Case No: 2500516/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Buchan**

Respondent: **Genting Casinos UK Limited**

Heard at: **North Shields** **On: 30 & 31 August 2017**

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

Representation:

Claimant: **Mr R Owen of Citizens Advice**
Respondent: **Mr D Dyal of Counsel**

REASONS

Representation and evidence

1 The claimant was represented by Mr R Owen of Citizens Advice, who called the claimant to give evidence.

2 The respondent was represented by Mr D Dyal of Counsel who called to give evidence on behalf of the respondent, Mr N Igsiz and Mr W Hinds who are, respectively, employed as General Manager of the respondent's casinos in Newcastle upon Tyne and Edinburgh.

3 The Tribunal also had before it a variety of documents contained in an agreed bundle prepared by respondent.

The claimant's complaints

4 The claimant had presented two complaints to the Tribunal. First, that his dismissal by the respondent had been unfair; secondly, a contract claim on the basis that he did not receive from the respondent the notice of the termination of his contract of employment to which he was entitled.

The issues

5 At the commencement of the Hearing, for the benefit of the parties I briefly summarise the issues in this case, which their representatives confirmed they understood. Those issues are as follows:

Unfair dismissal

5.1 Was the claimant dismissed? The respondent accepted that he had been.

5.2 Has the respondent shown what was the reason for the claimant's dismissal? The respondent asserted conduct.

5.3 Was that reason a potentially fair reason within sections 98(1) or (2) of the Employment Rights 1996 (the "1996 Act")? Conduct is such a potentially fair reason.

5.4 If the reason was a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for the dismissal of the claimant in accordance with section 98(4) of the 1996 Act? This would include whether (taking account of the Acas Code of Practice: Disciplinary and Grievance Procedures (2009)) a reasonable procedure had been followed by the respondent in connection with the dismissal and whether (in accordance with the guidance in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439, Post Office v Foley [2000] IRLR 827) and Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903) the decision to dismiss the claimant fell within the band of reasonable responses of a reasonable employer.

5.5 In this respect, Tribunal would, however, apply the guidance set out in British Home Stores Limited -v- Burchell [1978] IRLR 379 having regard to the fact that the statutory 'test' of fairness, which is now found in section 98(4) of the 1996 Act, had been amended in 1980 such that neither party now has a burden of proof in that regard.

5.6 An aspect of the question in sub-paragraph 5.4 above was whether there had been inconsistency of treatment between the claimant and other employees and, if so, whether that made it unreasonable for the respondent to dismiss the claimant: Hadjioannou v Coral Casinos Ltd [1981] IRLR 352.

5.7 With regard to the above questions, in accordance with the guidance in Burchell and Graham, I would consider whether at the stage at which the decision was made on behalf of the respondent to dismiss the claimant its Manager who made that decision had in his mind reasonable grounds, after as much investigation into the matter as was reasonable in all the circumstances of the case, upon which to found a genuine belief that the claimant was guilty of misconduct.

Contract claim

5.8 Was the claimant entitled to any notice of the termination of his contract of employment with the respondent?

5.9 If so, to how much notice was he entitled and did he receive that notice?

Consideration and findings of fact

6 Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

7 The respondent operates licensed casinos and gambling facilities across the UK. It is a large employer of some 3,500 employees and has significant administrative and other resources including a dedicated HR Department. One of the respondent's casinos is in Newcastle upon Tyne where the claimant worked.

8 The claimant's employment with the respondent commenced on 4 April 1993. By the time of the events giving rise to his dismissal he had been promoted to Gaming Manager. In effect he was the Duty Manager for a particular shift at the casino. He generally worked the nightshift. The claimant's employment record was not untarnished. The following are recorded:

2 March 2011	Stage 1 verbal warning
14 May 2014	Letter of concern
6 June 2015	Final written warning
24 October 2016	Letter of concern

9 I would add that the circumstances giving rise to the final written warning (which I do not detail here as they are not relevant to these proceedings) can rightly be described as bizarre and incredible. I can well see why the respondent's HR Department advised that dismissal for gross misconduct was appropriate but the local managers, Mr Brown and Mr Igsiz, stood up for the claimant on that occasion and he was only given a final written warning. I also record that in respect of none of the disciplinary sanctions referred to above did the claimant lodge an appeal.

10 I am satisfied on the evidence before me that this disciplinary history was not taken into account and did not influence Mr Igsiz in coming to his decision to dismiss the claimant on 31 January 2017. Rather that decision and the upholding of that decision on appeal were solely based upon the matters that he and Mr Hinds were considering at that time.

11 Those matters came to light when, on 17 January 2017, Mr Steven Henderson, who was employed by the respondent as a Cashier, informed Raquel Emery, Duty Manager, of what he considered to be unusual promotional activities. These related to the reward system operated by the respondent. Its policy in this respect is complex and somewhat to my surprise none of the three witnesses was able to explain the detail to my satisfaction by reference to the documents in the bundle before me.

12 Be that as it may they were all agreed that so far as is relevant to this case the respondent's customers could receive incentives in two particular ways; although there were others.

13 In fact, the first is not particularly relevant. It involves customers who use a loyalty card when gaming automatically receiving onto their cards loyalty points related to the amount that they spend. Those points can then be spent for gaming or on food or drink. This form of incentive is not dissimilar to the use of a store loyalty card.

14 The second is of direct relevance to this case. Managers, such as the claimant, are able to give discretionary awards of points to customers in a variety of circumstances. Primarily the purpose is to reward loyalty, incentivise spending and retain custom over competitors. The managers who exercise their discretion in this way must provide an explanation as to why the costs were approved and by whom. The records of those explanations are then audited monthly by Mr J Brown, Deputy General Manager.

15 I interject at this stage to record that in the following paragraphs of these Reasons I have decided to refer to customers of the respondent's casino in Newcastle upon Tyne utilising a variety of capital letters so as to protect their privacy. I explained this to the representatives when announcing these Reasons and they concurred with this approach.

16 Returning to Mr Henderson, he reported to Ms Emery that G had been recorded as receiving £40.00 as a slot promotion at 3:30am. This was strange as it was known that G only visited the casino during the day. On investigation Ms Emery found that the claimant, as Duty Manager, had instructed the respondent's cashiers to put money onto the loyalty card of X and record it as having been put on the card of G. On further investigation of the respondent's records Ms Emery identified such activity by the claimant as follows:

2 January 2017	£40.00 to Y recorded to B £10.00 to Y recorded to O
3 January 2017	£40.00 to Y recorded to T £25.00 to X recorded to A £25.00 to X recorded to M
6 January 2017	£40.00 to X recorded to H
10 January 2017	£50.00 to Y recorded to B £20.00 to X recorded to S £20.00 to X recorded to I
11 January 2017	£40.00 to X recorded to S and B
12 January 2017	£40.00 to X recorded to H
13 January 2017	£25.00 to Y recorded to A £25.00 to Y recorded to V
16 January 2017	£40.00 to X recorded to G £20.00 to X recorded to F £20.00 to X recorded to C

17 Ms Emery noted that in total £500 had gone onto the cards of X and Y. An examination by Ms Emery of the CCTV operated by the respondent confirmed these transactions.

18 Ms Emery then reported her findings to Mr Igsiz who instructed her to suspend the claimant when he arrived at the casino at 8:30pm that evening. She did that in the casino car park. There is no dispute between the parties that that was inappropriate. It is also accepted that a letter of suspension was not sent to the claimant as it should have been.

19 Ms Emery had obtained statements from the respondent's cashiers, three of whom confirmed that the claimant had asked them to award promotional vouchers to one customer and record them falsely as having been given to another customer, and the CCTV showed a similar instance involving a fourth cashier.

20 Mr Igsiz asked his Deputy, Mr J Brown, to conduct an investigation into these matters. In this regard, Mr Brown interviewed the claimant on 22 January 2017. He admitted incorrectly recording the transactions but said he was not trying to hide anything because he had done so in full view of the CCTV. He also said that he wished to avoid a situation arising as had happened previously with Z. This was that Z had obtained complementary spend from both a day Duty Manager and the night Duty Manager. In this regard it appears that Z had been somewhat duplicitous. Mr Igsiz thought that Z's rewards were excessive compared with his spending at the casino and, at a Managers' meeting, imposed a limit of £50.00 per week on any awards to Z.

21 At the hearing the claimant continued to use this explanation of wishing to avoid a Z situation to excuse his actions regarding X and Y and added that he had acted as he did so as to avoid the matter coming to the attention of Head Office. I accept the evidence of the respondent's witnesses, however, that there is no comparison between Mr Igsiz limiting awards to Z to £50.00 a week, all of which had to be properly recorded and audited, and the claimant disguising awards to X and Y as being given to other customers in a way that was not transparent and could not be audited. Further, in doing so, he far exceeded the £50.00 limit that Mr Igsiz had imposed on Z's awards; he being a higher value customer to the casino than either X or Y.

22 Mr Brown decided that the allegations should proceed to consideration in accordance with the respondent's disciplinary procedure (page 53). The claimant was invited to attend a disciplinary hearing by letter of 26 January 2017 (page 231). The conduct complained of was described as being, "*Clear misrepresentation of Slot Promotional Expenses, resulting in a potential breakdown in trust*". With the invitation the claimant was invited to bring a companion and was sent the investigation documents.

23 Mr Igsiz conducted the disciplinary hearing on 31 January 2017 (page 232). The claimant chose not to be accompanied. As at the investigation meeting the claimant did not deny the wrongdoing that had been identified. Indeed he admitted that he had been doing this for more than the six events that had been identified. When asked for how long he had been doing so his reply is recorded as follows, "*Nov - Dec a few months has been more*".

24 In my experience the record of the disciplinary hearing makes for unusual if not rather sad reading. On the one hand Mr Igsiz is recorded as not questioning the claimant's honesty and integrity or his loyalty. On the other hand the claimant is recorded as saying that he had a good business case for what he had done yet "*What I did was wrong and I apologise for it*", "*I should have come to you*", and "*I know I should never have done it like this – truly sorry*".

25 At the hearing Mr Igsiz summarised the background to the events and the investigation that had taken place. The claimant maintained that there were marketing reasons for what he had done and that he had never intended to hide anything as everything was on microphone and camera. Mr Igsiz did not accept

that the claimant had a good business case for what he had done and questioned, if there was such a good business case, why the claimant had hidden what he had done. He said that the claimant's actions had damaged the trust that was paramount between them and was difficult to repair, and the claimant confirmed that he could see that. Ultimately, after an adjournment of some 35 minutes during which Mr Igsiz spoke to one of his HR colleagues to use him as a 'sounding board', Mr Igsiz dismissed the claimant summarily for gross misconduct. That misconduct being misrepresentation of Slot Promotional Expenses resulting in a breakdown of trust making his position untenable. This was confirmed by letter of 1 February 2017 (page 239).

26 In coming to his decision Mr Igsiz took the claimant's length of service into account but considered that his conduct was too serious to warrant anything less than summary dismissal. He had effectively committed fraud despite knowing the company's policy in respect of such awards and the importance of correctly recording them. He also noted that the transactions had taken place while Mr Brown was on secondment at a different casino, which meant that he was not around to audit transactions as he normally would have done. This led him to believe that the claimant may have deliberately planned to carry out these transactions at this time.

27 The claimant was offered a right of appeal, which he exercised. His appeal letter (page 240) is again rather interesting, compared with what one would expect to see as the norm in a case of this type, as the claimant accepted that the way he had put the transactions through the respondent's business was wrong but asserted that the decision to dismiss him was "*extremely harsh and very unfair*". In the letter he also pointed to other irregularities at the Newcastle casino.

28 The appeal was heard by Mr Hinds. The claimant complains that he was not impartial as he and Mr Igsiz are personal friends. I accept their evidence, however, that they are not albeit they are business colleagues.

29 The appeal hearing took place on 24 February 2017 (page 242). After the hearing Mr Hinds conducted further investigations including of the seven key points that the claimant had raised with him. The first five of those seven points are not directed at excusing his conduct but at demonstrating that there had been other irregularities at the Newcastle casino in which the wrongdoer (as he saw it) had not been dismissed: ie there had been disparity of treatment between him and those other employees that rendered his dismissal unfair. His other two points were, first, that he had been unable to discuss the business case for rewarding X and Y with Mr Igsiz due to their different working hours and, secondly, that his relationship with Mr Igsiz had been poor for some six or seven years.

30 Having considered these points and investigated those that required investigation Mr Hinds rejected all of them. I need not go into the detail of why he rejected them for two reasons: first, they are clearly documented in the appeal outcome letter of 6 March 2017 (page 251), which I find to be a well written letter and is a matter of record; secondly, and in a way more importantly, due to the concession properly made by Mr Owen during closing that it was "*not part of the claimant's case that there is a disparity of disciplinary sanction*".

31 I say that concession was properly made by Mr Owen as, applying the decisions in the case law of Hadjioannou and Paul v East Surrey District Health Authority [1995] IRLR 305, that is my finding as recorded below.

32 As Mr Hinds said the main difference was that in the other matters the employee, one of whom was actually Mr Igsiz, had been open and transparent whereas the claimant had tried to hide the transactions and mislead his Manager and the respondent generally.

33 Mr Hinds took account of the claimant's length of service but nevertheless upheld the decision to dismiss.

Submissions

34 After the evidence had been concluded, the parties' representatives made submissions. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account in coming to my decisions. That said, I record the key aspects of the representatives' submissions below.

35 On behalf of the respondent, Mr Dyal made submissions including the following:

35.1 *A genuine belief*. The evidence overwhelmingly points to this. The claimant had misrepresented the respondent's reward system.

35.2 *A reasonable belief based on a reasonable investigation*. The investigation had been gold standard.

35.3 *Sanction*. The claimant had deliberately falsified the respondent's records and its audit trails and had intentionally asked that rewards be attributed to customers who did not receive them. This was obvious gross misconduct independently of the Disciplinary Rules, which added further weight. The claimant's explanation inculpates rather than exculpates in that he said that he had acted as he did in order to avoid the matter coming to the attention of Head Office, and the claimant accepts that he knew that what he did was wrong at the time.

35.4 *Comparable issues*. Reliance was placed on the decisions in Hadjioannou (especially at paragraphs 24 and 25), the matters relied upon by the claimant not being "truly parallel", and Paul (especially at paragraph 35).

35.5 *Wrongful dismissal.* The claimant had deliberately acted in a way that was deceptive and falsified the audit trail without reasonable and proper cause, which amounted to a breach of the implied term of trust and confidence. Just as a claimant can rely on multiple events so can a respondent. The events were undisputed and, therefore, individually and cumulatively entitled the respondent to dismiss the claimant.

36 On behalf of the claimant, Mr Owen made submissions including the following:

36.1 The claimant had been consistent throughout. He had accepted what he had done and did not deny or minimise that. It had been done openly, in sight of CCTV and hearing of the microphones and with the involvement of third parties, the cashiers.

36.2 The claimant had acted in the best interests of the respondent. He had an important role to build rapport, keep customers happy and incentivise them to come back and spend in the respondent's casino rather than go elsewhere. There had been no personal gain. He had had a good business case.

36.3 At the disciplinary hearing Mr Igsiz stated that there was no question regarding honesty, integrity or loyalty so seemed to accept that the claimant had not been deliberately dishonest. At the highest it was "misrepresentation of documents". The claimant accepted that what he had done was not correct and apologised. His motive had been borne out the Z situation.

36.4 The claimant had been very loyal. Although it is true that there had been a number of disciplinary issues these had not been great issues.

36.5 The claimant said that there had been a deterioration in his relationship with Mr Igsiz since he had given him a verbal warning in March 2011 when he was going through a difficult time from a personal point of view.

36.6 The claimant greatest issues in his appeal were that he thought that there were discrepancies by others but it was not part of his case that there had been disparity of disciplinary sanction. His case, bearing in mind the particular circumstances, was that dismissal was too harsh a sanction. Referring to paragraph 36 of the decision in Paul, there were mitigating circumstances in the claimant's long service and the "attitude of the employee" was relevant given that the claimant had accepted what he had done.

36.7 The fact that the claimant had previously received a final written warning did not mean that he could not receive a second. Maybe he had been misguided and subject to misjudgment but he did not intend to mislead. His was an error of recording, which was contrary to procedure but not such as to justify dismissal. It was not accepted that there had been a loss of trust. The claimant was an experienced manager who had given loyal service and although he may have been misguided he only acted in the best interest of the respondent doing what Gaming Managers are expected to do in keeping customers happy and incentivising them to keep spending. It may be a close run thing but, in all the circumstances, summary dismissal is outside the band of reasonable responses.

36.8 The claimant did not rely on any flaw in the disciplinary process. It is not necessarily 100% but, overall, was acceptable. He

had been given the opportunity to put his case, which he did consistently and honestly.

The law

37 The principal statutory provisions that are relevant to the issues in this case are all to be found in the 1996 Act and are as follows:

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) 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."

Application of the facts and the law to determine the issues

38 The above are the salient facts and submissions relevant to and upon which I based my Judgment. I considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

Unfair dismissal

39 I consider first the claimant's complaint that his dismissal by the respondent was unfair. In this regard I obviously considered section 98 of the 1996 Act and the relevant precedents including those set out above to each of which I had regard. I also took into account more recent decisions of the Court of Appeal, which had reviewed and indorsed those authorities: ie. Fuller v The London Borough of Brent [2011] EWCA Civ 267, Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29 and Graham, particularly at paragraphs 35 and 36 where Aikens L.J. stated as follows:

"In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct and has dismissed the employee as a result. I said that once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so 1996 Acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET

must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in f1996 Act the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals 1996 Act 1996."

40 The issues arising from the statutory and case law referred to above that are relevant to the determination of this case are summarised at paragraph 5 of these reasons.

What was the reason for the dismissal and was it a potentially fair reason?

41 The first questions for me to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within sections 98(1) and (2) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of his dismissal of the claimant.

42 I have no hesitation in finding that the respondent has discharged that the burden of proof to show that the reason for the claimant's dismissal was related to his conduct, that being a potentially fair reason. The claimant has asserted that he and Mr Igsiz had a poor working relationship. I do not accept that or that Mr Igsiz sought to dismiss the claimant for that or any other reason other than his conduct. The fact that he did not seek to dismiss the claimant in 2015 when that would have been in accordance with the advice of the respondent's HR Department gives the lie to any such suggestion.

43 I then turn to consider the three elements in Burchell.

44 I am satisfied that Mr Igsiz did believe that the claimant was guilty of misconduct. He was a good witness and gave compelling evidence. Thus the first element in Burchell, the fact of belief in guilt of misconduct, is satisfied.

45 The second element in Burchell is that the respondent must have in mind reasonable grounds to sustain that belief. In this case meeting that element is made easier for the respondent given that the claimant has never denied his actions or that they were wrong. Instead he seeks to rely on what he has repeatedly referred to during the disciplinary process and the hearing before this Tribunal to his having a good business case. I obviously accept that Gaming Managers have a responsibility to attract, incentivise and retain custom but that does not excuse deliberately concealing the means of doing that, which the claimant accepts he did. In that regard he sought to explain that his focus was on hiding these matters from Head Office, but that does not exonerate him; far from it. Further, he clearly also concealed his actions from his Managers at Newcastle.

46 In his defence the claimant points to having involved third parties, ie the cashiers. I do not regard it as any defence to instruct junior employees to engage in wrongdoing and deception. He also states that he was open in that everything was recorded on CCTV and in the hearing (for want of a better word) of microphones. Neither is that a defence, not least because it is apparent that his actions were not picked up by those means in November and December 2016

and possibly earlier and only came to light when Mr Henderson reported them. The claimant also says that there was no personal gain and that might be so. I certainly accept that there is no evidence of that but that is not the issue.

47 As the claimant accepts, what he did was wrong. In this regard I note that the respondent's disciplinary procedure gives examples of gross misconduct including:

- Falsification … of company records.
- The recording of authorised/unauthorised expenditure in such a way as to mislead the company as to the true nature of the expenditure.
- Any other deliberate misrepresentation of company records or returns in order to conceal the true state of the company business.

48 Whilst I record those elements, in truth even without those specifics, the claimant's conduct would amount to being gross misconduct.

49 Mr Owen submitted that the claimant maybe had been misguided and subject to misjudgment, the error only being one of recording but I am satisfied that the respondent's managers had a good basis for considering it to be much more than that.

50 For all the above reasons I accept that the second element of Burchell is met. Mr Igsiz did have in mind reasonable grounds to sustain his belief that the claimant had been guilty of misconduct.

51 The third element is that at the stage Mr Igsiz formed that belief on those grounds, the respondent must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Once more I do not need to go into this in great detail given Mr Owen's concession, again properly made, that the claimant did "*not rely on any flaw in the process. It was not necessarily 100% but overall it was acceptable*". I agree. Mr Dyal suggested it was gold standard. The question for me however is whether the respondent had carried out an investigation into the matter that was reasonable in the circumstances of the case. I am satisfied that it did.

52 That investigation included the initial investigation conducted by Ms Emery (and her consideration of the documentary records and the CCTV footage and her interviews with the respondent's cashiers), Mr Brown's investigation (which included his consideration of the product of Ms Emery's investigation and his investigatory meeting with the claimant), Mr Igsiz' own investigation of the issues with the claimant in the disciplinary hearing and Mr Hinds' investigation of the issues raised by the claimant in the appeal hearing.

53 I have concentrated above upon the position of Mr Igsiz as he made the decision to dismiss but I am equally satisfied that Mr Hinds, who conducted the appeal hearing (and was also a good witness who gave evidence in a very reasonable and balanced manner) believed, following a sufficient investigation, that the claimant was guilty of misconduct and had reasonable grounds for that belief.

54 In summary, by reference to the elements in Burchell, on the evidence available to me and on the basis of the findings of fact set out above, I accept that:

54.1 Mr Igsiz and Mr Hinds "did believe" that the claimant was guilty of misconduct;

54.2 they had in their minds reasonable grounds upon which to sustain their belief that the claimant was guilty of misconduct; and

54.3 at the stage at which they formed that belief on those grounds those managers had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

In all the circumstances (including the size and administrative resources of the respondent's undertaking) and considering equity and the substantial merits of the case, did the respondent act reasonably or unreasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing the claimant?

55 I now turn to consider the question of whether (there being no burden of proof on either party) the respondent had acted reasonably as is required by section 98(4) of the 1996 Act. That is a convenient phrase but the section itself contains three overlapping elements, each of which the Tribunal must take into account:

55.1 first, whether, in the circumstances, the employer acted reasonably or unreasonably;

55.2 secondly, the size and administrative resources of the respondent;

55.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

56 In addressing 'the section 98(4) question', I am alert, first, to the fact that I must not substitute my own view for that of the respondent and, secondly, that I am to apply what has been referred to as the 'band or range of reasonable responses' approach: in both respects, see the excerpt from Graham above.

57 The third of the elements in the Burchell guidance (whether the respondent's managers had "carried out as much investigation into the matter as was reasonable in all the circumstances") has a bearing upon both the reason for the dismissal and whether the respondent acted reasonably. As explained above I am satisfied that the respondent did carry out as much investigation as was reasonable.

58 A further important aspect of reasonableness relates to the process followed by the respondent. I have no concerns whatsoever in that regard. As mentioned above, the investigation was reasonable and thorough. Additionally, the claimant was invited to attend a disciplinary hearing on appropriate notice and was made aware, sufficiently in advance of that hearing, of the matters to be considered at the hearing. He was invited to be accompanied at that hearing by a companion and (as was conceded by Mr Owen) was given every opportunity by

Mr Igsiz to explain his position to him. In informing the claimant of his decision Mr Igsiz advised him of his right to appeal, which he exercised. Again he was given appropriate notice of the appeal hearing and of the right to be accompanied at that hearing. I am satisfied that the disciplinary process was reasonable and genuine.

59 I am therefore, satisfied that the respondent did act reasonably in the process that culminated in its decision to dismiss the claimant. In this regard, it is to be remembered that the band or range of reasonable responses approach applies not only to the decision to dismiss but also to all aspects of the process.

60 The final issue is, given the above, the reasonableness of the sanction of dismissal. Referring to established case law such as Iceland Frozen Foods there is in many cases a range or band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. My function is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted.

61 In this case I note that both the claimant and his representative accepted that a final written warning might have been a reasonable response but that dismissal was too harsh, Mr Owen adding that it may be "*a close run thing*". While I accept that some employers (although I consider they would be few in number) might reasonably have given a final written warning, I am quite satisfied that in the circumstances known to the respondent's managers as a result of their investigation, the dismissal of the claimant was a decision that fell within the band of reasonable responses of a reasonable employer in these circumstances.

62 Finally there is the issue of consistency between the respondent's treatment of the claimant and other employees whom he considered to have committed irregularities. The representatives were agreed as to the case law that guides me in this regard. A key phrase in the Hadjioannou decision is that the circumstances of the cases being compared should be "truly parallel" while in the Paul decision I am warned to scrutinise disparity arguments with particular care. In that latter decision, it was made clear that the Tribunal should not supplant the statutory test (see also Levenes Solicitors v Dalley [2006] UK EAT 0330/06). As indicated above, I am satisfied that there was sufficient to distinguish the cases of those other employees and the claimant. The cases were not truly parallel.

63 In summary, therefore, I am satisfied that, as is required of me by section 98(4), the respondent acted reasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing him.

64 In conclusion, my judgment is that the reason for dismissal of the claimant was conduct and that the respondent did act reasonably in accordance with section 98(4) of the 1996 Act. I have to be satisfied that there was a sufficient investigation, reasonable grounds and a reasonable belief allowing the managers, on the evidence available to them, to form a decision which fell within the range of reasonable responses. I am so satisfied.

65 For the above reasons the claimant's complaint under section 111 of the 1996 Act that his dismissal by the respondent was unfair, contrary to section 94 of that Act, is not well-founded and is dismissed.

Wrongful dismissal

66 I therefore turn to consider the claimant's complaint of wrongful dismissal: that the respondent was in breach of the claimant's contract of employment in dismissing him without giving him the notice of that dismissal to which he was entitled. Here the question is not whether the respondent acted reasonably but whether I am satisfied that the claimant's conduct entitled the respondent to take the view that he was guilty of a fundamental, repudiatory breach of his contract of employment thus removing his entitlement under that contract to receive notice of termination. I so find.

67 The claimant does not deny his conduct, which involved him deceiving his employers by falsifying the records and in so doing exposed junior colleagues whom he instructed make the incorrect records. His explanations do not justify that conduct. If, as he says, he had good business reasons there is no reason why he could not have shared those reasons with his managers and gained their approval to his course of action. He did not do so and his conduct breached the term of trust and confidence that is implied into all contracts of employment.

68 Thus his complaint of breach of contract is also not well-founded and is dismissed.

APPLICATION FOR COSTS

The application

1 After I had announced the above Judgement and Reasons, Mr Dyal advised me that he had been instructed to make an application for costs, which he did by reference to Rule 76(1)(a) and (b) of the Employment Tribunals Rules of Procedure 2013. He submitted as follows:

> 1.1 There had been a lack of merit in the claimant's claim. By reference to subparagraph (a) he had been unreasonable in bringing his claim and, by reference to subparagraph (b) he had had no reasonable prospect of success. At the core, the claimant only pursued his claim on the basis that dismissal was too harsh. He had clearly been guilty of gross misconduct and the Tribunal had so found. Dismissal was always within the band reasonable responses and his claim was bound to fail.
>
> 1.2 On 14 July 2017 the respondent's solicitors had sent a costs warning letter that went into considerable detail but was in moderate terms. The claimant was invited to reflect and withdraw his claim by 21 July. His failure to do so aggravated his unreasonableness.
>
> 1.3 A Schedule of Costs had been produced and was submitted. It was broken down by reference to the fees of the respondent's solicitors and counsel, and before and after the costs warning letter.

2 Mr Owen opposed the application. He submitted as follows:

2.1 There was an issue to be decided on the basis of reasonableness and the Tribunal needed to hear all the evidence before deciding. The Tribunal had indicated that a reasonable employer might have decided to give a final written warning. That was the approach on which this case have been brought.

2.2 It was conceded that this was not the strongest of cases but it could have gone either way depending on how the evidence came out.

2.3 It was not appropriate for costs to be awarded just because a carefully worded costs warning had been given.

Consideration and decision

3 The ability of an Employment Tribunal to award costs is provided for in Rule 76(1) of the Employment Tribunals Rules of Procedure 2013, which provides as follows:

> *"76* ***When a costs order or a preparation time order may or shall be made***
>
> *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or response had no reasonable prospect of success."*

4 That Rule is somewhat curiously framed. It is clear from the introductory phrase that the power to make a costs order is discretionary yet it continues that I must consider whether to do so if I consider that any of the circumstances in the subparagraphs is met.

5 Thus, a Tribunal's consideration of whether to make a costs order has two stages. First, if the Tribunal considers that the circumstances are such as are set out in Rule 76(1)(a) or (b) it must consider whether to make an order. The second stage of the Tribunal's consideration of whether to make a costs order is that, if the above conditions are met, it must consider whether to exercise its discretion as to whether or not to make such an order. As explained in the decision in Monaghan v Chance Thorntons Solicitors UKEAT 3/01/2002, the first question is whether the discretion has arisen, the second question is whether that discretion should be exercised.

6 In this case, the respondent relies upon two of those circumstances in Rule 76(1). First, that the claimant acted unreasonably in bringing the proceedings; to which, for completeness, I add or in the way that they had been conducted. Secondly, that his claim had no reasonable prospect of success.

7 In coming to my decision I have been guided by the decision in Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255 in which Mummery LJ said as follows:

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had".

With the greatest respect to Lord Justice Mummery I have noted that his reference to "and" conducting the case perhaps should have been "or" conducting the case.

8 So I first have to consider whether there has been unreasonable conduct at all. In this case, although I accept I did not verbalise it when giving my earlier reasons, I was struck by the claimant's insistence that he had always acted with good intentions and in the interests of the respondent. That was his position at the various stages of the disciplinary process and before me in this hearing. There has been no suggestion on behalf of the respondent that he was not doing that and certainly no evidence that he did so for personal gain. On the contrary, his misconduct has always been referred to as a "misrepresentation" of promotional expenses resulting in a loss of confidence.

9 I am satisfied that the claimant was, as Mr Owen suggested he might have been, misguided and made a serious error of judgment in this respect but I repeat that I am satisfied that he genuinely believed that what he was doing was in the respondent's interests in enticing X and Y to spend at the casino and indeed, as he said at the disciplinary hearing to lose their money: X "has a lot of money, approximately £80,000, he will lose in here" while Y had "just sold a shop. They will lose everything in here this financial year". I note that at the disciplinary hearing Mr Igsiz did not challenge or in any way respond to this suggestion and only remarked that they were, "Not significant players".

10 Further, the claimant was aware that Mr Igsiz had confirmed at the disciplinary hearing that he did not question the claimant's integrity, loyalty or honesty.

11 Additionally, the claimant had been employed by the respondent for 24 years, although I repeat that his was hardly an unblemished record.

12 Finally, in the claimant's opinion, others had been treated less harshly in respect of what he saw as being their irregularities.

13 In these circumstances, and returning to the decision in the excerpt from Yerrakalva set out above, looking "at the whole picture of what happened in the case" I am NOT satisfied that there was unreasonable conduct on the part of the claimant in bringing the claim or conducting the proceedings and, further, that it cannot be said, at least at the outset, that his claim had no reasonable prospect of success. In that regard I note that although not determinative no application was made by the respondent that the claim should be struck out as having no reasonable prospect of success or for a deposit order to the lower threshold that the claim had little reasonable prospect of success.

14 I have stated "at the outset" because there is also a question of whether the claimant's continuation of the proceedings became unreasonable after receipt of the costs warning letter of 14 July 2017. I record that that letter was not in my opinion inappropriate but it does not have the same effect as in other jurisdictions, often being referred to as 'the Calderbank principles', which are not applied directly in proceedings in the Employment Tribunal: see Kopel v Safeway Stores Plc [2003] IRLR 753 and Monaghan. While it is right that the claimant's unreasonable refusal of an offer would be a factor that could be taken into account in deciding whether or not to make a costs order, it is only one factor that must be considered in the context of all other relevant factors.

15 In answer to the question of whether the claimant's continuation of the proceedings following receipt of the costs warning letter then became unreasonable, I am not satisfied that it did. On the contrary the matters I have set out above continued to apply after the costs warning as they had before and I am not satisfied that it was unreasonable that the claimant sought to have the evidence in this case tested before and considered by an Employment Tribunal.

16 In the circumstances, therefore, I do not exercise my discretion to make a costs order.

_____

Employment Judge Morris

Date 19 September 2017
REASONS SENT TO THE PARTIES ON

21 September 2017

G Palmer
FOR THE TRIBUNAL