EMPLOYMENT TRIBUNALS

BETWEEN

Mr Wayne Calveley **(Claimant)**	**and**	**OCS Group Limited** **(Respondent)**

Held at: **Birmingham**

On: **27 and 28 September 2018**

Before: **Employment Judge T Coghlin QC (sitting alone)**

Representation:

Claimant: **In person**

Respondent: **Ms Louise Quigley, counsel**

JUDGMENT

The judgment of the tribunal is that the claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. This is a claim of unfair dismissal. The respondent's case is that the claimant was fairly dismissed for misconduct.

2. I heard the case over two days. The claimant represented himself. The respondent was represented by Ms Louise Quigley of counsel. I am grateful to both for the helpful way in which they presented their cases.

3. There was an agreed hearing bundle which ran to about 480 pages and I read those of the documents in that bundle to which I was referred. I also saw some CCTV video evidence.

4. The respondent relied on witness statement and oral evidence from Jeremy Dicks, Director of Operations, and Andrew Mortimer, Managing Director for Destination & Venues and Aviation and Gateways.

5. The claimant also gave a witness statement and oral evidence. He also put forward short written statements from four witnesses: Dane Rogers, Nick Leedham, Gary Martin and Kate Condorly. However none of these four were called to give oral evidence; none except for Mr Leedham had signed their statements; and there was email evidence from Mr Martin suggesting that he distanced himself from his statement. None gave evidence of particular relevance anyway. I attached no real weight to these statements.

Facts

6. The background facts are set out in detail in paragraphs 5 to 28 of the witness statement of Mr Dicks. This evidence was not controversial and I accept it. In brief, the respondent is an outsourcing company providing facilities management and property services to various clients. One of its largest and most important contracts is with the National Exhibition Centre Group (NEC), which among other things runs events from various sites in Birmingham including the Genting Arena.

7. The claimant began working for the respondent in 1991. At the time of the events relevant to this claim he was employed as a Senior Security Coordinator, but acting up on an interim basis as Acting Security Manager. His role was included managing and leading security at events. It was a position of trust. Security and compliance with security procedures, including checking tickets and conducting searches of customers and their bags, was fundamental to the respondent's operation, and to the claimant's role within it.

8. From May to November 2017 the claimant reported to Ben Stokes, Head of Operations. Mr Stokes reported to Mr Dicks, and Mr Dicks to Mr Mortimer. From 15 November 2017 the claimant reported to Gavin Ward, who was the newly appointed Security Operations Manager. It seems that Mr Stokes remained employed in a managerial role after Mr Ward was appointed.

Events on 17 November 2017

9. The pop group "Little Mix" appeared in concert at the Genting Arena on 11 November 2017. The show was sold out, with around 13,500 people in attendance. The claimant was on duty at the head of a large team of about 160 security staff. Security concerns at this time were heightened

by the terrorist attack at the Ariana Grande concert in Manchester a few months earlier.

10. Mr Ward and Mr Stokes had received an anonymous tip-off that the claimant, along with another individual (Mr A), were intending to allow a group of individuals to enter the Little Mix concert without tickets. Mr Ward and Mr Stokes engaged Mr Gary Ditchfield, an independent security consultant, to conduct covert surveillance of the claimant and Mr A on the night of the concert.

11. During the evening, Mr Ward became aware of a group of five people (two women and three girls), seated in the disabled area of the arena who did not have valid tickets, who appeared to be known to the claimant and Mr A, and who Mr Ward suspected had been allowed by Mr A and the claimant to enter the concert without tickets. I shall discuss this evidence, and the other evidence which was ultimately available to the dismissing officer Mr Dicks, later in this judgment.

12. Mr A was asked to leave the premises. He worked through an agency and was not an employee; Mr Ward subsequently informed the agency that it did not wish to engage him again.

13. Mr Ward suspended the claimant that evening. His suspension was confirmed in a letter dated 21 November 2017 which informed him that the following three allegations were being investigated (I will replace the original bullet points with numbers for ease of reference):

> "(1) That you willingly supplied promoter/disabled tickets to persons known to you, without authority from NEC Group.
>
> (2) That you have operated a security company, namely ArenaSec Group Ltd, utilizing OCS company infrastructure, such as emails and other processes, for your own financial gain, causing financial detriment to the company.
>
> (3) That you have operated a security company, namely ArenaSec Group Ltd, utilizing OCS company infrastructure, such as emails and other processes, for your own financial gain, potentially bringing the company into disrepute."

14. The second and third charges related to a company called ArenaSec Ltd ("ArenaSec") which the claimant operated and which provided security staff for events. It is not entirely clear exactly when the respondent had first become concerned about this matter, but it seems likely that it was as a result of information which came to light during Mr Ward's interviews with witnesses on 21 November (see below).

15. The letter of 21 November 2017 concluded by inviting the claimant to an investigatory meeting on 30 November 2017.

16. Mr Ward conducted an investigation which included interviewing a number of staff. On 21 November he interviewed Paula Navratil, disabled ramp team leader; Gary Hogben, security co-ordinator; Dave

Stainton, resources co-ordinator; and Caroline Durragh, scheduling assistant. On 22 November Mr Ward interviewed Katie King, who worked on the doors; and Paul Ickringill, security co-ordinator. On 23 November he interviewed Felicity Reeves, resourcing administrator; John Taylor, arenas security co-ordinator; and Ken Price, a member of security staff. On 28 November Mr Ward interviewed Martin Parlett, security officer.

17. Mr Ward had also produced a witness statement himself on 18 November 2017. CCTV footage was obtained and reviewed. A search was undertaken of the claimant's work emails.

18. Mr Ward interviewed the claimant on 30 November 2017.

19. The claimant was invited to a disciplinary hearing by letter dated 13 December 2017. The letter explained that Mr Dicks would be conducting the hearing and that a note-taker would be present; it informed the claimant of his right to be accompanied; and it warned that summary dismissal was a potential outcome of the meeting. The allegations against the claimant were as set out in the suspension letter, plus a fourth:

> "(4) That whilst using your OCS e-mail account you sent an email which contained personally identifiable information, some of which were OCS members of staff (*sic*), to an external agency, which could be deemed a breach of the Data Protection Act."

20. Copies of relevant evidence and of the respondent's disciplinary policy and procedure were enclosed with the letter.

21. The disciplinary hearing took place on 21 December 2017. It was chaired by Mr Dicks. A note-taker was present. The claimant was accompanied by a trade union representative, Alex McMahon. The claimant was given a full opportunity to respond to the allegations against him.

22. Mr Dicks' evidence was that during the course of the hearing the claimant was offered the chance to view CCTV evidence, but declined that offer. Although the claimant challenged that evidence, I have no hesitation in accepting it, for the following reasons:

    a. Mr Dicks' evidence was in accordance with the unequivocal contemporaneous note taken by the individual who was present in the meeting for the specific purpose of taking notes;

    b. although those notes were not signed by the claimant or his representative, who left the meeting rather abruptly at its conclusion, they were signed that day by Mr Dicks to confirm their accuracy;

    c. neither the claimant nor his trade union representative, who both knew of the existence of CCTV evidence (it had been referred to

by Mr Ward in the investigatory meeting), ever complained that they had been denied access to what would obviously have been potentially relevant evidence.

23. Mr Dicks decided to dismiss the claimant summarily, a decision which he confirmed in a letter written later that day. His findings were as follows:

> "The information provided as a result of the investigation process has demonstrated a proven extensive, systemic and continuous use of the OCS email system, resources and infrastructure for the purposes of your own business activities for Arenasec Ltd, of which you are a Director. This has been extensively used over a prolonged period of time with many emails discovered during the investigation process. This is a breach of your own contractual employment terms and conditions, and the OCS group electronic communications policy that is available on the MyOCS intranet platform.
>
> In addition to the breach of the OCS group electronic communications policy you have sent a number of emails with personal data attached without encryption to a third party. This data included details of OCS employees, without any prior permission from the company or proven evidence of employee consent. This has been sent on the OCS system. This is also a breach of the data protection act 1998 management guidelines that are available on the MyOCS platform.
>
> In reference to willingly supplying tickets without authority from the NEC, it is determined that your actions on the night linked you to the persons in question, and you did not follow normal security process that potentially jeopardised the security and safety of the venue occupants. This posed a risk to OCS and the NEC group. In many of the statements gathered there is frequent mention of Tank tickets.

24. The reference to "Tank tickets" was to the evidence given by several of those interviewed by Mr Ward, that there had been rumours or jokes that the claimant (whose nickname was "tank") had for some time provided free tickets to events. I shall return to this below.

25. It is worth noting that Mr Dicks did not find that the mere existence and operation of ArenaSec was a disciplinary matter, since its operation by the claimant had been known to the claimant's managers for some time.

26. Mr Dicks concluded that the claimant was guilty of gross misconduct. He decided that dismissal was the appropriate sanction. Before coming to that conclusion he considered whether a lesser sanction was appropriate but decided that it was not. His evidence, which I accept, was that he would have dismissed the claimant for either the email-related matters or his conduct at the Little Mix concert on 17 November 2017.

27. John Taylor, another member of staff, was also involved in running ArenaSec. He was interviewed, as I have said, on 23 November 2017. On 14 December he was invited to a disciplinary hearing, to face the same charges as the claimant, with the exception of charge (1), there being no suggestion that Mr Taylor had any involvement in with the

matters which occurred on the night of the Little Mix concert. Mr Taylor's disciplinary hearing took place on 21 December. Mr Dicks, the disciplinary officer, decided to issue him with a final written warning. The charge relating to breach of data protection was not upheld since there was no evidence to support it. The other charges were upheld, but it is clear from the decision letter (and it was Mr Dicks' evidence to me, which I accept) that Mr Dicks considered that Mr Taylor's conduct was not as culpable as the claimant's and in particular that Mr Taylor's involvement had been secondary to that of the claimant.

28. The claimant appealed against his dismissal by letter dated 3 January 2018. His appeal focussed on a number of matters. In summary: he objected to having been subjected to covert surveillance on 17 November; he suggested that the investigation had been biased and unfair; he said that there had been a misunderstanding about the expression "Tank's tickets" which he said related to his getting tickets legitimately for colleagues; he said that management had been aware of his operation of ArenaSec; he said that there had been a disparity of treatment as between him and Mr Taylor; as to the data protection issue, he said that there had been no complaints from staff; and he raised an issue about pay.

29. An appeal hearing was held on 1 February 2018. It was chaired by Andrew Mortimer, Managing Director. A note-taker was present and the claimant was again accompanied by Mr McMahon, his union representative. The claimant had a full opportunity to present his appeal. Mr McMahon, whose approach to the appeal was along the lines of a review as opposed to a rehearing, gave full consideration to the various points raised by the claimant and conducted further investigations into one or two points which he had raised. He decided to dismiss the claimant's appeal, and notified the claimant of his decision in a letter dated 9 February 2018. He addressed each of the matters which the claimant had raised and gave his responses to them. I am satisfied that Mr Mortimer conducted a proper and reasonable appeal process; and the claimant did not really suggest otherwise in the hearing before me.

The law

30. Section 94 of the Employment Right Act 1996 (**"ERA"**) provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

31. Section 98 ERA provides so far as relevant:

> "(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) … 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."

32. In *Orr v Milton Keynes Council* [2011] ICR 704 Aikens LJ summarised, at paragraph [78], the correct approach to the application of section 98 in misconduct cases:

> "(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.
>
> (2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.
>
> (3) Once the employer has established before an employment tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).
>
> (4) In applying that subsection, the employment tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of 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."

[I interpose that Aikens LJ was here summarising the well-known test described in *British Homes Stores Ltd v Burchell* [1978] IRLR 379.]

> "If the answer to each of those questions is 'yes', the employment tribunal must then decide on the reasonableness of the response of the employer.
>
> (5) In doing the exercise set out at (4), the employment tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its 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 it has, then the employer's decision to

> dismiss will be reasonable. But that 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.
>
> (6) The employment tribunal 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 tribunal 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'.
>
> (7) A particular application of (5) and (6) is that an employment tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.
>
> (8) An employment tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."

33. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ at [16]-[17] cited paragraphs (4) to (8) from that extract from Aikens LJ's judgment in *Orr* and added:

> "As that extract makes clear, the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111."

Analysis and conclusions

34. The first question, then, is whether the respondent has shown a potentially fair reason for dismissal. I am quite satisfied that the reason for dismissal was a belief that the claimant was guilty of misconduct. Having heard the evidence I am quite satisfied that that belief was genuinely held by Mr Dicks (and for that matter by Mr Mortimer). The matters in relation to which Mr Dicks formed such a belief were those set out in the dismissal letter as set out at paragraph 23 above.

35. Conduct is a potentially fair reason for dismissal.

36. In addressing the next stages of the *Burchell* test, it is appropriate to consider the evidence which was before Mr Dicks in relation to the two main issues: the Little Mix concert and the use of the respondent's email facilities.

The Little Mix concert

Was Mr Dicks' belief held on reasonable grounds?

37. There was sufficient evidence to support Mr Dicks' finding that the claimant had allowed the five females access to the Little Mix concert without tickets. In particular:

    a. The respondent's security processes require that if customers leave the venue, their tickets need to be checked again on re-entry (even if they cannot be successfully electronically scanned), and the customers also need to be searched again. These are basic and common-sense requirements and there was and is no suggestion that the claimant was unaware of them.

    b. The claimant's account in the investigatory meeting was as follows. He was present at the door when the five females arrived. He knew them personally. They had bought tickets from touts (which if true would of course mean that it would be impossible to show proof of purchase). He saw them arrive, and he told Mr Price, who was on the door checking tickets, that they had already been inside the venue. This meant that their tickets could not be scanned successfully.

    c. The CCTV evidence, which Mr Dicks saw but the claimant declined to review during the disciplinary hearing, shows an entrance door to the Genting arena. The five females are seen being ushered to the front of the queue by a man wearing a hi-vis jacket. It is common ground that this man was Mr Parlett. Although the CCTV footage did not capture the claimant directly at this point, Mr Dicks reasonably formed the view that the claimant's reflection was visible in the window, which meant that he was only just out of shot; and in any event by his own account the claimant was there – as noted above, it was his account that he was there when these five females arrived and entered.

    d. Mr Price, when interviewed by Mr Ward, said that he had scanned the tickets of the five females, although it was not entirely clear from his account whether he was referring to the same individuals. If he was referring to the same group of five females, his account was at odds with the claimant's account, which was that they had already been in, so the tickets could not be scanned.

    e. Moreover it was quite clear from the CCTV footage that the tickets of the five females were *not* checked. They were not scanned, and they were not even looked at, as they should have been. They went straight past Mr Price towards the claimant, who Mr Dicks reasonably believed was standing just out of shot. It was reasonable for Mr Dicks to conclude that the claimant knew that there had been no check, since he was there and saw them come in, and had told Mr Price that there was in effect no need to check their tickets since they had already been in.

f. Mr Parlett, who had ushered the group to the front of the queue, told Mr Ward that he had not looked at their tickets. He said they "came up to me and asked to speak to [the claimant]." He did not ask to see their tickets; it is common ground that this was not his job.

g. The evidence showed (and it was common ground) that the claimant then walked with the group of five and took them to see Paula Navratil, the security team leader at the disabled ramp. The claimant asked Ms Navratil to reseat them. It is not uncommon for customers (even those without disabilities) to be relocated to the disabled ramp at the request of the security manager, provided there is free space on the disabled ramp, and it was not suggested before me that relocating them to the disabled area was in itself a serious matter. The reseating process involves the customer exchanging their entrance ticket for a disabled ramp pass. However Ms Navratil's evidence was that "they didn't give me any tickets because I was distracted". She issued them with three disabled ramp passes (it is not clear why they were not issued with five).

h. The five then sat in the disabled ramp area. Mr Ditchfield's evidence was that he saw them interacting in a friendly way with both Mr A and the claimant. The claimant himself accepted in his interview that he knew them, though they were better known to Mr A.

i. Mr Ward's account, as set out his statement dated 18 November 2017, was that he saw the five in the disabled ramp. He approached one of the adults and asked her to produce her tickets. She gave him the three disabled ramp passes. These passes were exhibited to Mr Ward's statement. They were clearly marked "re-seat" and it was obvious that these were not entrance tickets that could be sold externally or by a tout but rather were internally-issued tickets, a fact corroborated by Ms Navratil's account as described above.

j. Mr Ward asked the woman for the other tickets and she said that she was only given three. He asked how she had got into the venue to which she replied "I don't want to get anyone into trouble."

k. Mr Ward's then asked her again if she had any other tickets and she replied "no".

l. Pausing there, this in itself was extremely powerful evidence that that the group had had no entrance tickets. If the group did indeed have entrance tickets, they should have been able to produce a total of eight tickets: five entrance tickets and three disabled ramp passes (given that Ms Navratil had failed to take entrance tickets

in exchange for disabled ramp passes). The woman replied that she had no more tickets. She did not suggest that she had lost or discarded the five original entrance tickets. It was therefore, to say the least, reasonable for Mr Dicks to conclude that the five individuals had not had entrance tickets.

m. I return then to Mr Ward's account. He said that on further questioning about how they had been let into the venue the woman told him again "I don't want to get anybody into trouble" and she refused, twice, to say which member of staff had let her in. Based on the evidence which I have summarised above it was reasonable for Mr Dicks to conclude that this was the claimant.

n. Finally Mr Ward said that during this discussion, a second woman joined him and the first woman. She was holding a smartphone which appeared to be in mid-call. Mr A's first name was visible on the screen. The second woman spoke to the first, and surprisingly loudly (Mr Ward inferred that it was because she had just left a loud concert) said "He says tell them we got the tickets from a tout." Mr Ward formed the view, unsurprisingly, that this was an attempt to deceive him. The group of females then left.

38. Mr Dicks also formed the view that the claimant had allowed the group of five to enter the arena without being searched.

a. The security plans in place for that event, which the claimant had written, required that customers be searched using a wand device and that their bags be searched.

b. The CCTV footage of the entrance area shows customers queuing to be searched once their tickets had been checked. The group of five females are seen walking in a different direction, bypassing this queue.

c. The claimant's account in the investigatory interview was that he asked Helen Stuart, a security officer, to search the females. That was not followed up by Mr Ward in his investigations. However Mr Dicks formed the view, in my judgment reasonably, that the claimant's account in this respect was anyway inconsistent with the CCTV. The CCTV showed the group of five females leaving the entrance area with the CCTV time-stamp showing between 19.19.27 and 19.19.31 and reappearing in a different shot at or shortly before 19.20.09. It was common ground in evidence before me that searching the five females, two of whom had bags, which would take about 40 to 50 seconds. Mr Dicks' evidence, which I accept, is that it would take 30 seconds to walk from the first CCTV shot to the next, even assuming that there was no search and no other people around. It is common ground that the time-stamps on the CCTV footage are synchronised and reliable. It follows that Mr Dicks was entitled to conclude that the CCTV

evidence was inconsistent with the suggestion that the group had been searched.

d. Further, the evidence before Mr Dicks was that the claimant was with the group throughout this period, so he was entitled to conclude that the claimant must have known that they had not been searched.

39. There was therefore in my view ample evidence to support Mr Dicks' belief in the claimant's guilt. However in considering whether his belief was held on reasonable grounds, I have also needed to consider his reference in his dismissal letter to "Tank's tickets". Several of the witnesses to whom Mr Ward spoke during his investigation referred to "Tank's tickets". This was described variously as a "long running joke" and as an "open secret", to the effect that the claimant would get staff tickets for his friends and family. No-one seemed to be able to say whether this in fact happened or whether any tickets which he may have obtained were legitimate. The references by these witnesses to "Tank's tickets" were therefore of no real probative value. However I do not consider that this was a matter on which Mr Dicks placed significant weight but rather he referred to it as general corroboration of a case which was on the other evidence already clearly established.

40. Overall I conclude that Mr Dicks' belief in the claimant's misconduct was held on reasonable grounds.

A reasonable investigation?

41. Before me the claimant made no challenge to the respondent's investigation or to the fairness of the processes conducted by Mr Dicks and Mr Mortimer.

42. I do not consider the process followed by the respondent to have been perfect. It would have been better if Mr Ward had interviewed Ms Stuart to establish whether the claimant had indeed asked her to search the five females. However I have concluded that this flaw was not sufficiently fundamental to the process as a whole to render the dismissal unfair. The claimant did not raise this point either at the disciplinary hearing or at the appeal stage, nor was it raised with the relevant witnesses in the hearing before me.

43. I also note that the question of bypassing security was not one that had been raised with the claimant in the letter inviting him to the disciplinary hearing. Again, this is not a point that the claimant advanced at any stage in the hearing before me. This allegation was closely bound up with the allegation relating to ticketing. In essence, Mr Dicks concluded that the claimant had bypassed both ticketing and security checks. The question of security checks was put to the claimant in both the investigatory and disciplinary meetings. Further, in assessing the fairness of the respondent's procedure it is necessary to consider the

process as a whole, including the appeal. The claimant was given a full appeal and had the opportunity to challenge the findings at that stage.

44. Taking the process as a whole I do not consider these flaw to be so fundamental to the process that they are sufficient to render the dismissal unfair. I would add that, although this is not relevant to the question of unfair dismissal, I do not consider that the outcome would have been any different in the absence of these flaws.

A reasonable sanction?

45. I have no hesitation in concluding that dismissal was a reasonable response based on the set of facts found proven by Mr Dicks. Mr Dicks acknowledged the claimant's long period of service. However given the nature of the claimant's role, his seniority, his experience, his leadership role, and his position of trust, which were all matters that Mr Dicks properly took into account, dismissal was clearly a reasonable sanction. Mr Dicks gave consideration to alternatives to dismissal but concluded that dismissal was the appropriate sanction. That was a decision which it was open to a reasonable employer to reach.

<u>The use of the respondent's email facilities to conduct the claimant's business</u>

A belief held on reasonable grounds?

46. Mr Dicks accepted that the respondent had been aware of the fact that the claimant had been operating ArenaSec. The main issue for Mr Dicks was the fact that the claimant had used the respondent's email facilities to operate the business.

47. The claimant's contract of employment made clear that any improper use of the respondent's IT facilities would be treated as a disciplinary offence, and potentially a matter of gross misconduct justifying summary dismissal.

48. The respondent also operated an electronic communications policy, which the claimant told Mr Dicks he was aware of. It provided that the respondent's communications facilities were made available to users for the purposes of the business. While "a certain amount of limited and responsible personal use by users is also permitted", the policy is clear that

> "under no circumstances may OCS's facilities be used in connection with the operation or management of any business other than that of OCS or a customer of OCS."

49. Like the contract of employment, this policy made clear that serious breaches of the policy would be treated as gross misconduct leading to summary dismissal.

50. The policy also made clear that the transmission of confidential information about OCS's staff would amount to gross misconduct, would be treated very seriously and would be likely to lead to summary dismissal.

51. Mr Dicks had before him a large amount of evidence in the form of emails, showing that the claimant had used the respondent's email systems over a sustained period (from 2016 but more intensively in the period from May 2017 onwards) to operate his own business. Some were sent to himself at his ArenaSec email account, some to Mr Taylor. Moreover a substantial number were sent to third parties, namely customers of Arenasec, including on a number of occasions sending Arenasec invoices.

52. All these emails carried the respondent's OCS.co.uk email suffix, the claimant's OCS job title, his OCS contact details, the respondent's email disclaimer, and the respondent's logo.

53. None of this was disputed by the claimant. He acknowledged in his interview with Mr Ward that he should not have used the respondent's email systems. The claimant did make the point that the respondent was aware that he was operating ArenaSec – this was, as I have said, accepted by Mr Dicks – and that one or more of his managers were aware that he used the respondent's *computers* when running it. He did not, however, say (and there was no evidence before me) that his managers were aware, still less that they authorised, his use of the respondent's *email system* for the purpose of ArenaSec.

54. Mr Dicks concluded that the manner in which the claimant was running his business might lead staff (some of whom worked for both ArenaSec and the respondent) and/or third parties to believe that the business was somehow connected with the respondent. That conclusion was one which was in my judgment perfectly reasonable. The potential for confusion among third parties about who they were dealing with was obvious. To an extent the claimant had recognised this in his interview with Mr Ward, where he acknowledged that "1/10 [of staff] might not know who they are working for."

55. For the claimant to send invoices and other business correspondence from his OCS email account created an obvious risk of confusion on the part of customers about who they were dealing with – this could potentially give the claimant an advantage, effectively trading off the respondent's name, and it could equally give rise to potential difficultie for the respondent, particularly in the event of a dispute between ArenaSec and one of its customers.

56. Mr Dicks was particularly troubled by the fact that the claimant had used his OCS email account to send personal data in the form of staff details such as their names, addresses, telephone number and dates of birth. Some but not all of the staff concerned were employees of the

respondent. This data was unencrypted and not password protected. Mr Dicks considered that this amounted to a breach of the respondent's electronic communications policy and in particular its provisions as to data protection. The claimant's answer to this at both the disciplinary and appeal stages was simply that the staff concerned had not complained. That was really no answer to the allegation. By sending the data he was processing it; he put forward no evidence that such processing was authorised; and he anyway took no steps to secure it by encryption or password protection.

57. I conclude that Mr Dicks' belief in this element of the claimant's misconduct was based on reasonable grounds.

Reasonable investigation?

58. In the hearing before me, the claimant did not advance a case that the respondent's investigation was inadequate in any way. Nor did I detect any flaws in it. The relevant evidence was collected and it spoke for itself. The claimant had a full opportunity to present his side of the story. The procedure was in my view one which it was open to a reasonable employer to follow.

Was dismissal a reasonable sanction?

59. In respect of the claimant's use of email facilities, dismissal was a sanction which it was clearly open to a reasonable employer to impose. This was not a one-off act but one which was repeated over a sustained period; it had the potential to cause confusion to third parties, which might improperly benefit the claimant and/or might cause damage to the respondent in its reputation or relationships with third parties; and it was a clear breach of the respondent's procedures, of which the claimant was admittedly aware. As I have noted above, Mr Dicks considered alternatives to dismissal but decided, in my view reasonably, to dismiss.

<u>Disparity of treatment</u>

60. The claimant argued that his dismissal was rendered unfair by the disparity of treatment as between him and Mr Taylor who only received a final written warning.

61. A dismissal which would otherwise be fair may in some circumstances be rendered unfair where there is a disparity of treatment as between two truly comparable cases. Here, the respondent had genuine and reasonable grounds for distinguishing between the two cases.

62. First, there was no suggestion that Mr Taylor had any involvement in the events on the night of the Little Mix concert, or anything similar.

63. Second, Mr Dicks considered that Mr Taylor's role in the ArenaSec business was less than the claimant's: he accepted Mr Taylor's

explanation that Mr Taylor was merely in charge of making payments rather than actively running the business. Moreover Mr Dicks accepted, based on the evidence before him, that Mr Taylor's use of the respondent's email systems for the purpose of that business was less extensive than the claimant's. Among other things there was no evidence of a breach of data protection rules on the part of Mr Taylor. The claimant sought to challenge those findings by saying that Mr Taylor was given an opportunity to delete relevant evidence from his email systems. But it is not my function to second-guess the investigation which was carried out into Mr Taylor's conduct. The fact is that different findings were made against him than were made against the claimant. The question of disparity of treatment therefore does not arise.

Conclusions

64. For the reasons set out above, I conclude that the claimant was fairly dismissed. His claim of unfair dismissal therefore fails.

Polkey

65. Had I found the dismissal to have been unfair, I am in no doubt, having heard the evidence, that had the respondent acted fairly, it would have dismissed the claimant in any event. I have referred above to one or two flaws in the respondent's procedure. I am satisfied that these made no difference to the outcome and that a fair dismissal would have followed had they not occurred.

Contributory fault

66. Had it been necessary to decide the point I would have concluded that the claimant was guilty of culpable conduct such that I would not have made any compensatory or basic award. I am satisfied, on the balance of probabilities, that the claimant was guilty of serious blameworthy conduct by allowing customers into the premises who did not have tickets, and by using the respondent's email systems for the purpose of his own personal business.

Employment Judge Coghlin

2 October 2018