EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr M Williams	**v**	Axial Systems Limited

Heard at: Reading **On:** 9 and 10 October 2018

Before: Employment Judge Gumbiti-Zimuto (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr B Watson (Consultant)

JUDGMENT having been sent to the parties on **5 December 2018** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant's employment with the Respondent commenced on 3 May 2005. He was dismissed on 9 November 2016, when dismissed he was employed as an account director. He brought a claim for unfair dismissal, notice pay, holiday pay, arrears of pay and other payments. The claim for holiday pay was withdrawn.

Evidence

2. The witnesses who have given evidence in this case were: The Claimant and on behalf of the respondent Mr Mike Simmonds, Mr Paul Brett, Mr Timothy Jones and Mr Paul Spencer. All the witnesses prepared written statements which were taken as their evidence-in-chief.

Issues

3. It is agreed that the Claimant was dismissed. The reason for the Claimant's dismissal was agreed: that was conduct. In issue is whether that dismissal was fair. Determining that requires me to consider; whether the Respondent followed a fair procedure in dismissing the Claimant and whether the dismissal was reasonable in all the circumstances. If the Claimant was unfairly dismissed, did the Claimant contribute to his dismissal and should there be a Polkey reduction?

Findings of fact

4. My findings of fact in this case are as follows.

4.1 The Respondent is a supplier of network monitoring and network security solutions to customers who include banks, telecommunications companies, government, local authorities, large and medium sized enterprises, universities and schools.

4.2 On about 7 November 2016, Mr Mike Simmonds, who at the time was the Managing Director of the Respondent, received a telephone call from an employee of a company called Arista Networks. He was informed that there was an issue with a customer. The customer had contacted Arista asking for support in respect of one of the products that had been supplied by the Respondent.

4.3 Mr Simmonds explained that he had been told by a client, Mr Goodridge, that the plugin interface devices (SFPs) supplied by the Respondent were showing as being Arista parts in some of the diagnostic codes returned to the software but were actually a Finisar (another supplier) parts and not a part supplied by Arista.

4.4 Mr Simmonds made some enquiries. He spoke to the Claimant who was the sales representative responsible. He asked the Claimant if he was aware of any issues at Three, and if there was any possibility that the SFPs that had been supplied to the customer could have been Finisar SFPs with an internal modification to make them appear to be supported Arista SFPs.

4.5 The Claimant told Mr Simonds that he had supplied alternatives to the vendor's specific SFPs and had done so on his own authority. The Claimant confirmed that he had done what had been alleged and provided Mr Simmonds with an email trail which showed the transaction. It was obvious that the Claimant had chosen to purchase SFPs from a source that would alter the internal code of the SFP to make it appear to be an Arista part as opposed to a Finisar part.

4.6 As a result of what the Claimant said Mr Simmonds considered that the matter required further investigation.

4.7 The Claimant was contacted by Mr Brett. The Claimant was old to attend a meeting at 8.30 on 9 November 2016 with Mr Brett. The Claimant was not told anything more.

4.8 The Respondent's Finance Director, Mr Tim Jones who has responsibility for HR, completed and signed a settlement agreement ready for the Claimant to sign at the meeting.

4.9 In cross-examination the Claimant put to Mr Jones that this was an indication that the decision to end his employment had already been made before the meeting on the 9 November 2016. Mr Jones' evidence was that he was preparing for all eventualities including the possibility of the Claimant being dismissed. In that event the way he would seek to deal with it, to quote Mr Jones "out of kindness", was by entering into a compromise agreement with the

Claimant. I accept this evidence. It was not Mr Jones' decision whether the Claimant would be dismissed or not; this decision was to be made by Mr Brett. Mr Brett was not a party to discussions about the compromise agreement with Mr Jones.

4.10 I am satisfied that on the balance of probabilities what Mr Jones is telling me is correct. If what the Claimant had told Mr Simmonds is correct there was potential for the Claimant to be found guilty of gross misconduct.

4.11 Mr Jones took advice from Peninsula, whatever advice he was given by Peninsula did not translate into any fair process in dealing with the Claimant.

4.12 When the Claimant arrived at the meeting on 9 November 2016, he was not aware that he was attending a meeting at which he was going to be facing any allegations: The Claimant had no knowledge of what the allegations that he was facing were.

4.13 When the Claimant arrived at the meeting Mr Brett asked the Claimant four questions. In his witness statement, he records them as:

"Have you been sourcing SFPs from someone other than the approved vendor?

Can you explain why you have been doing this?

Can you see why this would cause difficulty with the vendor and with the client?

Do you see any ethical difficulties with this process?"

4.14 The questions asked indicate some thought having been given to the process. The questions appear to pre-empt the answers. It is an odd approach to have four questions drafted in such terms to be the focus of the meeting.

4.15 Mr Brett's evidence was that during the brief meeting, the Claimant confirmed that he had bought SFPs from a company other than the approved vendor because they were a lower cost, that the Claimant agreed that his actions could cause difficulty with the vendor, that the Claimant agreed that there were ethical difficulties and that the Claimant accepted that he had not gained approval from either the Respondent or the customer.

4.16 Mr Brett concludes that as a result of selling and sourcing SFPs from another company the Claimant had earned more money in commission.

4.17 The notes of this meeting are very brief (p123). The Claimant did not demur from the content of the notes of the meeting. In particular the Claimant did not object to the passage which records his final

words as: *"I didn't think it would blow up in my face"*.

4.18 Mr Brett's conclusion was that the Claimant should be dismissed, and the Claimant was dismissed without notice. There were discussions about the Claimant signing the compromise agreement. The Claimant did not sign the compromise agreement and he was asked to leave the premises.

4.19 The next communication with the Claimant and the first communication in writing about this matter with the Claimant was on 14 November 2016 (p124). That is an email from Mr Jones which confirms the Claimant's dismissal. The first paragraph of the email says:

"Further to the meeting last Wednesday, 9 November, at 8.30 when further to the answers you gave to the questions asked by Paul Brett regarding non-vendor approved SFPs being sold to THREE, you were dismissed for Gross Misconduct with immediate effect without notice, …"

4.20 The email then sets out the payments that the Claimant is to receive. The email also then attaches a copy of the Respondent's employee handbook. There is no mention of the Claimant being entitled to an appeal. The only the reference to the allegations is the passage "*the answers you gave to the questions asked by Paul Brett regarding non-vendor approved SFPs being sold to THREE".*

4.21 The Claimant and the Respondent entered communication about an appeal and an appeal date of 30 November 2016 eventually emerged.

4.22 The Claimant asked for documents to be provided to him in an email dated 17 November 2016. The Claimant repeated the request in an email dated 28 November 2016. The documents that the Claimant requested relate to matters which are relevant to the issues which gave rise to his dismissal.

4.23 The Claimant's emails to Mr Jones were never brought to the attention of Mr Spencer who conducted the appeal. During the hearing before me he was taken to documents and said that had he seen the document he would have remembered it because of the contents of the document. The emails were forwarded to Mr Simmonds. There was no answer given to the Claimant and the emails were not provided to Mr Spencer as part of the documentation relating to the appeal.

4.24 The Claimant also sent to Mr Jones an email on 29 November 2016 (p140). This email sets out the Claimant's case and asks for "supporting evidence" for the appeal. Again, this email never got to Mr Spencer who was conducting the appeal.

4.25 Mr Spencer explained that when he was dealing with the appeal, he wanted to approach it with an open mind. However, at some point

between 9 November 2016, the date of the Claimant's dismissal, and 30 November 2016, the date of the appeal hearing, Mr Spencer attended a meeting with the management team at which the Claimant's case was discussed. The management team comprises a number of senior managers and directors and non-executive directors. At the meeting Mr Spencer confirmed that Mr Jones, Mr Brett and Mr Simmonds were present. All had been involved in the Claimant's dismissal.

4.26 It was not entirely clear from the evidence given by Mr Spencer what was discussed but the background and circumstances of the Claimant's case were discussed by Mr Spencer with the other members of the management team who had been involved in the Claimant's dismissal. There was no other documentation created or generated to inform Mr Spencer about the dismissal of the Claimant for the purposes of the appeal.

4.27 When the Claimant's appeal meeting took place on 30 November 2016 the Claimant was accompanied by a colleague Mr Pike. Mr Spencer was accompanied by the sales manager, Paul Morris (p141A).

4.28 The first two paragraphs of that appeal meeting are informative. It begins with these words:

"Paul Spencer introduced the meeting and described the process of the hearing and the roles of the parties in the meeting.

Paul Spencer that handed over to Mike asking why he believes that the decision was unfair to dismiss him from the business".

The Claimant then proceeded to state his case. Which can be summarised by the passage:

"Mike stated that he was been terminated on a trumped up charge of selling third party optics to customers whi8ch is standard practice Axial."

4.29 Until the start of the appeal process, indeed up until the conclusion of the appeal meeting, the Respondent had never set out its case to the Claimant in writing. The extent to which the Claimant was aware of the allegations against him was based on the very brief meeting that he had had with Mr Brett on 9 November 2016 and the letter confirming his dismissal.

4.30 The Claimant's case, in a nutshell, was that he did nothing wrong because what he was doing was following standard operating procedures. Mr Spencer went away to carry out further investigations into this.

4.31 Mr Spencer spoke to the management team again. In his witness statement Mr Spencer makes the following observation.

"I reported back to the management team and relayed the details of the discussion. The management team collectively concluded that nothing that had been mentioned during the hearing had changed the reason for the Claimant's dismissal".

4.32 It is not clear when that meeting took place. In a letter dated 8 December 2016 Mr Spencer wrote to the Claimant informing him that his appeal had been unsuccessful, and he gave his reasons. These included that he had made enquiries into the allegations that the Claimant made about the standard operating procedures and had not been able to find that those matters were substantiated.

4.33 On 24 February 2017 the Claimant presented is complaints to the employment tribunal claiming unfair dismissal.

5. An employee has the right not to be unfairly dismissed by his employer (section 94 Employment Rights Act 1996 ("ERA").

6. Section 98 ERA provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show- (a) the reason (or, if there was more than one, the principal reason) for the dismissal, and (b) that it is a reason falling within subsection (2). The conduct of an employee is a reason falling within the subsection.

7. Where an employer has shown a potentially fair reason 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.

8. The Respondent must show that: it believed the claimant was guilty of misconduct; it had reasonable grounds upon which to sustain the belief; at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case. It is not necessary that the tribunal itself would have shared the same view of those circumstances.[1]

9. After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting its own decision as to what was the right course to adopt for that of the employer) must decide whether the Claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair"[2]. The burden is neutral at this stage: the tribunal has to make its decision based upon the evidence of the Claimant and Respondent with neither having the burden of proving reasonableness.

[1] British Home Stores Limited v Burchell [1978] IRLR 379
[2] Iceland Frozen Foods v Jones [1982] IRLR 439

10. A failure on the part of any person to observe any provision of a Code of Practice issued by ACAS[3] shall be admissible in evidence, and any provision of the Code which appears to the tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.[4]

11. There are three basic requirements of natural justice which should be complied with during the proceedings of a domestic disciplinary inquiry: the employee should know the nature of the accusation against him; the employee should be given an opportunity to state his case; and the decision maker should act in good faith.[5]

12. Where there is a serious allegation of dishonesty, fairness demands that the accused person has the allegation put with sufficient formality and at an early stage to provide a full opportunity to answer the allegation.

Conclusions

13. The Respondent has been guilty of a number of breaches of the ACAS Code of Practice On Disciplinary And Grievance Procedures (2015) ("the ACAS Code").

14. Paragraph 9 of the ACAS Code states:

"If it is decided that there is a disciplinary case to answer, the employee should be notified in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

This was not followed in this case.

15. This was not only a failure to comply with the Code, it is also a failure to act fairly in that a party should know the nature of the accusation made against them and the process to be followed.

16. Paragraph 10 of the ACAS Code states that: "The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied to the meeting." This did not occur in this case. The Claimant was deprived of the opportunity of having somebody to accompany him at the meeting at which the decision to dismiss him was made.

17. Paragraph 11 of the ACAS Code states that: "The meeting should be held without unreasonable delay whilst allowing the employee reasonable time

[3] Issued by ACAS under the provisions of Chapter III of the Trade Union and Labour Relations (Consolidation) Act 1992.
[4] Section 207 Trade Union and Labour (Relations) Act 1992
[5] Khanum v Mid-Glamorgan Area Health Authority [1978] IRLR 251 EAT

to prepare their case." In this case on the one hand, the meeting with Mr Brett took place without unreasonable delay, two days after the discussion between Mr Simmonds and the Claimant. However, the Claimant was not given any time to be able to prepare his case. He was not notified of the purpose of the meeting or given any notification of the nature of the allegations that he was to face at the meeting at which he was dismissed.

18. Paragraph 12 of the ACAS Code states that;

"Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that had been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by the witnesses. Where an employer or employee tends to call relevant witnesses they should give advance notice that they intend to do this."

The Respondent failed utterly to follow this guidance.

19. Not only did the Respondent fail in respect of the disciplinary meeting stage the Respondent's dealing with the Claimant's appeal also gave rise breaches of the ACAS Code.

20. Paragraph 27 of the ACAS Code provides that: "The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case."

21. In his evidence Mr Spencer makes clear that the managers who had been involved in the Claimant's dismissal were all involved, in one way or another, with the appeal. The were two meetings at which briefings were given to Mr Spencer in respect of the Claimant's dismissal. In my view this feature too makes the process which the Respondent followed in the Claimant's case unfair. There is a lack of transparency in what took place in the briefings which appear to have been (i) the source of Mr Spencer's knowledge about the circumstances of the Claimant's case and (ii) where Mr Spencer went to investigate the issues raised by the Claimant in his appeal.

22. I am satisfied that in the circumstance the Claimant was unfairly dismissed.

Remedy

23. I now go on to consider the issues of contributory fault and whether the award of compensation should be reduced having regard to the decision in Polkey v AE Dayton Services Ltd.

24. Section 122 (2) ERA provides that: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to

reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

25. Section 123 (6) ERA provides that: "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

26. I am satisfied that the Claimant was aware that what he was doing was in breach of an instruction given by the Respondent. There was some debate about whether the instructions (see p82 and p149) establish that that the Claimant specifically instructed that he should not supply Arista products without written consent.

27. The Claimant says it is possible to analyse these emails in such a way as to leave open the possibility that the Claimant could sell Arista products without written consent. However, in my view on a plain reading the emails do not lead to that conclusion without an abandonment of common sense.

28. There is also the statement of the Claimant to Mr Brett on 9 November 2016 when he appeared to accept that he should have told the customer that he had been provided with SFPs from a third party.

29. The Claimant's evidence was equivocal on this issue but I am satisfied that he was aware that in supplying the specific SFPs which gave rise to problems notified to Mr Simmons on 7 November 2016 he had not complied with the Respondent's instruction.

30. The Claimant gave evidence that there was either a custom and practice or a standard operating procedure which meant that the instruction was ignored and in fact such sales were permitted. The Claimant when questioned about this was not able to give evidence to show that there were a significant number of transactions of a similar vein to the questionable transaction in this case. The Claimant's evidence did not prove the custom and practise or standard operating procedure he relied on and it was denied by the Respondent's witnesses.

31. The conclusion that I have come to is that the Claimant's conduct did amount to misconduct (perhaps gross misconduct) and in the circumstances he was therefore guilty of blameworthy conduct.

32. I am satisfied that the blameworthy conduct was the cause of the decision to dismiss the Claimant.

33. The evidence given by Mr Spencer was that he made enquiries relating to the existence of a standard operating procedure the Claimant referred to and it did not exist. Mr Spencer's evidence was tainted with the influence of managers who are involved in the Claimant's dismissal. The other managers did not support the Claimant's evidence.

34. However, I am not satisfied that it is just and equitable to reduce the basic award for the following reasons. There was an acknowledgement that non-vendor SFPs were sold in many instances without a breach of any

instruction. This is evident from Mike Simmonds' email sent to the sales department on 3 February 2016 (p82). The Claimant was open about what he did when he discussed the matter with Mr Simmonds on the 7 November 2016. There was no indication from the Claimant that he considered that he had done anything wrong at this stage. In his meeting with Mr Brett the Claimant was open about what he had done and gave no indication of being concerned that his actions were not permitted. He accepted that there was an "ethical" difficulty, but the Claimant was not accepting that he had done wrong. I note the terms in which paragraph 10 of Mr Brett's witness statement is drafted and the contents of the notes of the meeting on the 9 November 2016, in circumstances where the disciplinary process was spectacularly inadequate and deprived the Claimant of the opportunity to present his best case in the disciplinary process.

35. The Claimant in my view is entitled to succeed to recover a full basic award.

36. As to the compensatory award the Claimant is entitled to an award that is limited. I am satisfied that the Claimant's dismissal in this case is entirely due to his own actions. It might be categorised as 100% his fault. However, I do not consider that it is appropriate to reduce his compensatory award by 100%.

37. I am satisfied that had a fair procedure been followed the Claimant may well have been dismissed, and if the custom and practise or standard operating procedure, he relied on was not proved he undoubtedly would still have been dismissed at the end of that fair procedure. On the evidence presented at this hearing before me it has not been proved. He would have been dismissed for his own failure to comply with an instruction.

38. The Respondent's actions in entirely failing to comply with the ACAS Code of Practice are such that the Claimant has in effect been deprived of the opportunity of arguing his case before the employer in a way that gave him some prospect of achieving a result favourable to him. I note that the Respondent's evidence is that it was not pre-determined that the Claimant's case would end in dismissal.

39. However, the complete failure to follow a fair procedure robbed the Claimant of the opportunity of establishing his case at all. It is inevitable where the Claimant was entirely prevented from even beginning to present a credible defence to the employer in the disciplinary process that he will be hampered in the case he can present to the employment tribunal. While the evidence presented to me leads me to the conclusion that the Claimant did not establish the custom and practice or standing operating procedure, the fact that he has lost the opportunity to present his best case before the employer, should be reflected in the award of compensation. The Claimant should recover some compensatory award.

40. In arriving at the level of the compensatory award I have taken into account that a fair process would have allowed the Claimant a brief period to prepare his case and obtain the evidence he wished to rely on. The

result is that the Claimant's employment would have lasted no more than about a couple of weeks longer. I would therefore make an award of compensation to the Claimant to reflect that. This in my view is a just and equitable result because it reflects the effect of the Respondent's failings in the level of award and recognises the need to take account of the Claimant's fault. I make a compensatory award of two weeks' pay

41. Applying the Polkey principle to the same set of circumstances I come to the conclusion that there should not be any additional reduction to the compensatory award.

42. The failure on the part of the Respondent to comply with the ACAS Code of Practice in my view was total. They did not comply with the provisions of the Code in respect of the disciplinary hearing and although there was a supposed appeal process which took place, the Respondent did not comply in relation to that part either in my view in that there were breaches in the way that Mr Spencer dealt with it.

43. I make an award to the Claimant pursuant to provisions which are contained in section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. I make an award to the Claimant increasing the compensatory award by 25% because in my view there was a complete failure by the Respondent to comply with the ACAS Code.

44. The award is therefore as follows:

Basic Award	
16 weeks @ £479.00 per week:	£7,185.00
Compensatory Award	
At the rate of £1,589.23 per week	
X 2 weeks:	£3,178.46
Section 207A increase to award by 25%:	£794.61
Total Award:	**£11,158.07**

45. The Claimant's complaint of wrongful dismissal is dismissed.

46. The Claimant's complaint of unlawful deduction from wages is also dismissed.

Employment Judge Gumbiti-Zimuto
Date: 30 January 2019
Reasons sent to the parties on
14 February 2019

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For the Tribunal office