EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENTS**
MR R JANIK	**V**	**UK FIRE DOORS LTD**

HELD AT: **CARDIFF** **ON:** **3 APRIL 2017**

BEFORE: **EMPLOYMENT JUDGE W BEARD**
(SITTING ALONE)

REPRESENTATION:
FOR THE CLAIMANT: **IN PERSON**

FOR THE RESPONDENT: **MR CHAMBERS (SOLICITOR)**

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal is well founded.
2. The claimant's compensation pursuant to section 123 of the Employment Rights Act 1996 is reduced by 80% on the basis that had a fair procedure been followed the claimant would have been dismissed in any event.
3. The respondent is ordered to pay to the claimant the sum of £1,224.58
4. The respondent is ordered to pay to the claimant the sum of £1200.00 costs in respect of tribunal fees incurred by the claimant.

REASONS

Preliminaries

1. I heard oral evidence from the claimant via an interpreter. The respondent called evidence from Mr Tim Askew, the managing director and the witness to the misconduct, Mr A Waterhouse, the manager who conducted the disciplinary hearing and Mrs D Askew, a fellow director and the wife of Mr Askew who conducted the appeal. I have also been provided with two bundles of documents one from each party albeit many of the documents coincide.

2. The issues were identified with the parties at the outset of the hearing:
   2.1. Given that the respondent relied on conduct for dismissing the claimant, was the respondent's belief in this conduct based on reasonable grounds and was it genuine?
   2.2. Did the respondent carry out a reasonable investigation given the facts it relied upon to support the belief in misconduct?
   2.3. Was dismissal a reasonable response to the conduct in question?
   2.4. Was the appeal fair given it was decided by the wife of the witness to the conduct.
   2.5. If the dismissal was unfair should it be reduced on the grounds of contribution?
   2.6. If the dismissal was unfair should it be reduced on the grounds that had a fair procedure been followed the dismissal would have occurred in any event?

The Facts

3. The respondent manufactures fire doors, it employs approximately 130 employees. The claimant was a production operative/team leader. There is management team made up of Mr and Mrs Askew, Mr Waterhouse (Operations Director), a Finance Director, who was essentially a consultant and a Sales Director (the latter three are not directors within the meanings from the Companies Act). The claimant had been employed by the respondent from 13 March 2006 to the date of his dismissal 12 October 2016.

4. Matters begin on 7 October 2016 when Mr Askew was driving towards his premises.
   4.1. Mr Askew was driving past a container where inflammable materials were kept.
   4.2. Mr Askew saw the claimant and another employee standing near the door of the container next to a forklift truck; he gained the impression that he saw the claimant and the other employee smoking. He was angry about this because there was a clear rule about smoking and where employees were permitted to smoke because of health and safety issues. This was not a designated smoking area and given the flammable materials it was also a dangerous place to smoke.
   4.3. Mr Askew then approached the two employees on foot. His evidence to me was that although he could not see a cigarette in the claimant's hand he saw smoke and the claimant dropping the cigarette. He also indicated that neither denied smoking when he challenged them.
   4.4. The claimant's account to me was that he had said he didn't smoke and had not been smoking. His evidence was that he was not smoking and had come out to get a certain material from the flammable store and that he was driving the forklift when Mr Askew appeared.
   4.5. The evidence also revealed that cigarette butts had been discovered on the floor at this location previously.
   4.6. There was a dashboard video camera "dashcam" on Mr Askew's car. When he spoke to the two employees he indicated that the camera would have recorded them smoking. He never checked the footage because he considered that he had seen both employees smoking.

4.7. I am clear that Mr Askew is genuine in his belief that the claimant was smoking and that the evidence that he gave me is the evidence which was provided in the disciplinary process.
4.8. However, having heard from the claimant and the respondent I consider I am not in a position to conclude whether the claimant was actually smoking at the time.

5. Mr Askew returned to his office and telephoned his wife, also a director, and explained what he had seen. Mrs Askew told him that he should arrange for Mr Waterhouse to carry out a disciplinary process. Mr Askew then approached Mr Waterhouse and had told him his version of events.

6. A disciplinary meeting was arranged for the claimant in a letter dated 10 October 2016. The meeting took place on 12 October 2016.
6.1. Mr Waterhouse told me that he was not aware of ACAS guidance on disciplinary hearings.
6.2. He did not provide the claimant with any written indication of the evidence of Mr Askew prior to the hearing taking place.
6.3. He was aware that there might be dashcam footage but decided not to view it, being content with the account given by Mr Askew. Mr Waterhouse did not test any of the evidence given to him by Mr Askew.
6.4. Mr Waterhouse was aware that the claimant's native language was Polish, however he considered the claimant to be proficient in English and amply supported by a Polish colleague who also spoke English.
6.5. When asked about his reasons for preferring the account of Mr Askew to the claimant's Mr Waterhouse indicated that he took the view that there was no reason for Mr Askew to give a false account. When asked if he considered the possibility that Mr Askew could be mistaken he said that he didn't consider the possibility of Mr Askew giving a mistaken account at all, despite the fact that the initial sighting was in a moving vehicle and the later sighting was from a distance.
6.6. He decided that the claimant had been smoking and that the claimant was aware of the seriousness of such conduct. He also considered the claimant was aware of the policies on smoking (a fact which the claimant in his evidence confirmed to be correct.
6.7. On that basis Mr Waterhouse considered the claimant was guilty of gross misconduct and dismissed him. He told me that he believed he had no choice but to dismiss and considered no other outcome. The outcome letter dismissing the claimant additionally refers to fire hazards and fire regulations.

7. The claimant appealed this decision in a letter dated 17 October 2017. He provided the following grounds: that he had not been caught smoking and there was insufficient proof: that the claimant was only in the area of the container because he had to obtain materials: he argued that even if he was smoking that only amounted to unauthorised time off which was misconduct and not gross misconduct: that the claimant was not informed that the disciplinary hearing involved matters relating to fire regulations: that the claimant was not able to keep up at the disciplinary hearing as the vocabulary used did not match his abilities to speak and understand

English and that he had not been given the opportunity to ask questions at the disciplinary hearing. The claimant asked for an interpreter because he could not understand and respond properly; he suggested his wife or an independent interpreter. Mrs Askew told me that she did not want the claimant's wife present as that could lead to emotional situations. She indicated that she understood that in the stress of the situation she understood that the claimant could misunderstand the nuances of language and lose a level of understanding but she considered other employees to be good enough.

8. An appeal meeting was arranged for 2 November 2016. The respondent refused the claimant's request for an interpreter indicating that he could have a work colleague naming two who they considered had good enough English to assist the claimant. The claimant told me that these individuals were in the same position as he was, in other words whilst their general English was good when it came to more complex matters they would be no more equipped than he was to deal with them. In any event at the appeal hearing he refused to have support from either because he considered that they would gossip about matters on the shop floor after the hearing. The respondent considered whether one of the other members of the management team could conduct the appeal but chose Mrs Askew. This was because one of the team was a consultant and the other lived at some distance from the respondent's place of business and was preparing to retire in the near future.

9. Once again the claimant could not put questions to Mr Askew and there was no written statement from him. Mrs Askew had talked to her husband on the day of the interview. She did attempt to view the dashcam footage but found that it had become corrupted. Mrs Askew she took account of the fact that the claimant had denied smoking in her meeting but had not denied it when challenged by Mr Askew on the day nor in the meeting with Mr Waterhouse. She had seen the notes of the meeting with Mr Waterhouse, these had not been approved as correct by the claimant. After the meeting she spoke again to her husband to obtain his version of events again, no notes were made of this discussion. She upheld the decision to dismiss the claimant.

10. The claimant suggested that the reason for his dismissal was the need to make redundancies. However it was clear from the evidence, including that of the claimant himself, that redundancies had regularly occurred over the years. However, the redundancies always tended to involve more recent employees because of the experience and skill levels of the more established workforce of which the claimant was one. I could not accept that a need to reduce the workforce had anything to do with the claimant's dismissal which instead arose from the respondent's view of the claimant's conduct.

11. The claimant usually earned a gross weekly wage of £370.50 and a net wage of 313.04, however there were variations in the claimant's pay due to overtime and absence which indicated that the claimant had on average earned less than that. The claimant was aged 41, having reached that age

in August 2016. At the date of his dismissal He had been employed by the respondent for 10 years. The claimant's claim for 15 weeks as a basic award was misconceived, he was entitled to 10.5 weeks as a basic award. The respondent conceded the following figures in respect of the claimant's claim on the basis that there was no evidence to contradict: £382.00 unpaid holiday pay and £1050.00 loss of earnings once the claimant obtained new employment.

The Law

12. Section 98 of the Employment Rights Act 1996 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(b) relates to the conduct of the employee

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the 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.

13. The respondent must prove the reason for dismissal. Thereafter the parties bear an equal burden as to proving whether the dismissal is fair. I remind myself of the words of His Honour Judge McMullen QC in his judgment in ***Mitchell v St Joseph's School UKEAT/0506/12*** Making it clear that an employment Judge sitting alone in unfair dismissal cases, has to be careful to remember that the law remains at it was: it is not the subjective view of the employment Judge that is important, what is being examined is the employer's reason for dismissal and the objective reasonableness of that decision. It is a review of the employer's decision. That proposition is set out very clearly in ***Turner v East Midlands Trains [2013] IRLR 107:***

> *For a good many years it has been a source of distress to unfair dismissal claimants that, with rare exceptions, they cannot re-canvass the merits of their case before an employment tribunal. In spite of the requirement in*

> *s.98(4)(b) that the fairness of a dismissal is to be determined in accordance with equity and the substantial merits of the case, a tribunal which was once regarded as an industrial jury is today a forum of review, albeit not bound to the* ***Wednesbury*** *mast.*

14. Guidance has been given to Tribunals in dealing with misconduct cases beginning with that given in ***Burchell v British Home Stores [1978] IRLR 379***. Which guides tribunals to consider the following: whether the respondent has a genuine belief in the misconduct; whether that genuine belief is sustainable on the evidence that was before the respondent; whether that evidence was gained by such investigation as was reasonable in all the circumstances of the case. Finally, I must consider whether the punishment fits the crime, in other words whether dismissal fell within the band of reasonable outcomes a reasonable employer might decide upon given the evidence upon which it was based. ***Sainsbury's Supermarkets Ltd*** **v** ***Hitt [*****2003*****] IRLR 23*** makes it clear that the test to be applied to the extent of an investigation carried out by an employer is also the band of reasonable responses. I must examine the evidence as it was before the respondent at the time of the decision, and decide whether that evidence is sufficient for a reasonable employer to hold the belief in the claimant's misconduct. Then to ask whether the investigation was reasonable in a ***Sainsbury*** sense. I am to ask myself whether or not that decision was reasonable in all of the circumstances at that point in time and on that evidence. Tribunals are warned to avoid what is referred to as the substitution mindset. Mummery LJ said in the ***London Ambulance Service NHS Trust v Small [2009] IRLR 563 CA*** :

15. *It is all too easy even for an experienced Employment Tribunal to slip into the substitution mindset. In conduct cases the claimant often comes to the Employment Tribunal with more evidence and with an understandable determination to clear his name and prove to the Employment Tribunal that he is innocent of the charge made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the Employment Tribunal so that it is carried alone the acquittal route and away from the real question which is whether the employer acted fairly and reasonably in all the circumstances of the dismissal.*

16. However, the tribunal must also consider the limits set out by Longmore LJ in ***Bowater v North West London Hospitals NHS Trust [2011] IRLR 331*** where he said;

> *I agree with Stanley Burnton that dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The Employment Appeal Tribunal decided that the Employment Tribunal has substituted it's own judgment for that of the judgment to which the employer had come but the employer cannot be the final arbiter of it's own conduct in dismissing an employee, it is for the Employment Tribunal to make*

> *it's judgment always bearing in mind that the test is whether the dismissal is within the range of reasonable options open to a reasonable employer. The Employment Tribunal made it more than plain that that was the test which they were applying.*

17. Therefore, making it clear that the answer to the question of whether it is an *objectively* reasonable decision remains the tribunal's to deliver.

18. Section 123(1) of the Employment Rights Act so far as relevant provides:

> *Subject to the provisions of this section ---------- the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

19. I must consider the principles set out in **Polkey v A.E Dayton Services Ltd [1987] IRLR 503** as to what would have happened in this case if a fair procedure had been followed. I must consider whether the claimant might have been dismissed in any event. I must assess the prospects of the claimant being dismissed compared to the prospect of him retaining his employment. A **Polkey** reduction is a broad general principal of just and equitable compensation under Section 123(1) of the Employment Rights Act 1996 (see **Gover & Ors v Propertycare Ltd [2005] ICR 1073**).

Analysis

20. The respondent had a genuine belief that the claimant had been smoking in a dangerous area.
    20.1. Clearly there were conflicting accounts provided by the claimant and Mr Askew. Preferring the evidence of Mr Askew was not unreasonable in the circumstances.
    20.2. On that basis I am clear that the respondent could properly reject the evidence of the claimant.

21. The next question is whether there was sufficient evidence gathered. I consider that it was not.
    21.1. The respondent had the opportunity to view the dashcam material soon after it was recorded. There was nothing to indicate, at the disciplinary stage, that this evidence would not be available or relevant.
    21.2. Mr Waterhouse's decision not to view the footage was not reasonable in the circumstances where two different accounts were being given.
    21.3. In my judgment, this aspect make the investigation one which fell outside the limits of the band of reasonable investigations that an employer might carry out in these circumstances.

22. In addition to this I consider that the procedure was not reasonable in a number of other respects.

22.1. The respondent did not provide the claimant with any indication of the evidence he would face prior to the disciplinary hearing. No statement was produced by Mr Askew either for the disciplinary hearing or the appeal.

22.2. The respondent did not produce Mr Askew to give the evidence before the claimant as an alternative, where the claimant could have asked questions.

22.3. The appeal hearing was held by the wife of the main witness. There were others that could have carried out the appeal. The reasons the respondent gave for not asking those others to conduct the appeal did not appear to me to be reasonable, in particular because they did not ask those individuals whether they would be prepared conduct the appeal.

22.4. When considering whether someone should lose employment a reasonable employer would not consider that travelling some distance or being a consultant was a bar to conducting an appeal. This is particularly so where there was a clear conflict of interest in the Mrs Askew deciding whether her husband was correct.

22.5. In addition to their personal relationship, an added problem was that Mr and Mrs Askew discussed the evidence before the decision to take disciplinary action was taken.

22.6. The appeal was held in circumstances where the claimant was indicating that he had concerns about the language. Mrs Askew was aware that nuance could be lost. It was not reasonable not to allow the claimant either the opportunity for his wife to interpret or if that was felt to difficult to appoint an independent interpreter.

23. In those circumstances, I have concluded that the claimant's claim of unfair dismissal pursuant to Section 98 of the Employment Rights Act 1996 is well founded. The procedural failings made this dismissal unfair. However, I am also of the view that there is a strong likelihood that the claimant would have been dismissed in any event had the procedure been altered. This is because in any event the dashcam material was corrupted. In cross examination Mr Askew was firm in his account and I have no doubt the same would have been the case had the claimant had the opportunity to cross examine him at a disciplinary. However, there is a question mark as to the approach that would be taken at appeal: in my judgment on the same evidence there would be a small prospect of a different result. I consider that there was an 80% prospect that the claimant would have been dismissed in any event.

24. The claimant's claim for 15 weeks as a basic award was misconceived, he was entitled to 10.5 weeks as a basic award. The parties agreed that £3,751.80 represented the basic award given the average gross weekly wage and that the claimant should be compensated for the three weeks' loss of earnings which was calculated at the net rate of £313.04 per week a total of £939.12. The respondent conceded the following figures in respect of the claimant's claim on the basis that there was no evidence to contradict: £382.00 unpaid holiday pay and £1050.00 loss of earnings once the claimant obtained new employment. This gives a total of

£6,122.92. That sum must be reduced by 80% leaving a sum of £1,261.97 which sum I order the respondent to pay to the claimant in compensation.

Judgment posted to the parties on

18 May 2017

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For Secretary of the Tribunals

EMPLOYMENT JUDGE N W BEARD
Dated: 17 May 2017