EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr David Banner		DX Network Services Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 18 & 19 October 2018

EMPLOYMENT JUDGE Lloyd

Representation
Claimant: Mr A. MacMillan, Counsel
Respondent: Mr A. Johnston, Counsel

JUDGMENT

The judgment of the tribunal is that: -

1) The Claimant's claim of unfair dismissal fails and is dismissed.

2) He is ordered to pay costs to the respondent in the sum of £1,500.

REASONS

Background

1.1 The claimant was employed by the respondent from 1 August 1986 until his summary dismissal for misconduct, which took effect on 14 December 2017. At the date of his dismissal, the claimant was employed as a warehouse supervisor within the respondent's central hub at Willenhall. In November 2017 following an anonymous tipoff, the respondent commenced an investigation into a possible disciplinary matter relating to the claimant and two other employees; Mark Priest and Neil Tully.

1.2 The specific allegation against the claimant was that he had on multiple occasions been clocked in as at work by Mark Priest when he had not actually been present at work. Mark Saund, the operations manager, was instructed to investigate the allegations against both Mark Priest and the

claimant. Mr Tully ultimately resigned prior to a disciplinary hearing being held.

1.3 On 14th of November 2017, Mr Saund held a first investigatory interview with Mark Priest. At the interview, Mr Priest admitted that he had clocked in the claimant, at the claimant's request, on two occasions during November 2017.

1.4 Shortly after the investigatory interview with Mr Priest, Mr Saund interviewed the claimant who denied that Mr Priest had clocked him in on any occasion during November 2017.

1.5 At 4:30 PM on 14 November 2017, Mr Saund held a second investigatory interview with Mark Priest. During the interview, Mr Priest indicated that he had clocked the claimant in on other occasions. He stated that the claimant had contacted him via "WhatsApp" asking him to do so. It also transpired that the claimant had attempted to contact Mr Priest on about 12 occasions on 14 November. On the same day both the claimant and Mark Priest were suspended from work on full pay pending further investigation.

1.6 As part of the further investigation, clock cards relating to the claimant and Mark Priest as far back as 3 July 2017 were examined and compared. There was a distinct overlap between the clocking in times of the claimant and Mark Priest.

1.7 On 16 November 2017, the claimant attended a second investigatory interview with Mr Saund. During that interview, the claimant acknowledged that someone else may have clocked him in on 13 November. He had not clocked in himself but stated that he had not asked anyone to do so. On 22 November Mark Priest attended a third investigatory interview with Mr Saund. During that interview Mark Priest confirmed that on each occasion where his and the claimant's clocking in times coincided, it was because he had clocked in the claimant at his request; either verbally or by text or through WhatsApp.

1.8 On 23 November the claimant attended a third investigatory interview with Mr Saund. He claimed that he had never rung or texted any colleague to ask to be clocked in.

1.9 In all the circumstances of his investigation, Mr Saund concluded that there was a disciplinary case to answer against both Mark Priest and the claimant. Each were invited to disciplinary hearings in a letter dated 28 November. Disciplinary hearings were scheduled for 1 December. On that date, Chris Pearce, the hub general manager, conducted disciplinary interviews firstly with Mark Priest and then with the claimant. The claimant asserted that Mark Priest was a liar and denied that he had ever asked him to clock him in. The claimant stated that he sometimes walked into work with Mark Priest and suggested that this was the reason for the distinct similarity in the clocking in times. He did not advance any explanation as to why Mark Priest might be making up the allegations against him.

2.1 By a letter dated 6 December 2017, Mr Pearce stated that he had found the allegation of gross misconduct against Mark Priest proven. However, because of mitigation available to Mr Priest – which included the fact that he had not gained personally from his actions and also that he believed he was acting on the claimant's instructions – Mr Pearce decided that the appropriate sanction was a final written warning, along with a number of changes to Mr Priest's role.

2.2 By a letter of the same date, Mr Pearce informed the claimant that he had found the allegations of gross misconduct proven against him. Moreover, the claimant had benefited directly from his actions and had involved a more junior employee in his deception. In those circumstances the appropriate sanction was summary dismissal, effective from 12 December 2017.

2.3 The claimant appealed the decision to dismiss him on 14 December.

2.4 The claimant firstly complained that he had not initially received a complete copy of his dismissal letter. Because of this it was decided that his termination date would be amended to 14 December 2017.

2.5 A dismissal appeal was convened on 20 December. It was conducted by Alistair Steven, the regional director, who was supported at the hearing by Caroline Morrisey the human resources manager. During the course of the hearing, the claimant produced a letter ostensibly written by Mark Priest on 13 December 2017. In the letter Mr Priest appeared to claim that the allegations that he had made against the claimant were not true. The claimant also argued that he had arrived together with Mr Priest and others on a regular basis. The claimant was questioned during the appeal hearing, by Mr Steven, about the large number of handwritten amendments on his clock cards.

2.6 In the light of the appeal hearing, the respondent decided to embark on further investigation in respect of those matters that had been raised by the claimant during the appeal hearing. The claimant was advised of that by email of 24 December, and on the same day the claimant send an email to Caroline Morrisey including images of clock cards of various other employees.

2.7 On 21 December, Caroline Morrisey had carried out a further interview, by way of investigation, with Mark Priest. At the interview, Mr Priest indicated that the version of events in the letter which the claimant had produced was untrue. The account that he had originally given to Mr Saund and to Mr Pearce was the correct one. He stated that the relevant parts of the letter had been dictated to him by the claimant himself. Further, on 3 January 2018, Mrs Morrisey carried out interviews with three other employees; Naginder Singh, Christopher Grimes and Simon Wilson. None of them supported the claimant's assertion that he regularly arrived and clocked in with Mark Priest. The main theme of the accounts provided by those employees were to the effect that Mr Priest would do what the claimant asked him to do.

2.8 By letter, dated 3 January 2018, Mr Steven informed the claimant that he was upholding the original decision to dismiss him.

Evidence at the tribunal

3.1 I took verbal evidence from Christopher Pearce, the respondent's hub manager, and the dismissing officer in this matter and from Caroline Morrissey, the HR Manager. I heard from the claimant and he also called Daniel Cooper, a former employee of the respondent. The claimant produced a written statement of John Webb, also a former employee; but Mr Webb did not attend to give live evidence.

3.2 There was produced to the tribunal, a substantial common bundle of documents extending to some 424 pages.

3.3 I took submissions from both counsel on Day 2 of the hearing; those submissions having been set out in written skeleton arguments but augmented by counsels' verbal commentaries to the tribunal.

Issues and relevant Law

4.1 There is no dispute between the respective representatives as far as the law and its analysis is concerned.

4.2 Sections 94 and 98 Employment Rights Act 1996 ("ERA") apply.

4.3 At the core of this case is the three-part test which the Tribunal must apply to the evidence before it.

4.4 The Judgment of this tribunal is not an examination of the guilt or innocence of the Claimant in the events described in the evidence. Mr MacMillan has at times approached the case with a very forensic analysis of the events which are in issue. The tribunal makes no criticism of him for that, because in the process, he has left "no stone unturned" in advancing the Claimant's case. However, the Tribunal should not place too much emphasis on the forensic dimension of the alleged events in question.

4.5 The three-stage test originates from the case of **Burchell v British Home Stores [1978] IRLR 379**. Arnold J said;

> 'What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element.
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> First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case…."

4.6 The onus is upon the employer to satisfy the tribunal as to the first element; that is that the employer genuinely did dismiss for misconduct – the section 98 (1) elements – but not the remaining 98 (4) elements.

Counsel for the respondent cites **Boys and Girls Welfare Society v McDonald (1997) ICR 693**, where the EAT highlighted that **Burchell** had been decided when the burden of proving reasonableness rested with the employer rather than neutrally as is the present position. Accordingly, the citation at paragraph 4.5 above must be read subject to this qualification so as to avoid the tribunal falling into error and requiring the employer to prove reasonableness.

4.7 The reasonableness of the investigation carried out by the employer is to be judged in the same way as any question as to the reasonableness of the decision of the employer; namely by the "objective standard of the reasonable employer". The issue to be determined is whether the investigation carried out can be said to have fallen within the range of reasonable responses that would be open to the employer in the circumstances of the case.

4.8 In relation to an employer's investigation of misconduct, the Court of Appeal decision of **Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588** concludes that the need for an employment tribunal to apply the range of reasonable responses test, or, put another way, the need to apply the objective standards of a reasonable employer, applied as much to the reasonableness of an investigation as to the reasonableness of a decision to dismiss when considering a complaint of unfair dismissal. The application of that test does not seek to determine the claimant's guilt or innocence but rather the Respondent's fairness in making the decision it did at the time of the claimant's dismissal.

4.9 Once the tribunal has considered the **Burchell** test, it must still go on to consider whether it was reasonable for the employer to have dismissed the employee for the misconduct in question. It is not for the tribunal to substitute its view of the severity of the offence for that of the employer. The question is whether the sanction imposed fell within a range of reasonable responses of a reasonable employer. In determining this question the tribunal must focus upon the sufficiency of the conduct in which the employer found the employee to have engaged as a reason for dismissal.

Findings and Conclusions

5.1 I have carefully considered the evidence which has been placed before this tribunal in relation to the investigation process, the dismissal procedure and decision and the subsequent appeal.

5.2 In all these contexts, I have preferred the evidence of the respondent's witnesses to the claimant and his witness.

5.3 The Respondent's dismissal decision was made by Christopher Pearce and was in turn upheld by Mr Steven at the appeal stage.

5.4 By the time of the Disciplinary Hearing, I find that the Claimant's guilt was on the evidence before the respondent, clear to all involved; including the Claimant himself.

5.5 There has been some discussion advanced by Mr MacMillan in particular, as to exactly what was the claimant's misconduct; and was it clearly defined in the respondent's processes. It was. The claimant in his own evidence has acknowledged that an employee, more especially one of seniority and responsibility, who deliberately takes steps to falsify his record of attendance and who procures complicity from another is guilty of serious misconduct punishable by summary dismissal.

5.6 I believe that the claimant well knew his guilt throughout the investigation and the disciplinary process. His tactics were those of subterfuge and obfuscation of the truth. The claimant knew exactly what had been happening over a lengthy period of time. He was taking steps to cover it up in the disciplinary process; and sadly, exploiting the vulnerability of Mark Priest to assist him in that smokescreen.

5.7 It was clear to Mr Pearce on the evidence that the claimant had used his influence as a senior employee to procure the cooperation of the younger, much less confident Mark Priest to commit what the claimant knew to be sackable offences in fraudulent clocking procedures.

5.8 It is plain on the evidence that by the time Mr Pearce made his decision to dismiss, he had properly satisfied himself according to the essential tests. He genuinely believed that the Claimant was guilty of serious misconduct. That was apparent from the evidence and there were reasonable grounds provided by that evidence, for the belief Mr Pearce had. The Claimant had attempted to manipulate Mark Priest and the circumstances generally; not just at the relevant times of the wrong doing, but also since the investigation, so as to manipulate and pervert the justice of the case brought against him.

5.9 Was there a proper investigation? As counsel for the respondent has remarked in his submissions this tribunal must examine the respondent's investigation process generally, from first to last. I find that there was a fair, balanced and objective process which was in all respects compliant with the principles contained in **Sainsbury's Supermarkets v Hitt**. It has been suggested by the claimant and his counsel that more could have been done by the respondent in that investigation. But the test is not one of whether more could be done; and whether further steps could conceivably have been taken by the respondent in the investigation process. The real test is whether what had been done in all the circumstances was sufficient to bring the Respondent to a fair and reasonable conclusion. In my finding it had. It was a fair process; fair to the Respondent and fair to the Claimant in all the circumstances.

6.1 Whether the decision to dismiss was a reasonable response on the basis the evidence before the respondent was one of the issues pursued by the claimant's counsel during his cross examination of the respondent's witnesses. The claimant's lengthy service with the respondent, of some 31 years, is patently common ground. The issue pursued by Mr MacMillan has been was it within a range of reasonable responses for the Respondent to dismiss such a long serving employee?

6.2 However, not only was the claimant a very long serving employee; he was an employee also who had been vested with the trust of the respondent.

He was in a supervisory position. I considered whether Mr Pearce and subsequently Mr Steven had acted within such a range in all the circumstances. Before them was evidence on the basis of which they had reasonable belief of the claimant's serious misconduct along with the manipulation of another employee, subordinate to his own position. The claimant's conduct had been dishonest, and had been exploitative of a more junior, vulnerable colleague.

6.3 On the evidence of his employment record, the claimant was not an entirely unblemished employee.

6.4 Mr Priest, though he had been complicit on the face of the evidence, his prospective discipline properly gave rise to considerations different from those critical to the claimant's discipline. Those considerations were made plain by Mr Pearce in his evidence to this tribunal. The issue is the range of reasonable responses to the facts before the respondent. Would no reasonable employer have dismissed the claimant? I find that dismissal of the claimant was in all the circumstances a response which the Respondent fairly could take in all the circumstances.

6.5 As for the integrity of the Respondent's procedure, I find no evidence that unseats the fairness of the process. Counsel for the Claimant made strenuous efforts to discredit the procedure in his cross-examination and submissions. However, I find that the respondent's investigative and disciplinary procedure comfortably surmounts the hurdle of impartiality and fair and proper separation of functions.

6.6 The latter became contentious during the cross examination of the respondent's evidence. It was suggested, for the claimant that Mrs Morrissey was tainted by her involvement in an investigatory and decision-making process. I do not accept that as a fact; the evidence does not in any way support that. Mrs Morrissey at the relevant time was an employed HR manager, providing in-house HR support. It is by no means unusual for a HR business partner, or HR manager or their professional staff to work in precisely the way Mrs Morrissey did; supporting the investigatory and disciplinary processes. Mrs Morrissey had no decision-making brief here; it was a brief of support and not decision-making.

6.7 I conclude that the claimant was fairly dismissed. His proceedings fail in their entirety.

Costs application

7.1 The respondent in the light of my judgment made an ancillary application in respect of its costs under Rule 76 of the Employment Tribunal Rules of Procedure 2013. The exercise of the tribunal's power under the Rule is of course discretionary.

7.2 Mr Johnston, for the respondent, submitted that the application fell squarely within Rule 76(1)(b); that is to say this was a claim which never had any reasonable prospect of success. Counsel argues that the Claimant must have known at the time of the original disciplinary proceedings, that the respondent's case against him was utterly clear. It

was a case of alleged serious misconduct which the claimant accepted in his own evidence that if proven would be expected to lead to dismissal.

7.3 Some litigants may never taken any legal advice. However, I was invited to remind myself that this Claimant had the benefit of legal advice throughout. Mr Johnston submitted that on a reasonable analysis it was apparent to an adviser that this Claimant had no reasonable prospect of success.

7.4 Arguably, the respondent contends, the application for costs could be brought either under Rule 76(1)(b) or 76(1)(a) on the basis that it was unreasonable for the claimant to consider a claim. Mr Johnston argues that this is the only remedy effectively available to a respondent where a completely unmeritorious claim is brought against him. The position might have been, if this case had fallen outside the automatic directions regime, that an application in respect of a strike out or a deposit order might have been made at a preliminary hearing. However, this was a case which was listed straight through to trial by standard final directions.

7.5 The respondent limited the application to counsel's brief fee of £1,750.00 and the cost of Mrs Morrissey attending, of £450.00 and additionally a contribution to the costs of the respondent's solicitors of £1,000.00.

7.6 Mr MacMillan opposed the application. He has suggested a risk of confusing blameworthy conduct which the tribunal had found rightly led to a dismissal with the reasonableness of making a claim. Also, there were procedural considerations which properly should be argued on the claimant's behalf. Mr MacMillan submitted that for the tribunal simply to conclude that bringing the claim was unreasonable is to make a profound error; by mistaking the 20/20 vision of hindsight in the aftermath of the judgment for objective assessment of events at the critical time.

7.7 It was not unreasonable of the claimant, before having heard the respondent's evidence, and before the opportunity to give evidence himself, to seek judicial scrutiny of the procedure by which his lifelong employment was terminated. Counsel submits that it cannot be unreasonable, and it is not vexatious, abusive or disruptive.

7.8 The tribunal may have found that the Claimant was not a good employee, but in giving witness evidence, he answered all the questions; he wasn't disruptive, and he made no wild allegations. Simply, says Mr MacMillan, he attempted to defend himself reasonably. In his new employment he was now working nights. He has been on zero hours. He has the prospect of earning up to £18,000.00 annually, if he succeeds in gaining a continuing contract. He is at the end of his working life and is in relatively poor health. Counsel invited my discretion in the claimant's favour.

7.9 I am always very eager to protect the right of a Claimant to challenge a finding of misconduct and a dismissal which follows from it. But equally, I must fairly exercise my discretion in relation to both parties and I have reminded myself of the terms of Rule 76(1)(a) and (b): -

When a costs order or a preparation time order may or shall be made

76.— *(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.

8.1 I make no criticism of the way the proceedings have been conducted, but I think there is some controversy arising as to whether reasonably this claim should have been pursued to a full trial with Counsel instructed on both sides. Moreover, applying (b), the evidence before the Respondent of the claimant's misconduct was critical to the prospects of success. But more especially and even more significant, is the knowledge which I find the claimant himself must have possessed throughout.

8.2 I am at pains to be scrupulously fair to both sides on the matter of costs. The respondent has exercised moderation in the way they have assessed their costs for the purposes of this application. I propose to award costs to the respondent. I shall limit the award to £1,500.00 payable by the claimant to the respondent.

Employment Judge Lloyd

Signed: 13 December 2018