EMPLOYMENT TRIBUNALS

Claimant: Mr R Adamski

Respondent: APS Salads Limited

HELD AT: Liverpool **ON:** 13 & 14 August 2018

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondent: Mr Redpath, counsel

JUDGMENT

JUDGMENT having been sent to the parties on 22 August 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preamble

1. These are the judgment with reasons provided pursuant to a request made on behalf of the claimant following promulgation of the judgment only on 22 August 2018.

2. In a claim form received 14 November 2017 (the date of issue by ACAS of the Early Conciliation Certificate 14 October 2017) the claimant, who was employed by the respondent from 1 May 2015 to 26 June 2017 as a packhouse assistant, claimed unfair dismissal when he was dismissed for gross misconduct. The claimant maintained the respondent had not acted reasonably in dismissing him. The

claimant also claimed harassment and discrimination which were dismissed following an unless order.

3. The respondent denied the dismissal was unfair maintaining the claimant had been fairly dismissed for misconduct.

Issues

4. The issues discussed with the parties as follows –

4.1 Was the claimant dismissed contrary to Section 98 of the Employment Rights Act 1996? In particular:

(1) Was the claimant dismissed for a potentially fair reason within the meaning of Section 98(2) of the Employment Rights Act 1996, specifically a reason which relates to the claimant's conduct?

(2) If so, was the dismissal fair in all the circumstances of the case within the meaning of Section 98(4) of the Employment Rights Act 1996?

(3) Did the respondent have a genuine belief that the claimant was guilty of misconduct?

(4) Did the respondent have reasonable grounds upon which to base that belief?

(5) At that stage that the respondent formed this belief, had it carried out as much investigation into the matter as was reasonable in the circumstances given the size and resources of the respondent?

(6) Did the respondent follow a fair procedure given the size and resources of the respondent?

(7) Was the decision to dismiss within the range of reasonable responses open to a reasonable employer?

Remedy

(8) If the Tribunal finds that the dismissal was unfair, should there be a reduction to the compensation awarded on the basis that the dismissal was to any extent caused or contributed to by the claimant?

(9) If the Tribunal finds that the dismissal was unfair for procedural reasons, should there be a reduction to the compensation awarded reflecting the likelihood that the dismissal would have occurred in any event?

Evidence

5. The Tribunal heard oral evidence from the claimant on his own behalf. On behalf of the respondent the Tribunal heard from Nikki Anderson, HR director, and Carl Heap, senior operations manager, both of whom were the decision makers at the disciplinary hearing and they carried out some of the investigation beforehand.

6. With reference to issues of credibility the Tribunal found the claimant was confused in his evidence at times, he was an inaccurate historian, unable to answer some of the questions directly despite them being translated. It was clear to the Tribunal from its reading of the disciplinary and appeal minutes the claimant has now expanded his oral evidence referring to matters that were not said or raised during the disciplinary process. The Tribunal preferred to rely upon the contemporaneous notes in contrast to the claimant's recollection of what had been said many months after the event. The Tribunal has set out a number of credibility issues below in its findings of facts. Finally, with reference to the claimant's oral evidence, he indicated that had the respondent needed the three reels of copper wiring for production whilst he was not at work, all it had to do was given him a ring and he would supply them. This evidence was not credible, the claimant was not a manager and did not inform any person within the respondent that he had hidden the reels. There was no person within the respondent who was aware the claimant had retained the copper wiring; and the Tribunal found (as did the respondent) no managers were unaware the claimant had locked the copper wiring in the cupboard, despite the claimant's prevarication on this point. Carl Heap was unaware of the existence of the cupboard and the claimant's use of it; the claimant having been provided with a separate lock up for his own personal use outside the packing tent, as had all other employees. It follows as a matter of logic if the claimant had not informed any person within the respondent he had locked up the copper wiring then they would not know to make the request.

7. The Tribunal found the evidence given by Nikki Anderson and Carl Heap to be credible and supported by the contemporaneous documentation. It preferred the evidence of Nikki Anderson to that of the claimant on the balance of probabilities concerning the conflict in the evidence regarding whether the claimant had been offered the support of a colleague at the first investigation meeting, concluding that he had and this was confirmed in contemporaneous correspondence which the claimant did not question at the time.

8. The Tribunal was referred to two bundles of documents; one produced by the claimant the other for the respondent, together with written statements, oral submissions and the written submissions prepared on behalf of the respondent. The Tribunal has considered the parties' submissions, which it does not intend to repeat, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts.

Facts

9. The respondent's business is in fresh food, predominately tomatoes, which it packages and distributes supplying major supermarkets in the UK. It is subject to stringent codes of practice and auditing standards, and can be audited by its clients and/or the British Retail Consortium unannounced. If an audit is failed, this can have severe consequences on the business. All staff are trained to understand the guidelines and hygiene rules set out in the 'Quality Manual' issued to them. Staff regularly receive refresher training and sign an acknowledgment of their understanding of the hygiene rules as this was a very important matter for the respondent and its continuing business.

10. The claimant started working for the respondent in a despatch role and picker on a number of seasonal contracts, the last expiring some 6-months prior to the claimant taking up a permanent contract on 5 May 2013. There was a dispute concerning when the claimant's employment commenced, and the Tribunal finds the claimant's continuity of employment ran from 5 May 2013 to the effective date of termination 26 June 2017 when he was summarily dismissed. A contract of employment was issued and signed by the claimant dated 3 May 2013 and then 4 December 2013. The contract set out the commencement of employment date as 5 May 2013 with the provision that "no employment with any previous company or employer counts towards your continuous employment." The contract referred to a staff handbook that contained Disciplinary Rules and Procedures.

11. The claimant was issued with a Quality Manual; the copy in the bundle was is 29 May 2014. The rules were clear; personal belongings and mobile phones could not be taken into the production tent/packhouse and they should be stored in an outdoor locker provided to all employees. Glass was not allowed on site; a glass breakage was a serious matter for the respondent due to the risk of food contamination. Plastic was not allowed in the packhouse for similar reasons. The claimant confirmed his reading and understanding of the rules by signing and returning annually an acknowledgement, the last being 17 January 2017.

Disciplinary Procedure

12. The claimant was issued with a Disciplinary Procedure dated 31 January 2013 prepared by Nikki Anderson in her capacity as HR director. It provided examples of unacceptable and inappropriate behaviour including theft and failure to follow company procedures. The Policy set out the provision for suspension on full pay, the right to be accompanied at a formal disciplinary hearing or appeal but with no right to be accompanied at an investigatory meeting. It confirmed the investigation can be conducted by a director, partner, senior manager or HR representative.

13. By May 2017 there were issues with the claimant working late into the night and asking for doors ordinarily locked to be unlocked. A number of meetings took place concerning this matter, including one on 5 May 2017 when the claimant offered on the basis that he had worked in security in Poland, to look through CCTV to assist the respondent in his complaint that colleagues were having breaks when they ought not to be, stealing tomatoes and going home early. The claimant's offer was rejected. The notes of meeting do not reflect the claimant's evidence given today under cross-examination that he had put forward his friend (who was not an employee of the respondent) to view the CCTV evidence. At the 5 May 2017 meeting the claimant took up the offer of a translator, in contrast to the undisputed evidence that at the 31 May 2017 meeting he was offered but did not up a translator and confirmed he was "OK."

14. As of 14 May 2017, the claimant agreed to transfer out of his role in despatch into production. He was aware Carl Heap had agreed to the transfer, and that he required his authorisation to work late. Without Carl Heap's knowledge or consent the claimant continued to work well into the early morning on occasions, for example, until 3am when his shift was 9.30am to 6pm, despite being informed that to do so would be a disciplinary matter. The claimant was disciplined and this resulted in a

verbal warning confirmed in a letter dated 7 June 2017. In that letter, had the claimant been in any doubt, he was made aware that in his production role he would report through section managers to Carl Heap.

15. The claimant was off work 17 and 18 June 2017, and during his absence Elliot Bayne, section manager, found a hidden metal cupboard inside the production tent, reported the matter and as the respondent had no key, the lock of the cabinet was cut off by Reece Palfreyman in the presence of Elliot Bayne. Reece Palfreyman and Elliot Bayne provided statements to this effect, and photographs were taken of the contents that included packaging tent supplies, a surveillance camera (described by the claimant as a baby monitor) and two reels of copper wire belonging to the respondent. It is undisputed the copper wire was the most expensive material used by the respondent during the packaging process. Nikki Anderson viewed the contents of the cabinet, and in order to do so she had to squeeze past a number of boxes. The photographs show the cupboard was hidden in a box, surrounded by other boxes that were taped together by the claimant. The tape read "QC hold" which effectively would keep employees away from exploring or moving the boxes.

16. The claimant returned to work on the 19 June 2017 and was questioned by Nikki Anderson and Carl Heap. The meeting was minuted and recorded "did RA want someone to be present with him during the meeting? After some discussion RA said he wouldn't have a rep." The claimant today disputes this was offered to him, maintaining the minutes are incorrect and aimed at improving the respondent's case. The claimant was provided with a copy of the minutes during the disciplinary process and in a letter dated 20 June 2017 reference was made to the claimant deciding he did not want to be accompanied. The claimant did not question this. On the balance of probabilities, the Tribunal found the claimant was invited to bring someone to accompany him at the meeting; he had been offered a translator in the past which on two different occasions he had both accepted and refused the offer. He had also been accompanied and assisted by his wife on occasions. The Tribunal was satisfied that at no stage did the claimant indicate to the respondent to the effect that he failed to understand the allegations put to him at the investigation meeting, and confirmed in the 20 June 2017 letter referred to further below.

17. At the 19 June 2017 meeting the claimant was asked about the locked cupboard indicated managers on another section Zbiniew Kolsa and Kevin Burton "said I could have the cupboard" on the one hand, and yet on the other confirmed the cupboard was locked, no one had a key and "it is hidden so no one knows it is there." The claimant contradicted himself when he confirmed when the cupboard was put there by him and "…no one else knows about this…I moved it a week ago…it is hidden so that no one knows it is there."

18. In oral evidence given at the liability hearing the claimant indicated he had informed Carl Heap of the cupboard, its contents and the copper wire and Carl Heap had "knowledge that I keep items which belong to the company in the locker and items necessary for the production process." The claimant conceded he had made no mention of this fact at any stage during the disciplinary process, on the basis that "Mr Heap was present at my meetings and he had knowledge about the items being in the lock up and I didn't feel it necessary to inform him about it again," which made no logical sense. Given the claimant's belief that he was facing a theft allegation and

the fact that the disciplinary process undertaken by Nikki Anderson and Carl Heap jointly could result in his dismissal, this explanation was not credible. Further, the claimant did not cross-examine Carl Heap on this fundamental point, despite asking a number of questions on a raft of other issues. Had Carl Heap possessed knowledge of the locker and the reels of copper as the claimant now alleges for the first time, this would have provided the claimant with a defence. The Tribunal found the claimant was not a credible witness in this respect and its finding in this regard was relevant to the issue of contribution.

19. Jumping ahead to the appeal hearing, the claimant also referred the Tribunal to his letter dated 11 September 2017 as evidence that he had raised the issue of Carl Heap's state of knowledge earlier with the respondent. On a common-sense reading of the letter giving the words their plain meaning, the details of which have been set out below, the Tribunal found it made no such reference, and the claimant had not made mention of Carl Heap's knowledge either in his own correspondence or in any other the meetings, including the appeal hearing. The Tribunal did not find the claimant's explanation that the appeal hearing minutes had not correctly recorded his evidence as credible; he had been provided with copies of all the minutes and at no stage had he indicated either at subsequent hearings or in correspondence that the minutes were incorrectly drafted in respect of key points, including Carl Heap's knowledge.

20. In addition to taking photographs, Nikki Anderson and Carl Heap suspended the claimant on full pay on 19 June 2017, carried out the investigation that included witness statements being obtained from number of witnesses including Russell Whitney, a maintenance engineer, who confirmed on 18 June 2017 the claimant took him to "his box…I told him I knew nothing about it."

21. In a letter sent 20 June 2017 from Nikki Anderson, the HR director, she referred to the meeting held on 19 June 2017 and confirmed "you were asked if you wanted someone to be present with you in the meeting but you decided you didn't…The meeting was adjourned as it became clear that some of the things you are admitting to are against company rules…the allegations against you are serious, namely that you have broken Packhouse Hygiene rules by having [personal possessions in the Packhouse, that you have expensive company property in your personal possession which could be theft and you have a surveillance camera with a monitor hidden on site which you may or may not have used to watch your colleagues." The claimant was left under no misapprehension that if the allegations were proven it could result in his dismissal. The claimant was informed of his right to be accompanied and so the Tribunal found.

<u>The disciplinary hearing</u>

22. On 21 June 2017 the first disciplinary hearing took place and it was adjourned at the claimant's request in order that Nikki Anderson and Carl Heap could speak with Lidia Domzalaska, Danute Kania and Darota Latka. The meeting took place between Carl Heal, Nikki Anderson, the claimant's wife Nina Adamski and the claimant on 21 June 2017. Notes of the meeting were taken. The claimant confirmed his understanding of the seriousness of the allegations, and video evidence together with photographs were viewed. The claimant confirmed stock owned by the

respondent and needed for production was hidden and no one knew of the cupboard for which there was no spare key apart from the claimant. The explanation he gave was that he "keeps them safe because things disappear." The claimant conceded it was a serious breach in a food production unit and that it "does not look good" when it was put to him he had hidden the copper reels. The claimant stated, "I'm sorry for the situation, now I see that it looks very bad" accepting he should have used his outside locker. The claimant's wife described the claimant as "so stupid."

23. The claimant suggested witness statements should be taken from Lidia Domzalaska, Danute Kania and Darota Latka, which they were on 22 and 26 June 2017. Lidia Domzalaska provided a signed witness statement to the effect that the claimant had informed Dorota Latka there were no copper reels left, and when they went to look for them "he appeared with two of the copper reels which he said were the last two." Danute Kania provided a signed witness statement confirming the claimant had "appeared…with two roles in a box. Rafal clearly stated they were the last two rolls." Dorota Latka provided a signed witness statement that the netting machine had run out of coper wire, "Rafal then produced a box with the wire in which I took two rolls from and there were two rolls left in the box."

24. Whether Darota Latka saw two rolls left in a box or not may or may not have been an issue. The claimant now submits that the fact she saw four roles and not two (unlike her colleagues) this must show he was not attempting to steal the copper roles, but hide them to avoid theft. The claimant did not argue this at the time, and it cannot be said Dorota Latka's evidence undermined that of her colleagues on the basis that the claimant produced the wire, and the recollection of Lidia Domzalaska and Danute Kania was that the claimant had informed them the copper reels were the last two. Nikki Anderson and Carl Heap were entitled to accept this evidence given the cirumstances around which the copper wire was found, although clarification could have been sought from Darota Latka on this issue.

25. The disciplinary hearing was reconvened on 26 June 2017, the claimant was accompanied by his wife, Nina Adamski, who was also a witness. Carl Heap confirmed Lidia Domzalaska, Danute Kania and Darota Latka had provided statements and the claimant stated Darota Latka, a section manager, was aware of the existence of 4 reels, 2 were handed to her and "I said the other 2 I would put in the tent." Carl Heap took into account the fact that there was "clearly a conflict in the statements in terms of whether you said these were the last reels or if there were any more…. Lydia was very specific. I'm not sure what these statements prove – we found 2 reels in the bottom of the locked and hidden cupboard." The claimant confirmed again that no one else knew they were there and "the QC tape was to keep people away." Carl Heap and Nikki Anderson were entitled to disregard the claimant's arguments concerning the witnesses, preferring to accept the evidence given by two of the to the effect that the claimant had handed to them reels which he described as the last two, coupled with the claimant's clear evidence that no one knew the two reels were locked away in a box that he had carefully hidden away in the Packhouse.

26. The decision to dismiss was jointly made by Nikki Anderson and Carl Heap; both held a genuine belief the claimant was guilty of the allegations; however, their decision to investigate and take part in the disciplinary hearing was a procedural

unfairness in breach of the ACAS Code. The undisputed evidence before them was the claimant had "deliberately gone against the Company Packhouse Hygiene rules by having personal possessions in the Packhouse"; this was accepted by the claimant at the time. It was also found the claimant had "expensive company property in your personal possession which is locked away and nobody apart from you knows where this is." This allegation was also accepted by the claimant. Finally, it was found "also, you had a surveillance camera with a monitor hidden on site which may or may not have [been] used to watch your colleagues." This allegation was not accepted by the claimant who explained it was not a surveillance camera but baby monitor. As a result of all three allegations being met, Nikki Anderson and Karl Heap concluded "all trust between you and the company has been broken. We considered your explanations but came to the decision they were untrue and unacceptable. We considered evidence that was gathered by Carl Heap and myself, this included pictures and five statements shown to you at the meeting…"

27. Nikki Anderson sent the claimant an outcome letter dated 27 June 2017 confirming the claimant's summary dismissal for gross misconduct. The effective date of dismissal was 29 June 2017.

28. The claimant appealed, the appeal hearing was re-arranged four times due to the claimant feeling unwell. The claimant informed the respondent last minute of his inability to attend, and in relation to the 9 August 2017 hearings on the morning of the hearing. In a letter dated 9 August 2017 the claimant was informed in no uncertain terms that the agreed hearing date of 17 August 2017 will proceed regardless of whether he attended or not. The meeting went ahead on the 17 August 2017 and the claimant attended. He was accompanied.

29. The appeal hearing was heard by Mathew Pearson, MD of APS Growers and Simon Nicholls, operations director, both were independent joint decision makers who had not been involved at any stage of the disciplinary process. The appeal hearing was minuted and records Simon Nicolls going through the facts. The claimant had his say and put forward his case in full, which were properly and objectively considered by the panel. It is notable the claimant changed his evidence regarding the cupboard key being the same as is locker key and "so on my day off somebody could have used that…. I told my manager 2 years ago." The claimant accepted "I know I broke the rules and not denying it." Having considered the evidence and the claimant's admissions, Mathew Pearson and Simon Nicholls held a genuine belief the claimant was guilty of gross misconduct, based this belief on a reasonable investigation, and having considered the information put before them in an objective and fair manner, put right the procedural irregularity of the disciplinary hearing that had taken place when two dismissing officers had also acted in the capacity as investigators.

30. The appeal outcome letter dated 25 August 2017 written by Mathew Pearson made the same findings as the disciplinary hearing outcome letter. It confirmed "the surveillance camera was your personal possession and should not have been kept in the Packhouse…you said you kept the copper wire in the cupboard to keep it safe and that Elliot and Reece knew where the cupboard was but you admit that they were not aware the copper wire was kept in the cupboard. You also said you left space around the cupboard to access it and so people could see it. As you can see

from the picture evidence…the box was right at the back of the tent and was well-hidden out of view and did not have space around it to access it…. We got statements form Danuta, Lidia and Dorota all at your request and all three statements confirmed Danuta was present…You have not denied the fact that you knew that you should not have personal possessions in the Packhouse and have jeopardised the business…"

Law

31. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

32. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

33. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

34. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

35. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Conclusion: applying law to the facts

36. With reference to the issue 3.1, namely, was the claimant dismissed for a potentially fair reason within the meaning of Section 98(2) of the Employment Rights Act 1996, the Tribunal finds the claimant was dismissed for misconduct.

37. With reference to issue 3.2, namely, if so was the dismissal fair in all the circumstances of the case within the meaning of Section 98(4) of the Employment Rights Act 1996, the Tribunal found that it was for the reasons set out above.

38. With reference to issue 3.3 and 3.4 namely, did the respondent have a genuine belief that the claimant was guilty of misconduct the Tribunal found that it did, and it had reasonable grounds on which to base that belief. Nikki Anderson and Carl Heap held a genuine belief that the claimant was guilty of the misconduct alleged, as did the appeal officers, there were reasonable grounds upon which to base that belief set out within the investigation meeting minutes, the investigation report and the claimant's own evidence given at the disciplinary hearing, when he admitted to misconduct.

39. With reference to issue 3.5, namely at the stage at which the respondent formed this belief had it carried out as much investigation into the matter as was reasonable in the circumstances given the size and resources of the respondent, the Tribunal found that it had.

40. With reference to issue 3.6, namely, did the respondent follow a fair procedure given its size and resource, the Tribunal found that it did, and complied in the main with the ACAS Code. However, the Tribunal found it had not in respect of the disciplinary hearing, but this was put right on appeal. Paragraph 6 of the ACAS Code provides in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. It was practicable for this to have happened at the disciplinary hearing given the respondent's size and resources.

41. With reference to issue point 3.7, namely, was the decision to dismiss within the range of reasonable responses open to a reasonable employer, the Tribunal found that it was given the high importance to the respondent of the respondent's procedures in the Packhouse, and the possible undisputed impact on the business and its clients given the client had stored personal possessions (including material required for packaging product) in the Packhouse/production tent. In closing submissions, the claimant referred to the respondent's procedure and stated there was no glass locked up in the cupboard, and therefore this could not have been a risk. However, the claimant had locked up plastic items, and it was undisputed that

any personal items, including plastic, held in the production area could impact the business.

42. The respondent's Policies set out above made the position very clear to the claimant, and given his experience and expertise, had he addressed his mind to the issue, he would have realised the possible exposure of the respondent, to whom risk management was key. The claimant's admissions made during the disciplinary process, and the comments of his wife who supported him, revealed that he was aware of the breaches and its impact on both the respondent and his employment.

43. In conclusion, the Tribunal is satisfied that the claimant was dismissed for gross misconduct, and the respondent had acted reasonably in dismissing for the reason given in accordance with Section 98(4). The Tribunal being satisfied that in all the circumstances, the respondent was justified in dismissing the claimant for the reason it did. It is well-known that the range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: J Sainsbury v Hitt referred to above. The reasonableness test is relevant to the respondent's conduct, which the Tribunal has assessed and applied, careful not to substitute its opinion for that of the respondent. The claimant has the Tribunal's sympathies, this is a sad case and no doubt the claimant, who is in the process of separating from his wife and his family, will have suffered as a result. The Tribunal cannot substitute its decision for that of the respondent and even taking into account the claimant's mitigation the respondent's action fell well within the band of reasonable responses open to a reasonable employer. The Tribunal is satisfied that the facts and beliefs known to the dismissing and appeal officers at the time justified the claimant's dismissal for gross misconduct which fell well within the band of reasonable responses and was a fair dismissal in accordance with equity and the substantial merits of the case required in Section 98(4)(b) of the ERA.

44. With reference to issue 3.8, namely contribution, having found the claimant was not unfairly dismissed there is no requirement for the Tribunal to consider this issue. In the alternative, had the claimant been unfairly dismissed (which for the avoidance of doubt was not the Tribunal's finding) contribution would have been assessed on a just and equitable basis at 100% in relation to both the compensatory and basic award. The claimant was both culpable and blameworthy in accordance with the test set out by the Court of Appeal in Nelson v BBC (No.2) 1980 ICR 110, CA,

45. On the issue of the "no difference rule" set out in Polkey v AE Dayton Services Ltd [1988] ICR 142 HL, the Tribunal found the substantive unfairness had been put right on appeal and therefore Polkey was not an issue. In the alternative, had the Tribunal found the appeal had not put the procedural irregularity of the disciplinary hearing right, it would have gone on to find the claimant would still have been dismissed had a fair process taken place on the effective date of termination.

46. In conclusion, the claimant was not unfairly dismissed and his claim for unfair dismissal is not well-founded and is dismissed.

24.10.18

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Employment Judge Shotter

Date_____

JUDGMENT AND REASONS SENT TO THE PARTIES ON
2 November 2018

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FOR THE TRIBUNAL OFFICE