manager, Albert Lila, who had gone away.

10. On Sunday 31 January 2016 the Claimant had been the senior manager on site on the morning shift. He had begun work at 7am. Mr Hackett reported to Mr Hardy that staff had alleged that the Claimant had, at some point, been sleeping in the office while on shift. Mr Hackett said he was going to carry out an investigation. Witness statements were indeed obtained by Mr Hackett, from four members of staff, on 5 February 2016. Leona Rowley gave a statement by way of an email to him, as did Daina Stewart-Gayle and Ruchelle Scott. Matthew Hemsall also emailed Mr Hackett a statement in a Word document.

11. Mr Hackett passed these statements to Mr Hardy. Mr Hardy extracted the text of each of these statements and put them into a single document, labelling them Statement 1, Statement 2, Statement 3 and Statement 4 but not naming their authors. He did that because he understood from Mr Hackett that, at least at present, these colleagues did not want to be identified to the Claimant.

12. Ms Rowley's statement said that on the day in question she was working the morning shift with an 8.15am start. She referred to the Claimant having left her colleague, Ruchelle, to sign in a group of customers, although she said that was not unusual. Further on, she referred to the Claimant having come up "and was half asleep with red marks on his face from laying down asleep on something". She referred to various further appearances and activities by the Claimant, and then at the end commented on the Claimant's "laziness about not signing people in and being asleep while everyone needed some help from management." She referred to a systems problem and having run over time.

13. Ms Stewart-Gayle described coming into work at 1.05pm that day and seeing her colleague Ruchelle on the front desk, who complained about the Claimant. She continued: "After a few minutes Trevor appeared with bloodshot eyes and looking a little bit sleepy. I asked him if it had been a long day as a joke and he told me that nothing works on the system and if I can go and help as soon as my shift starts or whenever." She then went on to give an account of his interaction with Ruchelle. Further on she referred to the Claimant having disappeared somewhere, and commented that her colleagues "told me that he had been sleeping until an hour ago, which would explain his behaviour when I saw him the first time". Further on, at the end of her statement, she referred to having spoken Tim (Peacock - the other Duty Manager at Acton), after he came on shift, later on. She had told him about the concerns she had picked up from colleagues that the Claimant had "apparently been sleeping all day until I had come in and that he had not helped them which caused us to be so far behind."

14. The third statement was from Ruchelle Scott. She referred to signing in the first group and sending them upstairs for their briefing. I interpose that customers have to be formally briefed before being allowed to use the go karts. She commented: "Leona was in the bar at this time and Trevor was having a nap until it was time for the group to be briefed." She continued with an account of other difficulties that she said arose that day.

15. The fourth statement was from Matthew Hemsall. He wrote that on a few occasions he had got no answer from the Claimant when he had tried to get help on the radio and had eventually gone to look for the Claimant. He said, further on, that when he went to go and find the Claimant and went to the office "I opened the door into the office to see if the DM was there and the lights were off

but then, triggered by my movement, came on. I found the DM asleep on the floor using a race suit as a head rest."

16. He referred to further difficulties later, and commented: "I don't know if the DM at this time was sleeping again but I couldn't get in contact at first after calling repeatedly on the radio and marshalled shouting through the door at one point for him." He referred to there having been incidents on other shifts when "no one can find the same DM anywhere in the building. Also he can't be contacted on the radio. Then he has been found in the briefing room on his phone, but the reason for not finding him originally in there was that the lights were off, as these are on a motion sensor like all the offices, and so this means that for someone to be in there with the lights off they must have been in there for some time. Also, if you sit in a certain spot in the room you are less likely to set it off."

17. On Monday 8 February 2016, Mr Hardy met with the Claimant to raise the matter with him. He told the Claimant of the gist of the allegations made by colleagues, and that statements had been obtained, although he did not give him the statements in the meeting. However, he had some further discussion with the Claimant which was recorded in a short note. The Claimant said that he was not asleep, "I was just resting, ill that day but working due to one of the members of management being away on holiday. I could not get anyone to stand in, so came in anyway. Did not want to give the impression of illness to customers." A little further on he said he did not want to let staff know that he was ill "because he believes they will try and get away with stuff and do what they like." He thought the best option was not to tell staff of his illness so they would continue running things normally. He was asked whether he should have told Lee (Hackett) of the illness, and was recorded as replying: "was not thinking straight so did not think to tell." He was asked whether he should have told Mr Hardy and he said: "I did not think of that." He acknowledged that no member of staff was aware that he was ill on the day. He referred later to being concerned about the panic that that may have caused, from experience.

18. Mr Hardy told the Claimant that he was being suspended and that a disciplinary hearing would follow. That evening, Mr Hardy emailed the Claimant attaching a suspension letter and attaching the statements of the four members of staff in anonymised form, as well as copies of the staff handbook and disciplinary procedures. The Claimant was invited to a disciplinary hearing with Russell Martin, Dual Site Manager, to take place the following Monday at 2pm. Attached to the email were the documents referred to, including a letter explaining that suspension was a precautionary step and confirming the details of the disciplinary hearing.

19. The charges were set out as follows:

Care standards. Sleeping on duty/dereliction of duty, breach of company rules and procedures. Further particulars being that it is alleged that on 31/01/16 you failed to provide for the care and wellbeing of service users when you acted in the capacity of duty manager in that you were found to be asleep whilst on duty. Your actions placed the company in breach of its statutory obligations in respect of the care of service users/residents and amount to, if proven, a dereliction of duty and a gross breach of trust.
Alleged performance issues since the departure of Albert Lila, General Manager, resulting in additional works having to be completed by other staff at site.

20. The Claimant was given further instructions in the letter about protocols during his suspension and informed of his right to be accompanied. He was also informed that the charges were regarded as raising issues of gross misconduct and that his employment could be terminated without notice.

21. The second strand of the allegations, regarding performance issues, was said before me to have been supported by documents that I had at page 85 and 86 of my bundle, being anonymised statements from another colleague, raising various issues. The Claimant inferred that the colleague in question was his fellow DM at Acton, Tim Peacock.

22. I accept that Mr Hardy also emailed the Claimant that evening a recording of the suspension meeting.

23. Between 9 and 14 February 2016, the Claimant exchanged a series of emails with Mr Hardy. In the course of the exchanges, Mr Hardy confirmed that the charges were of gross misconduct that could lead to termination without notice. In one of these emails, on 11 February, the Claimant wrote:

I would like it to be noted prior to the proposed disciplinary meeting that TeamSport was made aware in 2012 of my medical situation whereby I suffer from … Hemiplegic Migraines. As TeamSport was aware of my condition, it falls within the remit of the Equality Act 2010. Prior to our proposed meeting, I would like to request statements are taken from the following staff:-

1. Dennis Pulle, Tower Bridge site, regarding a medical situation in early 2015 whereby I had a migraine whilst on duty, which resulted in both Dennis asking if he needed to call an ambulance and my heavily pregnant partner being called to drive across London to me at the site.

2. Jessica Martinez, Acton site, regarding a medical situation whereby I had a migraine whilst on duty in late 2015 whereby she witnessed me in the first hand suffering from a migraine including being physically sick constantly in the Duty Manager's office as well as other symptoms which resulted in her going outside to the car park to ask my partner to come inside with our newborn child and provide first aid.

24. On 14 February Mr Hardy replied: "Many thanks for the email. These incidences refer to historical episodes. However the meeting will still go ahead in the morning."

25. In the meantime, on 12 February, a statement had been obtained from an employee, Joseph Flak, referring to 31 January 2016 although in the narrative he referred to Saturday, when the 31 January was in fact a Sunday. He wrote "On Saturday I went in the Duty Manager's Office to print some important documents. I saw Trevor sleeping on the floor next to the wall. I have woken him up and gently warned him that it is not the best time and place to take a nap. Afterwards he continued his tasks."

26. On the evening of Sunday 14 February 2016, Ms Martinez emailed Mr Hardy: "On this specific day in question …" – I interpose that it was accepted that she had been asked to comment on the different occasion that the Claimant had referred to in his request that she be spoken to – "… I remember Trevor was

feeling very unwell and was vomiting into the bin in the office. I cannot recall what this was down to. I just remember he was ill.

27. Mr Pulle also sent Mr Hardy an email that evening: "I have been told by Trevor and heard from other members of staff about their experiences with migraines from casual conversation or mostly when they call in sick. No doctors' notes have ever been brought forward to my understanding. I have not seen any documentation to suggest the above-mentioned health issue with any member of staff to be true. It is just what I hear them say. I once found Trevor in a bad state at work lying down by the office and asked whether he wanted me to call an ambulance. He declined saying he had called his partner and was on her way to pick him up, he couldn't speak properly. I was marshalling at the track as we were then short-staffed without Trevor when his partner came, called me over to thank me for letting him go. I did not suggest calling an ambulance because I believed him to be suffering from a migraine or any other specific health issue, but because he looked quite ill, obviously not fit for work and not fit to go home or to hospital on his own.

28. On Monday 15 February 2016 the disciplinary hearing took place before Mr Martin. The Claimant was there, as was Lee Hackett. The Respondent prepared a short note of the main points. The hearing was also in fact recorded and although it was only produced later for the purposes of this litigation, I had in my bundle a transcript of that recording.

29. There were preliminaries during which the Claimant was asked questions about whether he had received the employee handbook and background matters of that sort. Further on, Mr Martin began to refer to the substance of the case. He referred to it being alleged by Mr Hemsall that he had found the Claimant on the floor of the office asleep and commented this was echoed by Joseph Flak "who alleged that he found you asleep on the floor next to the wall. During your investigation meeting with Christophe Hardy, you stated that you were not asleep but were resting your eyes due to being unwell." The Claimant then observed that he did not have Joseph's statement and Mr Martin said "Ok you put that down as the first point. Joseph's statement has not been supplied."

30. The Claimant said he did not have names (of the witnesses who had given statements) and Mr Martin said he was quite happy to use names, and that is indeed what he continued to do for the rest of the hearing.

31. The Claimant said again, further on, that Joseph's statement had not been supplied at all, but he could comment on Matt's statement. The Claimant also complained that there were two witnesses from whom he had asked that statements be taken, but that this had been refused by Mr Hardy. The Claimant went on to say something about his migraines, and observed, further on, that at no point had Matt said that he, the Claimant, was asleep or that he had had to arouse him or anything like that. The Claimant said that the migraine had occurred at an early stage in the shift. Mr Martin put it to him that there was still a concern that there 36 adults in the business, whether or not they were actually on the track. The Claimant referred to there being IT issues that day and said that customer service would have been affected in any event.

32. Further on the Claimant gave a more detailed account of how the types of migraine from which he suffers affect him when they occur. The Claimant also

responded to the concern that he had not spoken to management. He observed that it was Lee's first weekend and he did not notify Christophe because he did not think that it would be necessary for him to be informed. The Claimant was asked if he could provide any documentation for a medical practitioner in relation to his migraines and he said he could get documentation from his GP if required and would be happy to sign a medical release form. He thought he had told the company something about this back in 2012. There was further discussion again of this later on and the Claimant said he had not brought statements from his GP because he was not aware that he needed to bring them. He said there had occasions when his partner had called him in sick because he had a migraine.

33. Further on, Mr Martin referred to statements having been obtained from Dennis and Jessica. He said: "Jessica recalls you being ill and vomiting in the office but she does not recall why this way given it was that long ago but she does recall the occasion". He commented that these staff could provide anecdotal evidence that the Claimant had had migraines in the past, and some other staff had, "but what I have to ask myself is they are unable to provide me with some written evidence that migraines were ongoing and a persistent condition that you suffered from." He wanted to know whether the Claimant had ever raised this in formal interactions such as appraisals. The Claimant said he had not because it was not an issue and was once a month at most.

34. During the course of this meeting, the Claimant tabled a 9-page written submission to which he referred. Further on there was discussion of the statements of Mr Hemsall and Ms Scott. The Claimant said that being in a darkened room was because there was an issue of light sensitivity and so this helped him to cope with the migraines.

35. Further on, there was discussion of the performance issues, with it being identified that these had indeed been raised by Mr Peacock. Further on, there were further submissions by the Claimant about the witness statements on the sleeping issue, he noting that some things said were hearsay.

36. It is clear from the evidence I had before me, that Mr Martin had seen the statements of Mr Flack, Ms Martinez and Mr Pulle. These had been emailed to him by the time of this meeting and he was able to refer to them during the meeting, because he had them on his laptop. However, the Claimant was not given copies of those statements.

37. As well as his 9-page written submission, the Claimant, it appears, had brought with him some general medical information about the particular type of migraines from which he suffered; but he did not bring any specific medical evidence relating to himself.

38. At some point after 2 March 2016, Mr Hardy was contacted by an employee based at Tower Bridge, Jake Curtis, who told him that he had bumped into the Claimant on a bus and they had had a conversation about his suspension. Mr Hardy told Mr Curtis that fellow employees and the Claimant should not be talking about such matters during his suspension. Colleagues at Acton had been told this. He obtained a written statement from Mr Curtis about this episode. He did not see the need to pass this on to Mr Martin.

39. Mr Martin decided to commission an Occupational Health report and got the Claimant to sign the necessary consents. On 31 March 2016, there was an Occupational Health assessment conducted with the Claimant over the telephone and the Occupational Health practitioner then wrote a report that day. The report confirmed that the Claimant did have a problem of migraines, with which he had first been diagnosed at the age of 14. "Mr McHenry reports that the attacks had reduced to one every six months or so and this pattern continues to this day." It recorded the Claimant reporting that he had made his employer aware of this in 2012 and that the next episode was in mid-2015 when his wife came to take him home as he was vomiting; and that the Claimant had said that there were then no further episodes until that of 31 January 2016. Further on, the report said that it was not a feature of the condition for the person concerned to fall asleep as a result of the symptoms, but it provided corroboration for the Claimant's description of how the attacks affected him and the practice of lying down until they pass.

40. On 11 April 2016, Mr Martin wrote to the Claimant with his decision. After setting out the principal charge he wrote: "At the hearing your only explanation was that you suffer from Hemiplegic Migraines and this was the cause of your apparent sleeping. I considered your explanation to be unsatisfactory because, following the interview with Occupational Health, they have deemed that your condition would not affect your ability to perform the role. Additionally, sleeping is not an accepted symptom of the condition and you agreed this during your Occupational Health assessment. It is not a feature of this condition for there to be symptoms at any other times outside of the six-monthly episodes. The symptoms typically last 5 to 20 minutes yet there are numerous statements confirming your statement at different stages of your shift."

41. He referred to the Claimant being the senior member of staff on site, and a qualified first aider needing to oversee inductions and carry out other duties. He wrote that there were therefore various failures to perform the duties expected of him as the senior representative on site. "Additionally, by being in the office asleep and not responding to radio calls requesting support and leaving the team short, there was an increased possibility of a vital stage of the customer safety journey being missed. They have all contributed to a significant risk to the business and/or customers. We consider the above to be a serious breach of health and safety towards customers and therefore we find that this constitutes a gross breach of trust."

42. Mr Martin went on to set out that he considered this was a fundamental breach of the implied duty of trust and confidence, that he had considered the disciplinary procedure and that the appropriate sanction was dismissal with immediate effect without notice or pay in lieu of notice. The Claimant was informed of how to exercise his right of appeal.

43. It was common ground that the Claimant received that letter by email on 13 April 2016 which was the effective date of termination; and he was paid up to that date.

44. On 15 April 2016 the Claimant sent in an appeal referring to the fact that he had denied being asleep and that the reason he had given for laying down was to prevent secondary injury from falling or collapsing during the migraine; and he wrote that this was supported by the Occupational Health report. He wrote that

the sanction of dismissal was too severe and added: "I also believe that this was inappropriate as other members of TeamSport have not been dealt with in the same manner to the severity as myself, namely a member of senior management found by staff to be sleeping from another London track."

45. Rob Watts, an Area Manager, wrote to the Claimant on 19 April 2016 acknowledging his appeal, setting a date for the appeal hearing, summarising the grounds of appeal and informing the Claimant of his right to be accompanied.

46. I found that for the purposes of the appeal Mr Watts was provided with various documents, including the four original statements, which he got in anonymous form, the minute of the disciplinary hearing, in short form prepared by the Respondent, the note tabled by the Claimant at that hearing, the OH report, the dismissal letter and the letter of appeal. He also had a copy of Mr Flak's statement but he was not, I found, given copies of the statements of Ms Martinez and Mr Pulle.

47. On 23 April 2016, the appeal hearing took place before Mr Watts. Again there was a short form note prepared by the Respondent, although I also had the benefit of sight of a transcript, the hearing having been recorded. The Claimant attended and there was a note taker.

48. During the course of the hearing, the Claimant maintained that he was not asleep, Mr Watts commented: "OK, the thing of it is, Trevor, whether you were sleeping or not I think is semantics". The Claimant replied: "Well the dismissal is based on sleeping so it's not semantics." Mr Watts replied "It is semantics in as much as it cites gross dereliction of duty whether you were sleeping, napping or lying down, driven with buggies or sunbathing. Not available for your duties during that particular period, and that's me, that is how I would look upon it." The Claimant raised issues about the time frame. There was further discussion with the Claimant making similar points to those that he had made at the disciplinary hearing, including about lying down being a coping technique and about the short duration of the migraine episodes and his critiques of the witness statements from colleagues.

49. At one point, Mr Watts referred to Joseph Flak's statement. The Claimant said: "That statement was never provided and that's why its never been used. Christophe didn't provide it and it was never provided in the disciplinary hearing. That is why it was never used and can't be used now." Mr Watts replied: "Well it can be." The Claimant said: "Well I can't defend myself against something I have never seen and that is why" and again he confirmed that he had not been provided with this statement.

50. Further on in the appeal hearing the Claimant referred to the colleague at another site who he said had been sleeping and he showed a still photograph or image from social media, although he said there was a video as well; and there was some discussion about it. The Claimant also referred again to the two statements that he had requested but not seen; and he maintained that none of the statements supported that he was actually asleep.

51. Following the appeal hearing, on 3 May 2016, Mr Watts obtained by email, sent by Mr Lila it appears, a further statement from Ruchelle Scott. This was along substantially similar lines to her previous statement, although in this

account she said that the Claimant had "told me he was going for a nap" and was then unavailable; and she also said in terms at the end: "At no time did he make me or any of the staff aware that he was ill."

52. In view of the Claimant having raised the issue of another colleague having been caught sleeping, Mr Watts made enquiries of the manager at Tower Bridge. Mr Watts also emailed the Claimant asking for further details of where on social media the video could be found, who had recorded it, and so forth. The Tower Bridge employee who the Claimant alleged had been sleeping was Mr Curtis. I accepted from Mr Watts' evidence, that he spoke to the manager of the branch in question, Mr Thornton. Mr Thornton told Mr Watts that he had investigated and spoken to staff about this matter; and that his conclusion was that Mr Curtis had not been sleeping, but the posting of the video had been a prank.

53. On 11 May 2016, Mr Watts wrote to the Claimant. He summarised the Claimant's grounds of appeal. He wrote that there had been further investigations "which include witness statements reviewed from the investigation meeting involving the employee you believe was not dealt with in the same manner as yourself and witness statement from the receptionist." He wrote that he was confirming Mr Martin's original decision.

54. Mr Watts wrote: "It is my reasonable belief that you were asleep in your office whilst on duty and that you were not lying down on the floor of your office as a coping technique following a Hemiplegic Migraine. It is also my reasonable belief that your absence from the track constituted a dereliction of duties with severe health and safety implications. It is my reasonable belief that the decision to dismiss you falls within the band of reasonable responses as to health and safety of our customers, having clearly and knowingly comprised. With regards to your allegation that a member of senior management from another London track was found asleep on duty, they were not dealt in the same manner as yourself. This matter was investigated and statements taken from employees who witnessed this incident. On reviewing the statements it was the investigating officer's reasonable belief that the employee was not asleep and that this was a prank where footage of the employee 'sleeping' was posted to a social media site."

55. The Claimant was told that he had exhausted his avenues of appeal.

The Law

56. Section 98(1) **Employment Rights Act 1996** provides that it is for the employer to show the reason or principal reason for dismissal and that it falls within section 98(2) or is some other substantial and potentially fair reason. A reason falls within section 98(2) if, among other possibilities, it relates to the conduct of the employee. Section 98(4) provides that where the employer has fulfilled the requirements of sub-section (1) the determination of the question whether the dismissal is fair or unfair having regard to the reasons shown by the employer:

(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) Shall be determined in accordance with equity and the substantial merits of the case.

57. Where the employer has shown that the dismissal was for conduct, then, in considering whether it was fair pursuant to section 98(4) **British Home Stores v Burchell** [1978] IRLR 379 indicates that the Tribunal should consider whether the employer had a genuine belief that the employee had committed the misconduct, whether there was a reasonable investigation, and whether, in light of the fruits of that investigation, that belief was reasonably held. The Tribunal must also consider whether the sanction of dismissal for the conduct found to have occurred was a reasonable one.

58. In approaching all of the foregoing questions the Tribunal applies a "band of reasonable responses" test. That is to say, the Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's approach to all of these matters falls within the band of responses or approaches that it was reasonably open to it to take even if some employers might reasonably have taken a different approach. See **Post Office v Foley** [2000] ICR 1283 and **Sainsbury's Supermarkets Limited v Hitt** [2003] IRLR 23. There may be other issues said to be relevant to the fairness of the particular dismissal in the given case. Ultimately, the fairness of the dismissal must be judged by applying the words of the statute to the overall end to end process, including the appeal stage. See **Taylor v OCS Group Limited** [2006] ICR 1602.

59. Section 122(2) of the 1996 Act provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly." Section 123(6) provides: "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action or the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding." For these purposes the Tribunal must decide, drawing on the evidence available to it, whether or not there has been conduct falling within scope of these provisions. **Nelson v BBC No 2** [1979] IRLR 346 indicates that this will encompass conduct which the Tribunal considers to be culpable or blameworthy. By section 116 the Tribunal is also required to take such findings into account in deciding whether or not to grant an application for a reinstatement or reengagement order.

60. The **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** gives the Tribunal jurisdiction to consider claims by former employees of, amongst other things, wrongful dismissal. A dismissed employee is entitled to the appropriate period of contractual or (pursuant to section 86 of the 1996 Act) statutory minimum notice, or payment in lieu, unless he is himself in fundamental breach of contract. That may arise by way of a breach of an express term, or by conduct which places him in fundamental breach of the implied duty of trust and confidence.

The Tribunal's Further Findings and Conclusions

61. Turning first to the claim of unfair dismissal, it was for the Respondent to satisfy me as to the reason for dismissal. As I have described, two matters were

raised in the original disciplinary charges: firstly, the alleged conduct on 31 January 2016, when the Claimant was allegedly sleeping and/or otherwise in dereliction of duty; and, secondly, other performance issues.

62. It was clear to me that the latter were not ultimately relied upon by either Mr Martin or Mr Watts. Taking their evidence to me, and their letters at the time, at face value, both, however, found that the Claimant *had* been sleeping at some point on the day in question and *had* neglected his duties, in view of the degree to which he was unavailable or difficult to contact during the course of the shift. Whilst the onus at this point was on on the Respondent, the Claimant did not suggest that there was any other reason why Mr Martin would have dismissed him or why Mr Watts would not have upheld his appeal.

63. When deciding the reason for dismissal, the Tribunal is not, at this point, concerned with whether the employer's view was *reasonably* held, just with what beliefs actually were held, and influenced the decision to dismiss. But it may be harder to persuade the Tribunal that the employer truly believed something, if there was a lack of evidence before it that would reasonably support that belief, and easier to persuade the Tribunal if the converse is true. In this case, as I will describe, there *was* evidence that would reasonably support the holding of the beliefs that Mr Martin and Mr Watts professed to hold.

64. In all the circumstances, standing back, I was satisfied that Mr Martin did indeed believe that the Claimant was sleeping and was otherwise in dereliction of duty; and so did Mr Watts. The Respondent therefore satisfied me that the reason for dismissal was a reason relating to the Claimant's conduct.

65. I therefore turned to consider the fairness of the dismissal in all the circumstances of the case. As I have just indicated, I was satisfied as to what Mr Martin and Mr Watts believed, and that these beliefs were genuinely held.

66. Was there a reasonably sufficient investigation (applying the band of reasonable responses approach)? The Claimant was interviewed and he also had the chance to put his case at the disciplinary hearing and the appeal hearing, which he did both orally and in his written submission. Other interviews were conducted, including of two people suggested by the Claimant. There was no one else who the Claimant suggested should have been interviewed, but was not interviewed. Nor was there any suggestion that there was any other potentially relevant evidence that should have been looked for or investigated. For example, this was not a case where it was suggested that there might have been CCTV evidence.

67. However, the Claimant, at the hearing before me, made several more specific criticisms of the fairness of the process followed. In particular, he said it was not fair that he was not given copies of the statements of Mr Flak, Mr Pulle, and Ms Martinez, nor a copy of the second statement of Ms Scott. I consider the position in relation to each of these in turn.

68. As I have found, the Claimant was told about the existence of Mr Flak's statement, but he was not given a copy; and it was considered by Mr Martin. There is some potential ambiguity in the content of Mr Flak's statement, as to whether he, Mr Flak, was referring to the same occasion to which the charge related (31 January), or another occasion; but either way it was potentially

harmful to the Claimant, because Mr Flak was saying that he had directly observed, or found, the Claimant sleeping. Mr Martin said in evidence before me that he did not consider Mr Flak's statement; but it is hard to dispel the appearance of unfairness, given that he did *see* the statement, and there was therefore a risk that it could at least subconsciously have influenced him.

69. There is no rule of law that it is necessarily unfair for an employee not to be given a copy of a witness statement. In some cases it may be sufficient if the employee is told the substance of what the witness has said. However, what is sufficient to be fair in a given case is a fact sensitive matter. In a case which, as here, turns on consideration of conflicting accounts and other circumstantial material, such as the Claimant's Occupational Health evidence that he did indeed have a problem of migraines, Mr Flak's statement was a potentially material and important piece of evidence. Providing the Claimant with a copy would have enabled him to consider *precisely* what Mr Flak said, and how he said it, and make the best submission he could about it. Furthermore, the Claimant protested that he had not been given a copy at both the disciplinary and appeal hearings, and it would have been a simple matter to do so. I concluded that, in all the circumstances of this case, no reasonable employer would have failed to do this.

70. In relation to Mr Pulle and Ms Martinez, whilst their statements were mentioned, and what they had said was, to some extent, described, at the disciplinary hearing, the Claimant was not given copies of their statements. Mr Howson submitted to me that their statements were not particularly relevant, as neither of them gave any direct evidence about what had or had not happened on the day in question. But, once again, the nature of this case was that the managers concerned were having to weigh up various forms of evidence: direct, indirect, background, or otherwise circumstantial; and the Claimant made the fair point that Mr Pulle's evidence in particular potentially provided him with some circumstantial and background support for his own case. Once again I considered that the nature of the issues and the evidence in this case, was such that no reasonable employer would have failed simply to provide the Claimant with copies of these statements, so that he could read them himself and make the best submissions he could about them in the internal process.

71. As for Ms Scott's second witness statement, there were two differences between this and her first statement. The first was her adding that at no time did the Claimant make her or any other member of staff aware that he was ill. That was perhaps not very significant, given that the Claimant accepted this as a fact in any event; but there was also a shift between Ms Scott saying that the Claimant had gone for a nap, and, in the second statement, that he had *told her* that he was going for a nap. The Claimant was not only not given this statement, before the decision was taken on the appeal. He was not even told about its existence or contents. Mr Watts said, in evidence before me, that he was focusing on what the Claimant had to say, and on his grounds of appeal. But Mr Watts knew that the Claimant continued, on appeal, to dispute that he had been sleeping. In all these circumstances, this was a piece of evidence available to Mr Watts, that the Claimant should, in fairness, have been told about, and indeed given a copy of, before Mr Watts came to his decision at the end of the process. I found that no reasonable employer would have failed to do that.

72. Pausing there, for these reasons alone this was an unfair dismissal. However, I went on to address other points of unfairness raised by the Claimant, not least because they might have a bearing on remedy.

73. The Claimant submitted that it was unfair that firmer action was not taken following the revelation that Mr Curtis was aware of his suspension. He submitted that this gave rise to a concern that confidentiality around the process was not being properly observed. However, I accepted that his colleagues at Acton had been told not to talk about the matter, and that Mr Curtis was told the same thing, when it came to light that he knew about it. Realistically, it is not that surprising, whatever efforts were taken, that word had got out. I did not consider that the handling of this would separately have made this dismissal unfair.

74. The Claimant argue that it was also unfair that his claim, that Mr Curtis had been sleeping, yet had not been sacked, was not investigated more thoroughly. In particular, he argued that Mr Watts should have investigated this himself, rather than relying on Mr Thornton. I considered that it might have been better for Mr Watts to do that himself, but I did not think that no reasonable employer would have handled the matter in the way that Mr Watts did. It was not the case that Mr Watts simply ignored this matter. He spoke to Mr Thornton, who was the local manager, and he received an account from Mr Thornton of the investigation which he, Mr Thornton, said he had conducted, and the conclusions that he, Mr Thornton, had come to. The Claimant also accepted that there was nothing to suggest to Mr Watts that these were false conclusions.

75. In those circumstances, I could not say that the handling of this aspect was so inadequate that it would by itself have been a ground of unfairness. Nor did I have any other evidence before me sufficient to show that Mr Curtis was indeed known to have slept on duty, but had nevertheless not been dismissed, such as would support a finding of unfairly inconsistent treatment of the Claimant.

76. The Claimant also complained that the performance issues were inadequately considered and investigated by Mr Watts. But as I have found that these were not relied upon to support either the dismissal or the appeal decision, I did not consider the handling of this aspect of matters to render the dismissal for that independent reason, unfair.

77. I do record that I initially had some concerns about whether there was unfairness to the Claimant by the four witness statements being anonymised. However, there is no automatic rule of law that anonymising evidence in this way will necessarily always be unfair. Sometimes it will. But, again, this is a fact sensitive matter. Further, in this case, the Claimant acknowledged in evidence before me, that he easily worked out straight away who three of the four witnesses were, and during the disciplinary hearing, the names were used, and it was confirmed to him who all four were. Being given the statements initially without the names, does not, ultimately, seem to have placed him at any disadvantage. Indeed, he did not seek to make it a ground of unfairness before me; and I would not have found the dismissal unfair for this reason.

78. The Claimant did, however, criticise before me, the disciplinary and appeal managers' analyses of the evidence available to them, said to support their conclusions that he had been sleeping. Here the issue for me was whether no

reasonable manager could have concluded from the totality of the evidence available in the internal process, that he was sleeping.

79. Mr Howson submitted there was plenty of evidence to support that conclusion. Witnesses observed what they took to be the symptoms of the Claimant having recently been sleeping; one of them said that he had actually seen the Claimant doing so; and one that the Claimant had gone for a nap. True it was that managers had to balance against that, the Claimant's own internal evidence that he was *not* sleeping, and that he was in fact dealing with a migraine, including by lying down, and the support that the OH report gave to that account. However, Mr Howson submitted that this material did not, by itself, prove that the Claimant was suffering from a migraine on the day in question, and so the weighing of up of this various evidence, and which side of the line the balance fell, was reasonably for the appreciation of the managers concerned. Further, Mr Howson submitted that, also into the mix went some circumstantial evidence which pointed against the Claimant's account being true, being his failure to tell any of his colleagues or any managers what was going on on the day. Whilst the Claimant offered explanations for this in the internal process, once again it was for the managers concerned to weigh all of this up.

80. The Claimant, for his part, highlighted what he said were several specific weakness or problems with the evidence against him. There were elements of hearsay, where one witness reported what one or more colleagues had told them, not what they had seen themselves. Further, he said it was of concern that some of the evidence may have been contaminated by witnesses speaking to one another, that is, that, whether or not deliberately, witnesses' accounts may have been influenced by hearing those of their colleagues. The Claimant also said there were elements of inconsistency, if the witness statements were closely analysed, as to precisely the stages of the shift, or points in time, when he was said to have been sleeping, and for how long he was said to have been absent or unavailable. There was also, he said, a contradiction between the suggestions by one witness that he had been sleeping all day, and by another that he had been involved in dealing with various matters, such as customer briefings.

81. I reminded myself that, at this stage of my decision, in reviewing these various features of the evidence available to managers at the time, and considering Mr Howson's and the Claimant's submissions about them, my concern was whether it was reasonably open to managers, in light of the overall evidence they had, to come to the conclusions that they did. I considered that there was no feature or features of the evidence before them, which was so compelling that it meant that any manager acting reasonably would be bound to conclude that the Claimant was *not* sleeping. There was evidence supporting his account, and evidence going the other way. It was for the managers to judge how reliable people's accounts and recollections of timings were, to weigh up the element of hearsay, to weigh up the risk of contamination by collaboration or otherwise, and so forth, and to weigh up the evidence of the Claimant and the OH report. I concluded that it was reasonably open to managers to find, as they did, weighing up the overall picture, that he had been sleeping.

82. The Claimant had around four years' service and a clean disciplinary record. However, I found that, even taking account of that, this conduct was sufficiently serious to warrant the sanction of dismissal as being within the band of reasonable responses, particularly bearing in mind the Claimant's managerial

role and that he was the senior person on site on shift that morning, and the nature of this business. It was also, I found, reasonably open to the decision-making managers to conclude that there had been some dereliction of duty by the Claimant over and above the fact (as found) of sleeping, given the range of evidence about his unavailability, and his evidence as to the reasons for that.

83. Pausing to summarise, I found that this was an unfair dismissal because of the unfair failure to give the Claimant the four statements I have mentioned, but I also found, which is pertinent to remedy, that there was sufficient material reasonably to support the factual findings of misconduct in fact made, and to justify, within the band of reasonable responses, the sanction of dismissal.

84. However, for the purposes of remedy, I then had to consider what chance, if any, there was, that there might have been a different outcome, if the Claimant had been given those four statements, and had been given the chance to have his say on them, before the dismissal and/or appeal decisions were taken. That would plainly have been the opportunity for the Claimant to make his case that he had not been sleeping – contrary to what Mr Flak had said – and that he had not *told* Ruchelle that he would be taking a nap. He would also have been able to develop his case, in particular, as to why he said Mr Pulle's evidence was significant supporting circumstantial evidence regarding his migraines.

85. However, I concluded that, even had the Claimant made his best case in relation to all of these statements, it could not be said that there was any point so trenchant that any reasonable employer would have been bound to be persuaded to a different conclusion. The Claimant's submissions would go into the balance of his side, but it would still be open to managers, within the reasonable band, to find that he was guilty of the conduct charges. But what would, or might, have happened in this case? Having heard Mr Martin and Mr Woods give evidence before me, it seemed to me that, realistically, even if the Claimant had seen, and made the best case he could, in relation to all this material, they would both still have been likely to conclude that the Claimant was sleeping; and, if so, that would then have been a fair dismissal.

86. However, I could not be sure that this would, for certain, have been the outcome. The OH evidence supported the fact that the Claimant's problem of migraines was real, and he would have made a case that there was significant further supporting evidence from Mr Pulle. I did consider, taking this into account, that there was *some* chance that, with the benefit of the Claimant's representations about this additional evidence, either or both of the managers *might* have had pause, and been persuaded to a different view about whether he had been sleeping. It also seemed to me that neither could reasonably have found that any other dereliction of duty, by itself, was so serious as to warrant dismissal, by itself, bearing in mind that there was no clear evidence before them that he had failed to carry out safety-critical customer briefings properly.

87. I concluded, standing back, that there was a 75% chance that, if he had been treated fairly by being given all this material, the Claimant would still have been dismissed (which would then, also, have been a fair dismissal); but there was a 25% chance that he would not have been.

88. I turned then to the question of contributory conduct. I had to decide here, on all the evidence before me, whether the Claimant was guilty of culpable or

blameworthy conduct, and if so, how that should impact on any basic or compensatory award.

89. At this point, it was for me to weigh up all the evidence available to me. This included all the evidence which was available to the managers concerned, which I have already described, and, in particular, the evidence which I had from the Claimant himself as a witness before me. There is evidence pointing both ways. The evidence that the Claimant's problem of migraines was real, and as to the way they affected him when they hit, and the way he coped with them, albeit they were infrequent, gave real pause. However, I found the overall picture created by the totality of the evidence from other members of staff to be significant. I bore in mind that some of it was hearsay. I also considered the risk that some of it may have been contaminated by one witness being influenced, whether or not consciously, by what others had said. I bore in mind also that I did not hear directly from any of these members of staff in person. However, the content of their statements, and they way they each expressed themselves, had the feel of being straightforward accounts. There is sometimes an element of resentment where the Claimant is felt not to have been pulling his weight, but the accounts of what each of them says did or did not happen or they did or did not observe or believe, had the feel of having being independently given. Further, the accounts straightforwardly convey where a witness is describing their own observation or impression and where they are relaying what they have heard from others. Overall this evidence certainly did not have the feel to me of having been deliberately concocted.

90. I also weighed into the balance the evidence that there was no attempt by the Claimant at any point to suggest to anyone that he was unwell, or had, or had had, a migraine, whether to colleagues or managers. I took into account the Claimant's explanations for this reticence. But it was also apparent from his evidence that this was not a condition of which he made a secret at work; and the OH evidence supports his case that there had been previous, though only occasional, episodes at work. This makes it harder to understand why he would not tell anyone at all about having a migraine on this occasion, and harder to accept that this was for fear that colleagues would, in some way, take advantage of this to be derelict in their own duties.

91. Doing the best I could to weigh all the evidence up, and on the balance of probabilities, I found that the Claimant *was* sleeping for a time on the 31 January 2016 (and not in order to cope with a migraine). Given also his position and responsibilities, I concluded that this was serious contributory conduct on his part. I found that it should therefore fall to reduce any basic award; but I bore in mind that a basic award is there at least in part to reflect service given by an employee, and this employee had given four years' service without any prior adverse record up to this point. I considered that the fair reduction to make to any basic award in all the circumstances would be 75%.

92. Potentially this finding of contributory conduct could serve also to reduce any compensatory award, but I was not bound to make the same reduction as in respect of a basic award; and I considered it fair to take into account that I had already found that any compensatory award should be reduced by 75% because of my *Polkey* finding. In those circumstances, I did not think it fair that there should be a further reduction to the compensatory award on account of contributory conduct, on top of the *Polkey* reduction.

93. Turning to the notice money claim, the outcome of this turned on my appreciation, on the balance of probabilities, of whether there was conduct by the Claimant amounting to a fundamental breach.

94. I had found that the Claimant was sleeping for a period on the day in question. I did conclude that this was a fundamental breach, given his role and responsibilities, and the nature of this business. Therefore the wrongful dismissal claim for notice money failed. Given that, the question of whether a compensatory award should potentially (subject to *Polkey* reduction) compensate the Claimant for the full one month's notice that he would have received, had he not been in fundamental breach, even though he had mitigated his loss from 1 May, did not, in the event arise. In view of the mitigation, the underlying period of loss of earnings covered by any compensatory award would be limited to the period from 13 April to 1 May 2016.

Final Awards and Costs

95. As I have noted, the Claimant did not seek reinstatement or reengagement. In light of my foregoing findings, it was a straightforward exercise for the parties to agree, and calculate, the appropriate amount of the basic and compensatory awards. Having regard to his gross pay, the cap on a week's pay, his age (he was born on 3 October 1990) and his four years' service, the basic award was (after 75% conduct reduction) £360. As to the compensatory award, the loss of earnings period was as stated above; the net weekly earnings were agreed at £302.23. Compensation for loss of statutory rights was agreed at £400. After *Polkey* reduction of 75% the agreed award was £283.61.

96. Taking account of an element of remission, the Claimant had paid Tribunal fees of £85. Mr Howson did not oppose an award of costs in that respect, which I considered to be fair and right.

97. The Claimant also applied for costs in respect of legal fees that he had incurred. These could not be claimed in respect of the cost of advice during the internal process, and not related, as such, to the Tribunal proceedings. However, the Claimant produced evidence that £200 plus VAT had been incurred in respect of work by his lawyers on drafting his particulars of claim.

98. As to the basis under the relevant rule (rule 76(1)) for such an award, the Claimant argued that, in view of the failure to provide him with the four witness statements, which had in fact led to the finding of unfair dismissal, the Respondent's defence to the unfair dismissal claim had had no reasonable prospect of success.

99. However, the fact that, as it transpires, an argument has failed, does not mean that the case was necessarily not reasonably arguable. In this case, given that three of the witness statements were mentioned, and, to some extent, described, in the internal process, and the fourth was from a witness for whom a statement covering similar ground had already been provided, I did not think that it could be said that the Respondent's case that its handling of this aspect did not render the dismissal unfair, could be said to have been so weak as to have no reasonable prospect of success, though it did, indeed, fail. Alternatively, if I was

wrong, and it did cross that threshold for consideration of costs, it was so close to the line, that I would not have considered an award to be appropriate.

100. This further costs application by the Claimant therefore failed.

Employment Judge Auerbach
5 April 2017