Case Number: 3200814/2016

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr D O'Sullivan**

Respondent: **Capital Karts Limited**

Heard at: **East London Hearing Centre**

On: **4 January 2017**

Before: **Employment Judge Jones (sitting alone)**

Representation:

Claimant: In person

Respondent: Miss C Lord (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The dismissal was fair.**

2. **The claim is dismissed.**

REASONS

1. The Claimant who was employed by the Respondent as a Venue Manager, was dismissed on 25 May 2016 for gross misconduct. The Claimant brought a complaint of unfair dismissal. He considered that the decision to dismiss him had been harsh. The Respondent resisted the claim.

Evidence

2. The parties provided an agreed bundle of documents. The Tribunal also had signed witness statements and had live evidence from the following witnesses: The Claimant on his own behalf and from Luke Caudle, Venue Manager; Matt Holyfield and

Alastair Flynn – Managing Directors and owners of the Respondent; Jamie Bedwell and Martin Bedwell, silent partners and shareholders in the Respondent; on its behalf.

3. The Tribunal apologises to the parties for the late promulgation of this judgment and reasons. The Tribunal Judge has had ill-health, bereavement, extended leave and pressure of work since the Hearing, all of which contributed to the delay. The inconvenience to the parties is regretted and the Tribunal apologises for it.

4. The Tribunal came to the following findings of fact from the evidence presented in the Hearing. The Tribunal has restricted itself to making findings on the facts relevant to the issues before it.

Findings of Fact

5. The Claimant worked at the Respondent's business from its beginning. He was one of the first employees. He was employed on 28 October 2013 and the business began trading on 7 November 2013.

6. Matt Holyfield and Alastair Flynn were the Managing Directors of the business and the Claimant reported directly to them. They set up the business with investment from Jamie Bedwell and his father, Martin Bedwell. The business is a Go - Karting centre where members of the public come to race. The business was a new start-up, which had few employees, most of whom were on zero hours' contracts.

7. The Claimant was employed as one of two Venue Managers. The other was Luke Caudle. The Claimant agreed in his evidence that when he was on shift as Venue Manager he managed the day-to-day running of the venue. His evidence was that at those times, he managed the employees on site and it was his responsibility to make sure that they were carrying out their duties. He would also be on hand to address any queries from customers and was in the habit of walking around the venue at intervals during the day to check that everything was running smoothly. Staff would report to Mr Caudle if he was in, but in his absence, they would report to the Claimant.

8. Luke Caudle confirmed that as Venue Managers they would have sole responsibility for managing the site on any day that Mr Holyfield and Mr Flynn were not in. If they were both on site, Mr Caudle would manage the site while the Claimant would manage the workshop. When Mr Caudle and the Managing Directors were not on site the Claimant would be in charge.

9. Before the incident on 12 May 2016 the Claimant's performance had been commendable and he had been given pay increases to reflect that. The Claimant had not been given a written job description but as he had been working in the job for over 2 years it is likely that he was aware of the duties of his job and his responsibility as Venue Manager in the absence of the MD's and Mr Caudle. The Claimant had never asked for a job description before his appeal against dismissal. He did have a contract of employment.

10. The Respondent's business was run on an informal basis. Once every couple of months there would be a meeting between the Managing Directors (MD's), Mr Caudle and the Claimant at which they discussed the plans for the business and any operational issues. At one such meeting Mr Caudle and the Claimant were informed that the MD's

had decided to hire ten racing simulators for use by customers at the karting centre. Although there was disagreement between the parties of the actual cost of these simulators, the Tribunal finds that they were expensive pieces of equipment, which is one of the reasons they decided to hire rather than purchase them. The simulators were due to be delivered on a day when neither of the MD's were due to be present at the business. They advised the Claimant and Mr Caudle that the agreement with Radical Simulators – the company supplying them – was that they were not to be touched or accessed without the supplier's supervision. The Claimant's case was that he had not seen the contract between the Respondent and Radical Simulators but he would not have needed to do so to understand his employer's instructions.

11. To ensure that this happened, a separate fenced off, locked up area was constructed in which to store the simulators when they were delivered and while they waited for the suppliers to come and set them up. The Claimant had taken part in that construction. He and Mr Caudle were the only employees who had keys to this locked area. In the Hearing the Claimant stated that the locked-off area may have been created so that customers would not steal the simulators but this is not something that he had ever said before and was not in his witness statement. Initially in his live evidence he accepted that Radical Simulators were due to come later in the day to set up the simulators but later he changed this and stated that he thought that he might have been instructed to set 3 up and Radical Simulators would set up the other 3. The Tribunal find that this was unlikely. The Claimant's clear evidence at the time of the investigation was that curiosity had got the better of him and the junior members of staff. Also, it was extremely unlikely that he would have been expected to set up the simulators as his evidence was that he was not familiar with them and was curious about them. These machines were new to the Respondent and to its employees. The agreement with Radical Simulators, which the Venue Managers were aware of, was that they would return that evening and set the machines up.

12. The simulators were due to be delivered on 12 May. The Claimant was aware of this and as he was the Venue Manager that day, he would also have been aware that it was his responsibility to ensure that they were locked away in the fenced off area and that they were not accessed or touched by staff or customers.

13. On 12 May at around 9.15am, Radical Simulators delivered 4 driving simulators to the spectator area at the Respondent. They were expected to return later that day with a 5th simulator and to set up and install all of them. The simulators were put in the locked, fenced off area. At around 10am the Claimant and three junior members of staff: Jack Johns, Stacey Lawday and Andy Brandon, climbed over the fence and tried to get simulators working by hooking it up to Mr Jones' X-box which he had earlier gone home to retrieve.

14. Apart from the Claimant, the other witnesses confirmed that Mr Jones had gone home to retrieve his personal Xbox with the Claimant's approval. It was when he returned with the X-box that all 4 men went into the locked-up area where the simulators were being stored and attempted to get one working with the X-box. The Claimant was actively involved in doing so. In the investigation and in the Hearing, he explained that his curiosity had got the better of him and that he and his colleagues were interested in seeing how the machine worked.

15. The simulator failed to work with the X-box and although the Claimant's case is that he told Mr Johns to put the X-box in the car and 'crack on', the evidence of the other witnesses gathered during the investigation was that the X-box was taken back into the reception area and played by all of them, including the Claimant, using the Respondent's security monitor. To do so, they had to remove the security monitor from its usual location at reception leaving the reception team with no security coverage of the venue.

16. The evidence gathered from the other witnesses all confirm that they – along with the Claimant – played the X-box off and on for the rest of the day until about 3.20pm. The witnesses also confirmed that this was visible to customers who visited the venue that day, some of whom commented on it. Jack Johns, Stacey Lawday and Andy Brandon also confirmed that at no time did the Claimant tell them that they could not or should not play on the X-box. The Claimant is adamant that he had not played on the X-box that afternoon.

17. Mr Johns finished his shift at 3.20pm. He took his X-box with him at the end of his shift. Mr Lawday confirmed in his statement in the investigation that once Mr Johns had left both he and the Claimant downloaded a racing game from the internet on to the Respondent's reception laptop and played it. It was the Claimant's case that the game was already on the laptop. The Respondent considered that this was unlikely to be the case. It was not disputed that Mr Flynn was an IT expert and that he regularly checked the reception laptop for viruses. It is likely that he would have seen the game if it had previously been downloaded on to the laptop. His evidence was that had he seen it, he would have deleted it. Even if the game had been on there previously, it does not explain why the Claimant considered it appropriate to play during the working day.

18. Mr Lawday and the Claimant both confirm in their statements in the investigation that it was around this time that they took the company laptop back to the area where the simulators were and once again attempted to get one started with it. Andy Brandon also joined them. This meant that there was no one at the reception desk to take payments from customers or to watch the till which at that time had approximately £1,000 in it. The simulators did not work so they eventually returned to work.

19. While they were playing the game at reception members of the public who came to the venue noticed and some even commented on it.

20. Radical Simulators attended again at around 7pm that day with the 5th simulator, which the Claimant assisted them in unloading. They set up the simulators before they left.

21. On the following day, when Mr Caudle arrived for work Jack Brown informed him of the previous day's activities with the simulators and the Claimant's involvement. Mr Caudle rang the Managing Directors to inform them of what he had been told. Mr Holyfield and Mr Flynn decided that the incident needed to be properly investigated. They also decided that Alistair Flynn would conduct the investigation so that the Matt Holyfield would be available to conduct any disciplinary action against any of the employees involved, should that be necessary.

22. Mr Flynn telephoned the Claimant and informed him that he was suspended while the matter was investigated. The Respondent's disciplinary policy confirmed at paragraph 7.2 that suspension was not a disciplinary penalty and did not imply that any decision had

already been made about the allegations. The Claimant was told that the reason for his suspension was that the allegations against him were potentially serious. At the time, it looked like he had effectively given authority for the other three junior members of staff to play an unsolicited X-box at work on the Respondent's IT system, sent or allowed Jack Johns home to get the X-box, and tried to get the simulators working himself. As the Claimant had been the Venue Manager at the time of the incident, the Respondent considered he should be suspended while the investigation was conducted. The suspension was confirmed by a text message on the same day.

23. Paragraph 18 of the Claimant's employment contract dealt with Suspension and stated that "in order to investigate a complaint against the employee of misconduct and/or poor performance, the Company may suspend the employee for so long as may be necessary to carry out a proper investigation and complete any appropriate disciplinary and/or capability process."

24. Paragraph 5 of the Respondent's Disciplinary Procedure dealt with investigations in disciplinary matters. It stated that the purpose of an investigation is for the Respondent to establish a fair and balanced view of the facts relating to any disciplinary allegations before deciding whether to proceed with a disciplinary hearing. It also stated that the amount of investigation required would depend on the nature of the allegations and will vary from case to case. It may involve interviewing and taking statements from the employee being investigated as well as any witnesses and/or reviewing documents. The policy confirmed that no decision on disciplinary action would be taken until after a disciplinary hearing has been held.

25. As already stated Mr Flynn began his investigation on the following day. On 13 May he interviewed Jack Johns, Andy Brandon and Stacey Lawday and on 14 May he interviewed the Claimant. The Tribunal had the statements in the Hearing Bundle. Those are the statements referred to above. The statements were handwritten. Mr Flynn did not interview Mr Brown as part of that investigation. In the Claimant's statement to the investigation, he agreed with Mr Flynn that reception had been left 'unmanned' while he, Stacey Lawton and Andy Brandon tried to get the simulators to work with the reception laptop. He did not state that Mr Brown had been left in charge of reception. At the Tribunal Hearing the Claimant's witness statement stated that Jack Brown had been left on reception to cover phones and take bookings. The Tribunal finds that is unlikely to have been what happened. The Tribunal makes this finding for two reasons. Firstly, if that had happened it is likely that the Claimant would have said that in his statement in the investigation. Secondly, the Respondent's evidence at the Hearing was that Mr Brown was a race director and was not a trained receptionist. He had no knowledge of the booking system and did not usually answer the phones. Andy Brandon was supposed to be covering reception. As no one mentioned Mr Brown in the statements given in the investigation, the Respondent did not take a statement from him.

26. Mr Caudle was not asked to provide a statement as part of the investigation as he had not been at work that day. He was asked to provide a statement for the Tribunal Hearing to give evidence on whether he and the Claimant, as Venue Managers, had been told that the simulators should not be touched until Radical Simulators came and set them up.

27. It is the Claimant's case that the investigation statement taken from him is incomplete and that Mr Flynn had also stated to him in their meeting that he would also

have been curious about the machines and that he had agreed with him that his job was a tough one. He complained in the Tribunal Hearing that CCTV footage should have been produced that could have shown whether he was playing X-box on reception.

28. In the Claimant's investigation statement in the bundle, Mr Flynn discussed with him the potential danger to the simulators if they had been damaged while the Claimant and the other members of staff tried to get them started. Also, it was possible for personal injury to occur if someone is holding the steering wheel of a simulator when it is started for the first time. As the Claimant and the other members of staff were not familiar with the simulators they would not have been aware of this at the time. It is unlikely that, given the seriousness with which the Respondent considered the incident, that Mr Flynn said to the Claimant during the investigation that he would have had a go on the simulators himself had he been there. It is likely that he did express appreciation for the fact that the Claimant would have been busy with covering the Venue Manager's job as well as working in the workshop but that he was still expected to follow instructions and ensure that the staff under his management did their jobs. He did suggest to the Claimant that an option for him on the day would have been to telephone one of the Managing Directors if he had trouble getting staff to listen to him.

29. Mr Brandon, Mr Johns and Mr Lawday all confirmed in their statements to the investigation that the Claimant had been involved in playing the X-box during the day, that he had authorised them to play on it as he was also doing so and had not told them to stop, that reception had been left unattended while they did so, and that the Claimant had effectively authorised Mr Johns to go home and get his X-box to try to get the simulators working.

30. After the investigation, the Managing Directors met and discussed what it had revealed. Mr Flynn confirmed that in his opinion it was appropriate for the Claimant to be invited to a disciplinary hearing. Mr Flynn confirmed that he believed that it was appropriate for the Claimant to be invited to a disciplinary hearing. They agreed that Mr Johns, Mr Lawday and Mr Brandon would be given informal verbal warnings. They considered that what they had done was misconduct but that as those men believed that they had express authorisation from the Claimant on the day to act as they did, it was appropriate to give them verbal warnings as a disciplinary penalty. There was a text message from Jack Johns on 13 May at 15.54 to the Claimant that stated that he had 'just been sacked'. However, the Tribunal did not hear from Mr Johns as to what he meant by the word 'sacked'. The Respondent was clear that he had never been dismissed and was still employed there at the time of the Hearing. All three men were advised that if any such conduct occurred again it would be treated formally.

31. On 16 May, the Claimant emailed the Managing Directors to ask again for the reason for his suspension. He had not been given a letter of suspension in writing. He asked what evidence the Respondent had and who else had been involved. In his response, Mr Flynn referred to the Claimant having committed multiple potential acts of gross misconduct. He stated "It is clear in my opinion that …… trust at management level has been irrevocably eroded." However, he confirmed that Mr Holyfield would make the final decision on the following week. This response came from Mr Flynn alone. It does not appear from the email that the opinions expressed in it are that of both Managing Directors. As Mr Flynn conducted the investigation on his own it is likely that he addressed the Claimant's query without referring it to Mr Holyfield and that the opinions expressed in it are his own. Mr Holyfield in his evidence confirmed that

they had agreed that the outcome of the investigation was that the Claimant should be invited to a disciplinary hearing and that the outcome of that hearing was his decision.

32. The Claimant wrote to Mr Flynn again on 18 May. He stated that he considered that Mr Flynn had already made up his mind without giving him a fair hearing and that the decision was therefore premeditated and flawed. He asked for the summary of the investigation to present to his legal adviser, for his job description. He denied that he had ever admitted to acts of gross misconduct and disputed whether Radical Simulators would have been displeased if they had seen the Respondent's employees "pouring all over their machines" and cancelled the partnership with the Respondent. The Claimant contended that they would have been pleased to see a client intrigued by the technology. As far as the Respondent was concerned, this was unlikely because of the potential financial exposure to the company if any of the equipment was damaged.

33. The Claimant considered that all team members were senior members of staff as they were key holders and regularly took home the day's takings. However, in the Hearing he confirmed that he was the Venue Manager that day and that he was responsible for supervising staff on shift.

34. On 19 May Mr Flynn sent the Claimant a summary of the investigation meetings along with the disciplinary procedures and rules. He informed him in the email that Mr Holyfield would have the same information with him and that it was for him to decide whether gross misconduct had been committed. The Claimant was invited to a meeting on the following day with Mr Holyfield and when he queried by email whether it was going to be an informal or disciplinary meeting, Mr Flynn responded within 10 minutes on the same day, to confirm that it was to be a disciplinary hearing.

35. The Claimant considered that he had not had sufficient time to prepare for the meeting and asked for it to be postponed. The Respondent agreed and the meeting was eventually rescheduled for 25 May. The Claimant asked of his right to be accompanied and was informed that he could but have someone with him but that it had to be by a colleague. The Claimant did ask a colleague to accompany him but that person declined to do so.

36. The Claimant attended the disciplinary hearing unaccompanied and met with Mr Holyfield who conducted the meeting. The notes of the meeting confirm that Mr Holyfield reviewed the notes of Mr Flynn's investigation and then asked the Claimant to describe what occurred on the day in his own words.

37. There was a dispute between the parties as to whether the Claimant told Mr Holyfield that he believed that Mr Holyfield had already made up his mind that he was to be dismissed or whether Mr Holyfield told him that he had made up his mind earlier that morning to dismiss the Claimant's employment. It his highly likely that the Claimant told him that Mr Holyfield that he had made his mind up. He believed this from the letter referred to above.

38. The notes of the meeting that Mr Holyfield wrote up after the meeting had ended and were produced as part of the Hearing bundle; show that Mr Holyfield noted that he went through with the Claimant the aspects of his conduct that were, in his opinion gross misconduct. That was:- the unauthorised use of property (which is likely to be a reference to the use of the reception computer); negligence in the performance of his duties, (this is

a reference to the Claimant's tacit approval of Mr John's going home to get his X-box), assisting in trying to get the simulators working, playing the X-box during the day and playing the downloaded game. He also cited bringing the organisation into disrepute. This was a reference to the Respondent's worry that the incident could have damaged irreparably its relations with Radical Simulators, to its detriment. He referred also to serious misuse of IT, which again is likely to be a reference to the use of the reception laptop and unauthorised entry into an area of the premises to which access had been prohibited. The Claimant confirmed that the area where the simulators had been stored was a specially built locked up and fenced off area to which only he and Mr Caudle had keys, in addition to the Managing Directors. The Claimant confirmed that these matters were discussed with him in the disciplinary hearing. He also stated that they discussed the statements that had been taken in the investigation and that he expressed his opinion that they had been forced on the witnesses or that there had been some type of collusion but he did not explain how or when that had happened or who had been responsible. The Claimant was unable to clarify this at the Tribunal Hearing.

39. It is unlikely that this discussion would have occurred if Mr Holyfield had informed the Claimant that he had already decided that morning that the Claimant was to be dismissed. From the notes of the disciplinary hearing and from Mr Holyfield's and the Claimant's evidence; the Tribunal finds that there was a full disciplinary hearing in which the Claimant had opportunities to respond to the evidence and to answer the allegations laid against him. It is likely that at the start of the disciplinary hearing the Claimant told Mr Holyfield, based on Mr Flynn's email response of 17 May, that he believed that the Respondent had already decided to dismiss him. He stated as much in his email response to Mr Flynn on 18 May. Well before the disciplinary hearing the Claimant believed that the Respondent had decided to dismiss him and this is what he expressed at the start of the hearing.

40. However, Mr Holyfield told him that no decision had yet been made and that it was his decision whether a disciplinary sanction would be imposed on him or not. He was informed that the purpose of the disciplinary hearing was to provide an opportunity for him to respond to the allegations and put his side of the story to management.

41. In the disciplinary hearing the Claimant confirmed that prior to the 12 May, the Respondent had made him aware that the simulators were to be kept in the fenced off area and were not to be accessed by any member of staff without being supervised by Radical Simulators. He was aware that this was the reason why he had been involved in the construction of a fenced off area with a lock on it for the simulators to be contained in. He also agreed that Jack Johns, Stacey Lawday and Andy Brandon were junior members of staff but stated that he was not there to 'babysit' them. However, he agreed that he was the Venue Manager on the day and that this included supervising junior staff.

42. In the disciplinary hearing the Claimant admitted that the X-box had been played off and on during the day and that it had been visible to some customers. He also stated that he had asked Mr Johns to put it away. However, even if he had done so, which Mr Johns, Mr Lawday and Mr Brandon denied; that would have been an inconsistent message from him since he had also been playing on it. He admitted taking the company laptop into the fenced off area after Mr Johns had left with his X-box; and trying to get one of the simulators started with it. It was at this point that he said for the first time that the reception had not been left unoccupied as Jack Brown had been there. Mr Holyfield pointed out to him that he had not stated this before. None of the three witnesses had

stated that Mr Brown had been left on reception. Also, Mr Brown had not been trained to take bookings or deal with telephone enquiries.

43. The Claimant stated that he was unaware of any damage that an unsolicited X-box could have done to the simulators and was also not aware of any health and safety risks involved in misusing the simulators.

44. Mr Holyfield went through with the Claimant the clauses in the contract and disciplinary rules that related to his conduct on the day. In the disciplinary rules at section 3.1 headed 'misconduct' he referred to subparagraph (c) damage to, or unauthorised use of our property and 3.1 (k) Negligence in the performance of duties as the misconduct the Claimant had done. He also referred to section 4.1, headed "gross misconduct", which stated that Gross misconduct is a serious breach of contract and includes misconduct which, in the Respondent's opinion, is likely to prejudice the business or reputation or irreparably damage the working relationship and trust between the employee and the Respondent. Gross misconduct could be dealt with under the Respondent's disciplinary procedure and would normally lead to dismissal without notice or pay in lieu of notice. Examples of gross misconduct given in the rules and which Mr Holyfield referred to were 4.2(e) serious misuse of our property or name, (i) bringing the organisation into serious disrepute, (l) serious or repeated breaches of health and safety rules or serious misuse of safety equipment, (r) serious neglect of duties, or a serious or deliberate breach of an employee's contract of employment or operating procedures, (aa) a serious misuse of the company IT systems including misuse of developed or licensed software, use of unauthorised software and misuse of email and the internet and/or (cc) unauthorised entry into an area of the premises to which access had been prohibited.

45. It was pointed out to the Claimant that his contract of employment stated at paragraph 3.2 that he would perform his duties faithfully and diligently and exercise such powers consistent with those duties given to him; obey all lawful and reasonable directions of the Company; observe in form and spirit any relevant Company policy, procedures, rules and regulations (whether formal or informal); and use his best endeavours to foster the Company's interests.

46. The Claimant asked about his job description and was told that he knew the duties of his job. The Tribunal finds that as he had worked as Venue Manager and Head mechanic in the workshop since he started his employment, it is likely that he was fully aware of what the job entailed.

47. During their discussions in the hearing it was clear to Mr Holyfield that the Claimant did not accept any responsibility for what had occurred. However, Mr Holyfield considered that if the Claimant's version of events was correct and he had not given Jack Johns permission to go home and retrieve his X-box then he ought have treated his conduct as a disciplinary matter and informed him of that on his return. The Claimant had not done so but had instead joined in with the activities with the X-box. That strongly suggested that he had given permission for Mr Johns to go home and get it. Mr Holyfield also considered that the Claimant had lied to him and Mr Flynn when he stated that he did not know and had not given Jack Johns permission to go home and get his X-box.

48. Also, the Claimant disputed that anyone could have been injured if they had been successful in getting the simulators started. Radical Simulators had advised the Respondent that when the simulators are started for the first time the steering wheel spins

violently in both directions for calibration purposes. The Respondent had been told that if anyone held the steering wheel during that process it would break his or her arm. The Claimant was unable to dispute this, as he was unfamiliar with the machines. He disputed that he was responsible for managing and supervising staff on the day.

49. Mr Holyfield noted with concern that the Claimant did not appear to appreciate the severity of the situation or to care about the impact that it could have had on the business. He disputed that the investors would have been concerned if they had come in and seen staff playing the X-box at reception or that Radical Simulators would been concerned about damage to their equipment had they arrived to set up the simulators and found staff meddling with them.

50. Mr Holyfield concluded that this was gross misconduct. He also concluded that the Claimant's refusal to take responsibility for anything other than playing Xbox and trying to get the simulator working, as well as his conduct; had caused irreparable damage to the relationship of trust and confidence between him and the Respondent. He was unapologetic. It was only in the Tribunal Hearing that the Claimant admitted that he had 'dropped the ball' on the day, meaning that he had failed to do his job properly. At the time of disciplinary hearing, the Respondent did not believe that they could trust him to continue as Venue Manager.

51. Mr Holyfield considered what was the appropriate sanction in all the circumstances. He considered whether there were other actions short of dismissal that would be appropriate in the circumstances. However, due to the Claimant's refusal to apologise or take responsibility, the fact that he may not have told the truth in relation to Mr Johns going home to get the X-box and the serious nature of the breaches; he considered that summary termination of his contract was the most suitable sanction to impose.

52. Paragraph 15 of the Claimant's employment contract was titled 'Summary Termination". It stated that the Company may terminate the employee's employment at any time, without notice or pay in lieu of notice, and with no liability to make any further payments, if he commits any act of gross misconduct or he is negligent and/or incompetent in the reasonable opinion of the Company in the performance of his duties.

53. The Claimant was informed that his contract was terminated and that this would take effect from 26 May. A letter of dismissal was sent to him dated 26 May, which confirmed that the reason for his dismissal was gross misconduct on 12 May. It stated that the reasons for terminating his employment was: "Bringing the organisation into disrepute, serious neglect of duties, or a serious or deliberate breach of operating procedures; and a serious misuse of our information technology systems." The Respondent informed the Claimant that he would be paid up to the end of the month and that he was not to return to the site. They had agreed at the disciplinary hearing that the Claimant was to send information about outstanding expenses to the Respondent so that those could be paid. Once he had done so, the Claimant was paid his final salary and reimbursed for his expenses. There was further correspondence between the parties clarifying the various parts of in his final salary and adjustments were required to his final payment. By 1 June the Claimant had been paid all monies due to him.

54. By a letter dated 1 June the Claimant informed the Respondent that he wished to appeal against his dismissal. He appealed on the grounds that the penalty of dismissal was too severe, that the Respondent had not listened to his explanation of the events on

the day and that his previous clean disciplinary record and long service should have been taking into account in the consideration of an appropriate penalty. The Claimant also asked again for his job description and for the notes of the investigation interviews. He alleged again that his dismissal had been decided upon before the disciplinary hearing.

55. Mr Holyfield and Mr Flynn had both been involved in earlier parts of the disciplinary process. They considered that it was not appropriate for either of them to hold the appeal hearing. Their investors/silent partners, Jamie and Martin Bedwell agreed to consider the appeal. The Claimant was not informed of this but was simply offered a meeting with Mr Holyfield on 6 or 7 June.

56. Before the meeting, Mr Jamie Bedwell spoke to Mr Flynn about the Claimant's grounds of appeal. He asked whether there was any substance to the Claimant's allegation that the decision to dismiss him had been made before the disciplinary hearing and had been communicated to colleagues. Mr Flynn confirmed that the decision had not been made before the disciplinary hearing and that as he had not been the decision maker no decision had been made before the disciplinary hearing on 25 May. The Claimant had been informed of the decision on the day. He also confirmed that Luke Caudle had been informed of the Claimant's dismissal on 26 May in order that it could be communicated to colleagues. Mr Flynn confirmed that as the investigation statements were handwritten and difficult to read, he had typed up a summary which he provided to the Claimant as it was easier to read and covered all the main points. He also confirmed that the security monitor had been connected to the computer and had been working at the time that it was disconnected on 12 May. Lastly, he confirmed that no cost saving had been achieved by dismissing the Claimant. The Respondent confirmed at the Hearing that they have had to replace the Claimant with 4 members of staff: two additional Venue Managers and two junior mechanics; at an increased cost to the business.

57. Mr Holyfield met with Martin Bedwell on 5 June at his home in Kidderminster. He prepared a note of the matters that needed to be discussed with Messrs Bedwell and those notes were in the bundle of documents in the Hearing. Mr Holyfield presented Mr Bedwell with all the documents in the case, which included the Claimant's written statements of the events of 12 May, the statements taken by Mr Flynn and his typewritten summary, notes of the disciplinary meeting, the dismissal letter dated 26 May and the Claimant's grounds of appeal. Mr Bedwell also spoke to Mr Flynn during that meeting. Jamie Bedwell spoke to his father about the documents, which they went through in detail.

58. After careful consideration of all the documents, the information provided by Mr Flynn on the investigation, and the grounds of appeal; Jamie and Martin Bedwell concluded that it was appropriate to consider the Claimant's conduct on 12 May as gross misconduct and that the sanction of dismissal had not been excessive. They also considered that the Claimant had been given sufficient evidence in the disciplinary process to enable him to properly present his case and his appeal. He had the summary of the investigation interviews. They concluded that Mr Holyfield had considered all the relevant circumstances when making his decision, including the Claimant's length of service and clean disciplinary record. They concluded that the Claimant had not appreciated the gravity of his misconduct and had not taken sufficient responsibility for his actions. He had only admitted to trying to get the simulator working. The Claimant had been in breach of a clear management instruction not to allow anyone near the simulators. He had also breached his contract of employment and the disciplinary rules as set out

above. Messrs Bedwell considered that the Claimant's conduct amounted to gross misconduct and had made his position untenable. They agreed that it was appropriate to expect the Claimant to be held to a greater level of responsibility than the other more junior employees involved given his seniority and his role as Venue Manager.

59. Martin Bedwell informed Mr Holyfield that their decision was that unless the Claimant raised new points at the appeal meeting on 7 June or presented any additional evidence - which he and Jamie Bedwell would need to be consider; the decision to dismiss him for gross misconduct should be confirmed.

60. When Mr Holyfield met with the Claimant on 7 June he did not inform him that Jamie and Martin Bedwell had considered his appeal. The Claimant was not aware of their involvement. The Claimant believed that Mr Holyfield was conducting this appeal on his own, having already made the decision to dismiss him.

61. The Claimant recorded the appeal hearing without seeking prior approval from the Respondent, in direct contravention of his employment contract. He reproduced parts of that recording as a transcript in his witness statement to this Tribunal. The transcript confirms that Mr Holyfield gave the Claimant an opportunity to put his appeal points forward and that he considered them and responded to them in the meeting. In the appeal hearing the Claimant asked again for his job description. Mr Holyfield became frustrated and told him to look up the definitions of 'manager' and 'mechanic' in the Oxford dictionary.

62. In the appeal hearing Mr Holyfield answered the appeal point that he had made his mind before the hearing. He confirmed that he told the Claimant on the day of the disciplinary hearing that he wanted to hear from him what had happened on the day and that he had not yet made his decision. He confirmed that he made his decision at the end of the disciplinary hearing. Also, the transcript confirms that he stated in the appeal hearing that he had considered the Claimant's long service and clean disciplinary record but concluded that the Claimant's conduct on 12 May was even more concerning given the long service. Mr Holyfield considered that the conduct on the day was so serious because it could have jeopardised the Respondent's relationship with Radical Simulators and with its investors. From the discussion in the appeal hearing, the Claimant did not accept this as a legitimate concern because no one had been hurt and the equipment had not actually been damaged. The Respondent was also concerned that the Claimant still did not take responsibility for his actions. He did not accept responsibility for his failure to properly manage the other more junior members of staff.

63. At the end of the appeal hearing Mr Holyfield informed the Claimant that he was confirming the Respondent's decision to dismiss the Claimant on the grounds of gross misconduct.

64. The Respondent's disciplinary procedure stated that it did not form part of the employee's contract of employment. It also stated that the employee was entitled to written notice of the date, time and placed of the appeal hearing and that the meeting would normally take place 2 – 7 days after receipt of that notice. The appeal hearing would be either a re-hearing or a review of the fairness of the original decision in the light of the procedure that was followed and any new information that may have come to light. The procedure stated that wherever possible the appeal hearing will be conducted impartially by a manager who has not been previously involved in the case. The

procedure stated that the employee had a right to be accompanied to the appeal meeting. There was also a possibility that the hearing could be adjourned in there was a need to carry out further investigations, if relevant. Following the appeal hearing, the Respondent could either confirm, revoke or substitute the original decision. The procedure ended by stating that the Respondent would write to the employee within one week of the appeal hearing to notify the employee of the result and could also do so in person.

Law

65. Section 94(1) of the Employment Rights Act 1996 (the Act) gives an employee the right not to be unfairly dismissed.

66. Section 98(1) of the Act states that in determining whether a dismissal of an employee is fair or unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is for a reason falling within sub-section (2).

67. Conduct is one of the possible reasons set out in that sub-section.

68. Section 98(4) states that the next stage for the tribunal is to determine whether the dismissal was fair or unfair. That 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. The tribunal will determine this in accordance with equity and the substantial merits of the case.

69. The guidelines set out in the case of *BHS v Burchell* [1980] ICR 303 are definitive in the assessment of a complaint of unfair dismissal. Those guidelines give three questions that the Tribunal must ask itself, as follows:

69.1 whether or not the employer reasonably believed that the employee had committed the misconduct

69.2 whether or not the employer had reasonable grounds upon which to sustain that belief, and

69.3 at the time that he had that belief, had the employer carried out as much investigation into the matter as was reasonable.

70. The Claimant submitted that the investigation was flawed because some of the meetings with members of staff had occurred under duress. He believed that the investigator had not allowed them to say what had happened but that they agreed to say what they did in order to save their jobs. He submitted that Jack Johns had been dismissed and had made his statement so that he could get his job back. The Claimant also complained that the investigation officer had referred to him as having committed gross misconduct quite early in the proceedings and that it had been decided from there that he was to be dismissed. He had complained of the lack of CCTV evidence of the reception area.

71. The Respondent submitted that it had carried out a reasonable investigation. It had been expensive to replace the Claimant so if the investigation had found out that the junior

members of staff had been responsible then it is inconceivable that it would have kept them on and dismissed the Claimant. This was a new start up that depended heavily on its investors and on building good relationships with suppliers. The Claimant's actions put both of those in jeopardy. The Claimant's combination of skills as a good mechanic and Venue Manager was difficult to find and the Respondent replaced him with 4 members of staff.

72. The Tribunal was aware of the case of *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ. 94. In that case, a floating housing support worker claimed excessive amounts of mileage as his essential car user allowance. An investigation conducted by the employer led to disciplinary proceedings at the end of which the worker was dismissed. The worker contended in the EAT that the Tribunal failed to consider whether the Respondent had undertaken a reasonable investigation into his response to the disciplinary allegations. It was his case that the employer should have investigated all the possible scenarios that he put forward as reasons why his mileage claims were as high as they were. In the Court of Appeal Richards LJ made the following statement:

> *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. Moreover, in a case such as the present it is misleading to talk in terms of distinct lines of defence. ….. What mattered was the reasonableness of the overall investigation into the issue."*

73. It is settled law that it is not for this Tribunal to substitute its own view of the employee's conduct. What the Tribunal must determine, as stated above, is whether or not the employer acted reasonably.

74. The Tribunal considered the case of *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] EWCA Civ. 903 in which it was confirmed that the Tribunal has to determine whether:

> "*by the objective standards of the hypothetical reasonable employer, rather than by reference to the Tribunal's own subjective views, the employer has to act within 'a band or range of reasonable responses' to the particular conduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable.*"

75. The range of reasonable responses test applies to the decision to dismiss as opposed to any other sanction; as well as to the decision to take disciplinary action.

76. The Claimant submitted that his dismissal had been unfair because he believed that the Respondent failed to conduct a thorough investigation i.e. they had not got CCTV footage from the camera at reception to show whether he had been playing the Xbox or the game there. He queried whether the statements obtained from his colleagues were freely given. He submitted that the investigation was flawed as Luke Caudle and Jack Brown had not been interviewed. He also stated that he had various people telling him

that they had known that he was going to be dismissed before the disciplinary hearing, which meant that the decision had been premeditated and had not been based on what had been said at the disciplinary hearing. He referred also to Mr Flynn's reference to gross misconduct and trust being irrevocably eroded – in his letter of 17 May before the disciplinary hearing - as proof that the decision had already been made and the disciplinary hearing was only a formality.

77. The Respondent submitted that this was a small employer, a new start up with limited resources dealing with a disciplinary matter. The Respondent had conducted a reasonable investigation. Ms Lord submitted that the Claimant had not stated what evidence relevant to the issues Mr Brown could have provided. He had informed Mr Caudle on the following day what had occurred. No one had stated that he had been involved. It was not until much later that the Claimant stated that he had been on reception for some of the time. Mr Caudle had not been there on the day. It was submitted that Mr Flynn carried out a reasonable investigation.

78. The Respondent submitted that it had a genuine belief that the Claimant had committed misconduct. The financial impact on the business if something had got damaged would have been significant. They lost trust in the Claimant, especially when he did not seem to appreciate the seriousness of what occurred and what could occur again if that was his attitude to his responsibilities as the Venue Manager who would be in charge in the absence of the Managing Directors.

79. In determining whether an employer had acted reasonably the Tribunal can take into account the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Code was introduced in 2009 and revised in 2015. The Code states that it provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. Non-compliance with the ACAS Code would not necessarily render a dismissal unfair. However, Employment Tribunals can take the Code into account when considering relevant cases. A Tribunal can adjust any awards made by up to 25% for unreasonable failure to comply with any provisions of the Code.

80. The Respondent submitted that its policy did not require the statements prepared in the investigation to be given to the employee concerned. There was discretion to do so. In relation to the appeal the Respondent submitted that the Claimant had been offered a right of appeal. His appeal should have been considered by someone different from the person who dismissed him and it actually had been. The Claimant had not been told of the involvement of the appeal officer but it had been considered by Jamie and Martin Bedwell. Ms Lord referred the Tribunal to the case of *Westminster City Council v Cabaj [*1996] IRLR 399. In that case the Respondent failed to give the employee an appeal before a panel constituted in the way set out in the contractual disciplinary policy. The Court of Appeal held that the defect in the composition of the appeal tribunal had been a significant contractual failure in that case. However, it did not mean that the decision to dismiss the employee was necessarily unfair. LJ Morritt held that the question for the Tribunal is not whether in all the circumstances the employer acted reasonably in dismissing the employee; but instead, whether the employer under section 98(4) (of the Employment Rights Act 1996) acted reasonably or not in treating the reason relied on as a sufficient reason for dismissing the employee. That question must be decided in accordance with equity and the substantial merits of the case. Therefore, in determining whether a contractual breach rendered a dismissal unfair the tribunal ought to consider

whether the effect was to deny the employee an opportunity of demonstrating that the employer's real reason for dismissing him was not sufficient.

81. The Claimant submitted that it was not reasonable to dismiss him. He submitted that no one had been injured and he disputed whether the investors would have pulled out had they come to the business that day and seen the staff playing on the X-box or trying to get a simulator working. He disputed whether Radical Simulators would have been concerned had they also attended and seen the staff.

82. The Respondent submitted that this was a fair dismissal. Also, that even if the Claimant had looked at the investigation statements at the disciplinary hearing rather than just the summary that he had been given, he would not have been able to add anything as he has not done so since he received them. He had not made any points in the Hearing about them.

83. It was the Respondent's submission that it was appropriate to dismiss the Claimant for gross misconduct based on the investigations conducted throughout the process. The Tribunal was urged to step back and look overall at the process followed by the Respondent in reaching that decision.

84. The Respondent's case was also that even if the Tribunal considered that the dismissal was unfair because of a failure on procedure, it would need to consider whether under the principle set out in the case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 the Claimant would have been dismissed anyway, at the same time as he was here, even if a fair process had been followed. It was the Respondent's submission that he would have and that any compensation due to him for unfair dismissal in those circumstances should be reduced by 100% to reflect that.

85. Both parties made submissions on the matter of contributory conduct. Under section 123(6) of the Act where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of 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.

86. If a tribunal concludes that an employee has been unfairly dismissed but that there was conduct on the part of the employee that was, or could be regarded as blameworthy, it is bound to consider contributory fault irrespective of whether the issue has been raised by the parties.

87. The Respondent submitted that it would be open to the Tribunal in this case to conclude that the Claimant contributed to his dismissal to the extent that any remedy due to him should be reduced by 100%.

<u>Applying law to facts</u>

88. The first question for the tribunal is to determine the reason for the Claimant's dismissal.

89. It is this Tribunal's judgment that the Claimant was dismissed because of his conduct on the 12 May. Although the Claimant submitted that he was dismissed as a cost saving measure, the Tribunal accepted the Respondent's undisputed evidence that it cost

the business more to recruit staff to take the Claimant's place and that at least 4 members of staff had been taken on to do so. The Claimant had been employed for over 2 years and there was no suggestion that the Respondent were in financial difficulty so that they needed to cut costs. The Claimant had been good at his job and had been awarded increases in his salary to reflect the Respondent's confidence on the day. There was no evidence that the Respondent wanted to dispense with the Claimant's services before the events of 12 May.

90. It is this Tribunal's judgment that the Claimant was dismissed because of his misconduct on 12 May.

91. Did the Respondent have a reasonable belief that the Claimant had committed gross misconduct at the time of dismissal?

92. It is this Tribunal's judgment that Mr Holyfield had not made up his mind to dismiss the Claimant at the start of the disciplinary hearing. The situation was bleak but he had not made up his mind. He wanted to hear the Claimant's explanation of the events of the day. At the end of the investigation Mr Flynn had expressed his opinion about the Claimant's position but Mr Holyfield had not yet spoken to the Claimant about the incident. The Respondent knew that they must keep the investigation and the disciplinary hearing separate that is what happened. Mr Flynn handed over the investigation papers and had nothing more to do with the matter. Mr Holyfield then conducted the disciplinary hearing. At the time that he dismissed the Claimant, Mr Holyfield believed that he had committed gross misconduct on 12 May and that it was reasonable to dismiss him.

93. Was that belief based on a reasonable investigation? Had the Respondent carried out a reasonable investigation at the time that it formed the belief that the Claimant had committed gross misconduct?

94. The Respondent acted immediately upon hearing about the incident to suspend the Claimant and put an investigation into motion. Mr Flynn attended to take statements from those involved on the following morning. There was no evidence of collusion between or of coercion of the witnesses. All the witnesses stated that the Claimant had been aware of and had tacitly agreed that Mr Johns could go home of his X-box. They all stated that the Claimant had played the X-box that day. They all stated that they had taken the X-box to try to start a simulator and later, had tried with the reception laptop. The Claimant only agreed that he had tried to start a simulator with the reception laptop. In addition, the Claimant refused to take any responsibility for allowing junior staff members to conduct themselves in this manner. He accepted that as Venue Manager he oversaw staff that day. He accepted that a fenced off area had been created to keep everyone away from the simulators. Not only had he allowed them to breach that area, he had joined in with them. That would have given junior staff the indication that it was acceptable conduct. Whether Mr Johns, Mr Lawday and Mr Brandon had keys or banked the day's takings, they were still junior members of staff to the Claimant and he was aware of this.

95. Despite not having a written job description, it is this Tribunal's judgment that the Claimant knew his job and usually did it well. He knew that he was in charge when the MD's and Mr Caudle were not there. There was no evidence of any confusion around the nature of his role within the company on 12 May.

96. It is this Tribunal's judgment that this was a reasonable investigation. The Respondent interviewed all relevant members of staff. It was not necessary to interview Mr Caudle as he had not been there on the day. Mr Brown had not been referred to by anyone in the investigation. The CCTV was not required as the Claimant admitted that he had played the game on the reception computer and that he had gone to the simulator with the reception computer to try to start it. The other members of staff had confirmed that he had played the X-box. The Respondent had three statements confirming this and it was reasonable to rely on those statements instead of the Claimant's in determining what happened on the 12 May.

97. The Claimant had opportunity to consider the investigation evidence. He was not given the actual statements until after his dismissal but he was told of the evidence against him. It would have been better for him to be given the actual statements before his disciplinary hearing so that he could see the evidence against him. However, the Claimant was aware of the allegations against him throughout the proceedings. He had opportunity at the disciplinary hearing to hear the evidence and give his explanation of what occurred on 12 May. Apart from his denial that he had played the X-box the Claimant agreed with the evidence provided by the others. The main dispute between him and the Respondent was the importance of the events of 12 May. The Claimant's position was that as no one had been hurt there was nothing to be concerned about. His disputed that Radical Simulators or Jamie and Martin Bedwell would have been concerned had they walked into the business on 12 May and seen the staff trying to set up the simulators with the reception laptop or playing an X-box or unsolicited game on reception. As the Managing Directors run the business and were responsible for maintaining a relationship with suppliers and investors, they were best placed to judge whether the incident had the potential to damage their business.

98. The Claimant failed – at the disciplinary hearing and at the appeal – to appreciate the seriousness of what had occurred. It was this and his failure to properly manage junior staff, together with the actual misconduct that made Mr Holyfield conclude that despite his long service and clean disciplinary record; he could not remain as an employee with the Respondent.

99. The investigation and the disciplinary hearing led the Respondent to conclude that the Claimant had been negligent in the performance of his duties. Also, that he had neglected his duties, misused the IT equipment and entered an area of the premises to which access had been restricted and not for a legitimate purpose. He had therefore breached his employment contract and committed gross misconduct.

100. As the Managing Directors were frequently out of the business they needed Venue Managers that they could rely on to manage junior staff and to do their job. The Respondent concluded at the end of the process that its trust in the Claimant to do so had been damaged.

101. The Claimant was given right of appeal. However, he was not informed that Mr Jamie and Mr Martin Bedwell were going to be part of the appeal process. He was not told about the meeting with Messrs Bedwell on 5 June but only of his meeting with Mr Holyfield on 7 June. In addition, the person who conducted the appeal meeting on 7 June was the Managing Director who had dismissed him. The Respondent's procedure did state that the appeal hearing would wherever possible, be conducted by a manager not previously involved in the case. Mr Holyfield had been previously involved as he had

dismissed the Claimant. There were no other managers senior to the Claimant who could conduct the appeal. Mr Holyfield did not in reality conduct the appeal on his own. Although the Claimant had not been aware of it – Jamie and Martin Bedwell had also been part of the appeal process.

102. The Claimant did not submit in the Hearing that the way in which the appeal was conducted was a fundamental flaw in the procedure followed to confirm his dismissal. It is unusual for an employee to have an additional layer of appeal applied in their case but to not be told about it. The Claimant was entitled to an appeal before someone different to the person who made the initial decision to dismiss him. Did he have that? The answer must be yes as there was sworn evidence from Messrs Bedwell, which the Claimant did not challenge, that they considered his appeal before his meeting with Mr Holyfield on 7 June and determined that his dismissal should be confirmed unless he brought something new to the appeal hearing.

103. This was a small employer without in-house HR support and with only two Managing Directors who had already been involved in the investigation and disciplinary hearing stages. It was right for them to involve their investors in the next stage. It would have been appropriate for the Respondent to inform the Claimant that Messrs Bedwell were considering his appeal.

104. It is this Tribunal's judgment that the Respondent did not breach the ACAS Code of Practice and did not fundamentally breach the Claimant's contract of employment or its disciplinary procedure. The potential flaws were the failure to give him the investigation statements as opposed to the summary and the failure to notify him that Jamie and Martin Bedwell were going to consider his appeal. The Claimant knew the allegations that he faced. He took part in the investigation before a decision was made to start disciplinary proceedings against him. Also, he was able to represent himself at the disciplinary hearing and at the appeal meeting with Mr Holyfield. Someone senior to the person who dismissed him, considered his appeal. His meeting with Mr Holyfield was to see if he had anything new to put forward which would have required consideration by Messrs Bedwell at another meeting. It is this Tribunal's judgment that any flaws in the procedure adopted by the Respondent were not sufficient or of such gravity as to make the process and the dismissal unfair.

105. The question for this Tribunal, as stated above is whether, taking all matters into consideration, including the size and administrative resources of the Respondent, it acted reasonably in treating the Claimant's gross misconduct on 12 May as sufficient reason to dismiss him?

106. It is this Tribunal's judgment, taking everything into account and looking at the process overall, that the Respondent had a reasonable belief that the Claimant had committed gross misconduct in that he allowed a junior member of staff to go home to collect his X-box, he allowed or took part in that member of staff and others going into the fenced-off area where rented simulators were stored and attempted to start them. The weight of evidence from the other members of staff in the investigation was that the Claimant played the X-box during the day and did not tell them to put it away and 'crack on' as he stated. The evidence was that he was part of a second attempt later in the day to start a simulator with the reception laptop, leaving reception without it, and to play an unsolicited game on the laptop when it was returned to reception. The Claimant had opportunity to explain the events of 12 May from his perspective. He had opportunity to

put forward evidence that the witnesses who had given statements to the investigation had fabricated their evidence. He had opportunity to show that his conduct on the day was not a sufficient reason to dismiss him. It was not until after his dismissal that the Claimant raised lines of enquiry such as looking at the CCTV evidence and querying why Mr Brown had not been interviewed. It was appropriate, given the weight of evidence from the other witnesses for the Respondent not to have followed up those lines of enquiry at that time, given that they had a reasonable belief that the Claimant had committee gross misconduct and the Claimant's defence to the allegations was not that he had not been there but that it was not as serious as the Respondent believed. That was a matter of judgment. Whether or not he played X-box on reception during that day was not the only matter that concerned the Respondent as they were also concerned about him allowing the X-box to be brought into work, the attempts to get the simulators working with the X-box and the reception laptop and the Claimant's response that as no one had been hurt, there was nothing to worry about.

107. The Claimant had a disciplinary hearing and an appeal hearing at which he could make representations and put his case in response to the allegations against him. Although he was unaware of it at the time, someone other than the person who dismissed him had considered his appeal against dismissal. At the Hearing and in his examination of Messrs Bedwell he did not submit anything additional to his appeal letter that he would have said to Messrs Bedwell on 5 June had he known that they were considering his appeal.

108. The Respondent concluded that the Claimant had committed gross misconduct. This was compounded by his failure to consider the events of 12 May to be serious. This affected the Respondent's decision on the appropriate sanction to impose on him following the conclusion that he had committed gross misconduct. The Claimant as Venue Manager was in a position of responsibility. His job was to supervise junior staff and manage the venue and the workshop when the other managers were not there. He had failed to do so effectively on this occasion. In terms of his ability to do the job in the future, he had not accepted that his misconduct was serious. He disputed whether Radical Simulators would be concerned if they had seen him and his colleagues trying to get the machine started having no knowledge of Radical Simulators and their arrangements with the Respondent. Whether the simulators cost £3,000 or £50,000, they were still expensive pieces of equipment and it was open to the Respondent as a small business to expect the Claimant to be concerned about the consequences of them being damaged while he was Venue Manager. The Claimant would not accept from the Respondent that Messrs Bedwell were likely to have been concerned about the business had they visited on 12 May and saw what was happening. The actions of the Claimant and the junior staff on the day could have damaged the business. As Venue Manager, the Claimant oversaw the business when the Managing Directors and Mr Caudle was not on duty. As such the Respondent had a reasonable expectation that he would not engage in misconduct and not join in with junior staff who were doing so, but would either report them to the MD's or discipline them, as appropriate. The Claimant had failed to do so but had instead participated in the misconduct and the Reasonably believed that he had encouraged it by allowing Mr Johns to go home for his X-box and joining in all the other misconduct that day.

109. In this Tribunal's judgment the Respondent concluded that the Claimant had committed gross misconduct and that it could no longer trust the Claimant to manage the venue properly and effectively in the absence of the MD's and Mr Caudle. Mr Holyfield

concluded and Messrs Bedwell agreed that in those circumstances it was appropriate and reasonable to dismiss the Claimant. It is this Tribunal's judgment that the Respondent acted reasonably when it treated the Claimant's gross misconduct on 12 May as a sufficient reason to terminate his employment. The decision to dismiss him was reasonable in all the circumstances.

110. In addition, it is this Tribunal's judgment that it is highly likely that had the Claimant been told about the appeal hearing with Jamie and Martin Bedwell that he would not have made any additional representations other than what was said in his letter of appeal. It is likely that they would have confirmed their same decision and the Claimant would have been dismissed at the same time that he was.

111. It is this Tribunal's judgment that the Claimant was fairly dismissed for gross misconduct. His claim is dismissed.

Employment Judge Jones

20 July 2017