EMPLOYMENT TRIBUNALS

Claimant: Krysztof Kilmek

Respondent: Ingram Micro (UK) Limited

HEARD AT: Cambridge: 11, 12 and 13 February 2019

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: Ms Wisniewska (lay representative)
For the Respondent: Mr Ludlow (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim for unpaid holiday pay is dismissed upon withdrawal.
2. The Claimant's wrongful dismissal claim is dismissed.
3. The Claimant's unfair dismissal claim is dismissed.
4. The remedies hearing listed for 13 May 2019 is vacated.

REASONS

BACKGROUND

1. The Claimant was employed by the Respondent from 13 February 2006 until 28 February 2018 ("**EDT**"), when he was summarily dismissed for "serious neglect of duties" and/or deliberate breach of his employment contract constituting gross negligence, in connection with the loss of 10 iPhone X units. Following compliance

with the Early Conciliation procedure, on 11 May 2018 he presented a claim alleging unfair and wrongful dismissal, as well as a claim for accrued holiday pay.

HEARING

2. I heard oral evidence from the claimant, with the assistance of an interpreter, and from the claimant's witness Mr Korcz. On behalf of the respondent, I heard from Mr Iqbal (investigating officer); Ms Horton (dismissing officer), and Mrs Jackson (appeal officer). I was referred to an agreed 280-odd page bundle of documents, and some agreed portions of CCTV footage.

3. The claimant had an interpreter's assistance. (Although the claimant has been living in the UK for some 13 years, his first language is Polish.) Although no concerns were expressed to me at the time, the Claimant/Ms Wisniewska was not satisfied with standard of service provided by the interpreter who attended on the first day of the hearing. As a result, arrangements were made for a replacement to attend. At Ms Wisniewska's suggestion, and after I had expressed concerns as to lack of progress on the first day, we arranged for the hearing on 12 February to commence at 9.30am. However, the replacement interpreter did not arrive until after 10am.

4. Other housekeeping points emerged. Firstly, the claimant wanted to adduce a short supplemental witness statement. The respondent objected to its late inclusion. I considered that it was appropriate to allow the statement in, but to make sure the respondent's witnesses had the opportunity in examination in chief to address any supplemental issues arising from it.

5. Secondly, the respondent produced on the second day of the hearing an additional sheet of paper (inserted into the bundle at p.282) which purported to show the respondent's system recording 10 iPhone Xs being 'written off' on 22 February 2018 as a Code 45 (i.e. theft). Its production was in response to my having asked if there was paperwork in the bundle which showed a record of the loss of the 10 iPhones on around 10 January 2018. After the respondent's barrister had already put to Mrs Horton some questions relating to the document, and after it had been explained that the document related to the iPhones at issue in this case, the claimant's representative objected to its inclusion. I allowed the document in. If, as appeared to be the case, the document was relevant, it was disclosable and it made sense for questioning to be allowed in respect of it. (To that end, Mr Iqbal was recalled to explain and be asked questions by both sides about it.) And as I told Ms Wisniewska, it was always open to the claimant to ask questions/make submissions regarding its late appearance and non-inclusion within the bundle.

6. Inevitably, matters took longer than usual because of the need for an interpreter's input. Also, although I was keen to ensure Ms Wisniewska (as a lay representative) had adequate opportunity to put her client's case, and although I therefore allowed her leeway, Ms Wisniewska was reminded on several occasions to focus her questions on relevant matters, and avoid prolixity or repetition. By the end of the day 2, we still had not heard from the claimant, almost all the time having been used in cross-examination of the respondent's three witnesses. (The one witness interposed for the claimant, Mr Korcz, was asked no questions.) Fortunately, resources became available to extend the hearing for a third day. Once the interpreter had arrived shortly after 10.30am, the claimant was cross-examined for about 2.5 hours on the third day. I then heard submissions from the parties which lasted until about 3.50pm.

7. As far as the witnesses were concerned, the claimant presented to me (as he had apparently done to the respondent during the disciplinary process) as a straightforward individual. His primary difficulty, however, as explained below, is that before me -just as during the investigatory and disciplinary process- he was wholly unable satisfactorily to explain the loss, and the data, which led to his dismissal. Each of the respondent's witnesses came across as credible, conscientious and reliable in their recollection.

ISSUES

8. The holiday pay claim had been resolved between the parties. Accordingly, it was agreed that the claim be dismissed upon withdrawal.

9. As regards the rest of the claim, the parties agreed that at this stage I would only deal with liability issues (and any deductions for contributory fault or on **Polkey** bases), leaving remedy for a later date if necessary, and not capable of agreement between the parties. The issues for me to determine were therefore agreed and refined as follows:

Unfair dismissal

a. What was the reason for dismissal? As to this:
    i. The respondent asserted that the reason was misconduct (i.e. a potentially fair reason for the purposes of s.98(2) of ERA).
    ii. The claimant did not accept that misconduct was the principal reason for his dismissal, and that the respondent believed the claimant to be guilty of misconduct. It was asserted that the claimant's dismissal was because of the respondent's desire to 'cut costs'.

b. Was the dismissal fair for the purposes of s.98(4) of ERA? In particular:
    i. Did the respondent have reasonable grounds, founded on a reasonable investigation, for its belief that the claimant was guilty of misconduct?
    ii. Did the decision to dismiss the claimant fall within the band of reasonable responses open to the respondent for the purposes of s.98(4) of ERA?
c. If the dismissal was unfair:
    i. Should any award be reduced (and if so, by how much) having regard s.122(2) and s.123(1) ERA and the principles set out in **Polkey v. AE Dayton Services Ltd**?
    ii. Should any award be increased pursuant to s.207A(2) of TULCRA (and if so, by how much, up to 25%), in so far as there was unreasonable non-compliance by the Respondent with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("**the Code**")?

Wrongful dismissal

a. Has the respondent shown on the balance of probabilities that the claimant acted in repudiatory breach of his employment contract, so as to justify dismissal without notice?

FACTUAL FINDINGS

10. The Respondent is a large distributor of computer and technology products, and is part of a global network operating in 52 countries. It employs some 614 people in the UK, at its Northampton and Milton Keynes sites.

11. The Claimant was employed by the Respondent at the Northampton site as an operations associate. His role involved him finding and packaging stock to fulfil customer orders, including high value items such as mobile phones. He was an experienced member of staff, who had used scanners to select stock for packaging throughout his 12 years' of employment. He had used the radio frequency terminal or 'RF gun' ("gun"), which featured in the evets leading to his dismissal, for some 4 or 5 years.

12. The gun was a key part of the process, which in summary[1] is as follows.

[1] A fuller version of the process, which I accept as correct and which was not challenged, is at paras 32-38 of the GoR.

a. Workers are issued with a shipping label or 'pick ticket', which they pick up from a conveyor belt (together with packaging) on the ground floor of the premises.
b. The respondent's warehouse order/management system, known as IMFirst, sends details of customer orders to the guns to enable employees to locate and pick the item.
c. Employees scan the label/ticket with their gun, by means of a laser. They then go to the 'pick' location.
d. The gun will display on a small screen where the product to be shipped is located in the premises.
e. Once the item is 'picked' at the appropriate location, the gun is used to scan the item and send back the details of what has been 'picked' to the IMFirst system.
f. Employees will then package the product, and put it on a conveyor belt which will then take it to the appropriate part of the premises for onward transmission.
g. Items placed on the conveyor belt will work their way up to the weighing scales, which will determine whether or not the weight is consistent with the order. If it is consistent, it will be auto-billed. Otherwise, the shipment will require a manual check of the contents to ensure it is correct.

13. If by any chance a worker scans the wrong item -as sometimes happens- the gun will register that fact with an error message on the screen, and with a loud 'bleeping'. (The claimant asserted in his evidence -which was given in the absence of any of the respondent's witnesses- that in the event of error, the gun would also 'freeze' for about 10 seconds. This was not something which was put to the respondent's witnesses or mentioned in his witness statement; nor did he suggest his gun 'froze' at any relevant time.)

14. Because of his experience, the claimant was authorised to work in the 'at risk area' or "ARA', which contained high value items such as iPhones. He was also on course to be a team leader and to that end was performing 'step-up' duties. He carried out inductions of new staff members from time to time (in English). A high degree of trust was placed in him by the respondent, and by Mr Iqbal (Operations Manager) whom he saw on a daily basis and with whom he had a good relationship.

15. High value items are subject to daily stock checks and reconciliations. Since the beginning of 2018 there had been daily stock checks of the iPhone stock.

Loss of iPhones

16. On about 11 January, a discrepancy was found in the stock. Ten brand new iPhone Xs, which had only been released a few months previously and had a value of over £800 per unit, were found to be missing.

17. (During the tribunal hearing, Ms Wisniewska challenged Mr Iqbal's evidence that 10 iPhone Xs had been shown as missing at the relevant time. She pointed out that there was no paperwork in the bundle showing the outcome of the 11 January stock check. Whilst that was a perfectly fair challenge for her to make:

    a. at no point during the investigatory or disciplinary process did the claimant dispute the fact that 10 iPhone Xs had gone missing;
    b. Mr Iqbal explained to me- and I accept- that the document inserted at p.282 of the bundle, showing a Code 45 for 10 items on 22 February 2018, did indeed relate to the 10 iPhone Xs at issue in this case (the 'write-off' of the items having been authorised only once the investigation had been completed); and in any event
    c. I accept Mr Iqbal's evidence that he saw the results of the 11 January stock check at the time, albeit such results are now archived.)

18. After some preliminary enquiries, Mr Iqbal was tasked with investigating matters. This was entirely appropriate, as he had over 20 years of experience and knew the respondent's systems intimately well. CCTV footage of the aisle or area on the mezzanine level of the premises and which housed iPhone Xs -aisle E03 in the ARA- was examined. It showed the claimant going to that aisle at about 11.47pm -towards the end of his eight hour shift, and at a time when there were not many other employees around. He could be seen to take about 5 boxes (which were the size of distinctively packaged iPhones) from the shelve, bend down and perform what looked like a scanning action with his RF gun, and then place the boxes into a larger cardboard box.

19. When the claimant performed his scanning action, there was no sign that the gun (assuming it was actually used to scan, as opposed to made to look as if it was doing so) showed an error sign, or 'bleeped'. Mr Iqbal considered and I accept that it would have done so, if the claimant had mistakenly tried to scan the wrong item.

20. The CTTV footage shows that the claimant then left the area, only to return a minute or so later (having carried out a legitimate scan of another product elsewhere using his gun) whereupon -without doing a further scan- he picked from the same place in aisle E03 another 5 of the same boxes.

21. Mr Iqbal could not understand why the claimant would do two such trips, rather than do the job 'in one go'. This was particularly so given that the claimant again put all the boxes he had taken from aisle E03 into the same large cardboard box. (So, if it was a legitimate job, it would be packaged for the same customer.)

22. As to why the claimant might 'go through the motions' of scanning, at least the first time around, Mr Iqbal explained that many staff would have been aware that CCTV cameras monitored much of the area. (He also explained that not all of the area was covered by CCTV cameras at that time. Hence it was possible for some staff and product movement to go unmonitored.).

23. My Iqbal looked at other CCTV footage. This showed the claimant apparently doing further scans (without any 'bleeping' etc from the gun) at the conveyor belt which is used to move product onto the distribution areas. Other footage showed the claimant carrying two smaller bags (rather than the one large box into which he had put all his pickings from aisle E03) towards a 'cage' for onward distribution.

24. Mr Iqbal checked the IMFirst system. He established that it showed no customer order whatsoever had been made for 10 iPhone Xs that day. Nor (therefore) was there any shipping order or pick ticket on the system for 10 iPhone Xs. There had only been one legitimate order, for 5 such phones, that day. This had been completed by a work colleague, and validly processed by the system, about 1 hour before the claimant approached the ARA and aisle E03. But there was no sign on the computer system that somehow there had been a duplication (or triplication) of that colleague's 'legitimate' job by the claimant. Mr Iqbal considered that the chances of an erroneous triplication were minimal ("more chance of winning the lottery"). He said he had never come across such a thing in his 20+ years' service. I accept that evidence.

25. Mr Iqbal checked the gun used by the claimant. It was not faulty. Indeed, minutes before and after he had taken product from aisle E03, the claimant completed pickups using the same gun without difficulty.

26. Mr Iqbal looked at the 70-odd jobs showing on the respondent's computer system as having been tasked to the claimant that day. There was no sign of any job involving iPhone Xs, or any indeed any product at aisle E03.

27. Mr Iqbal also made enquiries of various customers to whom the iPhones might have been sent. This came to nothing.

Investigatory meetings

28. Mr Iqbal asked the claimant to attend a meeting to discuss the issue. They met on 22 January 2018.

29. At the beginning of the meeting (which lasted for about 1 hour 5 mins), the claimant said he was “okay” to proceed. At no point did he suggest that he required the assistance of an interpreter. Mr Iqbal knew the claimant well, and he had never noticed any particular difficulties on the part of the claimant in understanding his English-speaking colleagues. Mr Iqbal had no particular reason to believe that an interpreter was necessary at that stage.

30. In any event, as set out below, during several hours of later investigatory/disciplinary meetings at which an interpreter gave assistance, the claimant had adequate opportunity to explain his position and test the evidence.

31. In cross examination, Ms Wisniewska suggested that Mr Iqbal made no proper allowance for the fact that the claimant may have been tired. Mr Iqbal explained that the claimant’s work was well within WTR limits. Also, that Tuesday 9 January was near the beginning of the working week, and shortly after the Xmas break. In any event, if the claimant had made an error through tiredness, he explained(and I accept) there still ought to be data on the system which would show how and why that error might have been made. (The gun would e.g. have shown an error, if it really had been used to scan.)

32. Ms Wisniewska suggested Mr Iqbal (and others) should have checked if the claimant had sight or hearing problems. I reject this suggestion- not least, because the claimant did not suggest he had (and, it was confirmed to me by Ms Wisniewska, did not in fact have) any such problems.

33. Ms Wisneiwska also criticised Mr Iqbal for not allowing the claimant himself to interrogate the respondent’s computer system. But, as explained below, others did so (in good faith, and with the necessary expertise). Moreover, at no point did the claimant ask to be allowed to do that job himself.

34. The claimant was shown the CCTV footage, and other information. He confirmed that the footage appeared to show him placing two ‘batches’ of five boxes into the larger container. He was unable to explain what it showed him doing by reference to customer orders he had been ‘picking’ at the time. He was also unable to explain why he had ‘picked’ items for which there was no custom order, shipping label, or correlating information stored in his gun. Nor why there was no error paper-trailed on IMFirst.

35. As a result, Mr Iqbal considered it was necessary to suspend the claimant pending further investigation. This was in accordance with the respondent's disciplinary policy. I accept that suspension (on full pay) was entirely appropriate.

36. Shortly after he was suspended, the claimant spoke to his line manager (Mr Lisek) about events, in breach of the instruction from Mr Iqbal that he did not discuss matters with colleagues. Mr Ludlow asks me to find that such actions damage the claimant's credibility. Though ill-advised, I do not think this makes a great difference. In particular, there is no suggestion the claimant tried to 'tamper' with evidence.

37. Notes of the meeting were taken, and were promptly provided to the claimant.

38. It was put to Mr Iqbal in cross examination that the meeting with the claimant ought to have taken place closer to 10 January 2018. I agree that it is generally appropriate for an employee facing potential allegations of serious misconduct to have matters put to him at the earliest possible opportunity. However, I accept that Mr Iqbal wanted to get more clarity on the position before asking questions of the claimant, and that such clarity took a few days to obtain. Moreover, the fact remains that the majority of evidence against the claimant was documented. Any 'fading memory' on the part of the claimant caused by speaking to him about 12 days - rather than (say) 4 or 5 days- after the event would not in my view have made a real difference, given the documentation. There is also no suggestion that any hard evidence such as CCTV footage which might have exculpated the claimant had been lost in the interim.

39. It was also put to Mr Iqbal in cross-examination that he had only looked for incriminating evidence. I do not think this is a fair criticism. For example, He checked to see if the gun was working properly. His check might have ended up showing a fault with the gun. He made contact with customers to see if the phones had ended up with them in error. This might have resulted in the phones being found. However, the fact remained that the fruits of Mr Iqbal's researches did not indicate an 'innocent' explanation- and gave every indication that the phones had probably disappeared in circumstances of gross error or dishonesty.

40. Once the claimant had been suspended, some additional investigations took place. The respondent obtained some further CCTV footage showing Mr Korcz (a worker for a third party, NX Transport) handling a box of a similar size to that which the claimant had earlier used at aisle E03.

41. The claimant and Mr Iqbal met for further investigatory meeting on 24 January 2018. It lasted for about 3 hours. Prior to that meeting, the claimant had asked if his son

could attend with him. As the son was neither an employee nor a trade union representative, and given the familial relationship, Mr Iqbal did not think it was appropriate for the son to be there. However, there is nothing to suggest that, had the claimant asked for someone else to accompany him, or for an adjournment to facilitate that, Mr Iqbal would have refused. I consider that if the claimant had wanted an adjournment, he would simply had asked for it.

42. At the meeting, the claimant again indicated that he appeared to pick two batches of five boxes from aisle E03. He did not give a satisfactory explanation as to how the system could be showing 10 iPhone Xs as missing, and have no paper trail in relation to any order for those phones. Neither he nor Mr Iqbal noticed on the CCTV footage any sign that the gun had signalled an error when the claimant 'scanned' the first five boxes.

43. The claimant made a clandestine recording of the meeting, in breach of the provisions of the respondent's Handbook. (He said this was because he did not trust the respondent.) The notes show, and Mr Iqbal candidly conceded, that at some points during the meeting Mr Iqbal was not as dispassionate as he could have been, and was rather too 'leading' in his questions. Mr Iqbal explained this was because he felt let down by the claimant, whom he had trusted. This might have clouded the issues– though I accept that it did not do so in this case.

44. At one point during the meeting the claimant appears to assert that the respondent might be trying to get rid of him to 'save money'. (As Mr Iqbal explained, this made little sense, as Mr Iqbal would have been keen to retain a worker as experienced as the claimant.) But he gave no other particulars of any 'conspiracy' against him.

45. The claimant attended another investigatory meeting with Mr Iqbal on 2 February 2018 (which lasted for about 1.5 hours). At that meeting, he was provided with the support of an interpreter. He was also shown further paperwork, such as a document highlighting the 70 transactions which the claimant had completed that day, none of which related to aisle E03. The claimant was also asked questions relating to the CCTV footage which showed Mr Korcz carrying a similar sized box from the premises.

46. The claimant asserted that he may have made some sort of mistake by picking up items from aisle E03. The problem with this, as Mr Iqbal explained to him, was that although everyone makes mistakes from time to time, such mistakes would have been picked up by the respondent's computer system. The claimant speculated that perhaps somebody had manipulated the computer data by deleting entries relating to the iPhones.

47. However, Mr Iqbal's further enquiries over the next couple of days (made of Mr Steve Walker, Global Systems Contact) indicated this was not a realistic explanation. For example, if an order had been voided, that would still have been possible to see on the Impulse system.

48. After the meeting, Mr Iqbal compiled a management report. His conclusion was that there was some wrongdoing, whether by way of "theft or… wilful negligence of business process resulting in the theft".

Disciplinary hearing

49. The claimant attended a disciplinary hearing on 23 February 2018, conducted by Sarah Horton. Before that meeting, he was provided with copies of all material paperwork and CCTV footage. The invitation letter set out the charges against him.

50. In preparation for that meeting, the claimant prepared his own statement. It concludes "on the balance of probabilities, there is no shred of evidence that I took the phones or was involved in theft. Investigation notes offered of possible scenarios, speculations. I do agree it is suspicious that there is no history on the system of me being located at the location E03 but my version is that the only reason I was there [was that] I had a ticket for it.… If this is not satisfactory, I am asking company to give me a benefit of the doubt".

51. At the meeting, the claimant was accompanied by his union representative, Sally Prime, who asked various pertinent questions. She agreed that it would not have been appropriate to the claimant's son to be at the earlier investigatory meeting. Mr Iqbal attended to present his findings. It was suggested in cross-examination that his attendance was not appropriate in principal, and that investigatory officers "only attend disciplinary meetings in the NHS". I disagree, on both counts.

52. During the meeting, the claimant confirmed that he always would "have the sound up" on his gun, to alert him of any errors.

53. Ms Horton was responsible for processing and issuing payments. She knew very well how the respondent's computerised warehouse management system operated. She was also very familiar with the Impulse system with which she had worked for almost 20 years. However, she was not familiar with precisely how the gun worked. So, after the meeting she was provided with a full demonstration of its operation.

54. Having reviewed all the evidence, Ms Horton considered that for the apparent loss of 10 iPhone Xs to be the result of a mistake or error, both the gun, the Impulse system

and the IMFirst warehouse system all needed to have been non-functioning or misfunctioning at the same time. She concluded this was wholly unlikely- not least because these were systems the respondent relied upon year-round, and which had shown no other sign of error at the material time.

55. Despite Mr Iqbal's stronger conclusions, she did not go so far as to determine that the claimant had definitely stolen the items. She discounted the footage relating to Mr Korcz. Instead, as she explained in her decision letter dated 1 March 2018, she considered that the claimant ignored, "either negligently or willfully", any error messages on the gun (assuming he really used it to scan the product at all), leading directly to the loss of over £8,000 in stock. She considered the allegation of serious neglect of duties proven, and that his continued employment constituted "a significant risk to the business". She referred to the definition of gross misconduct in the handbook, which includes "serious neglect of duties or a serious or deliberate breach of your contract of employment or operating procedures" (as well as "theft" and "causing loss…through serious negligence").

56. Ms Horton was a credible witness. I have no hesitation in accepting her evidence that she reached her own decision (rather than had it foisted on her by Mr Iqbal, as was suggested), for the reasons she gave in her evidence.

Appeal

57. Mrs Jackson heard the claimant's appeal, at which the clamant again had the support of an interpreter. Mrs Jackson did not have much experience in presiding over disciplinary matters. However, she struck me as a particularly conscientious and thorough individual. (Indeed, Ms Wisniewska in her submissions sensibly accepted that Mrs Jackson "did her best" and acted in good faith.)

58. Mrs Jackson carefully considered the relevant documentation and other materials prior to the meeting.

59. During the 5 April 2018 appeal, she found the claimant presented as sincere and "very straight". She listened to what he had to say, and gave him every opportunity to provide an explanation as to what had happened.

60. After the meeting, she made very thorough further enquiries (including checks to see if it was realistically possible for the claimant to somehow have been 'set up'). The enquiries she made are set out at paragraph 33 of her witness statement. By way of small example, she asked for data to be run to cover the start of shift on 9 January to the end of the day on 10 January 2018 to check if there was any order at all for 10

iPhone Xs - there was not. The only order had been for 5 iPhone Xs, which order was properly processed by another member of staff about an hour before the claimant's first pick up, as identified by Mr Iqbal (above).

61. She duly dismissed the appeal. In her decision letter, she concluded that the claimant had "either ignored negligently or willingly the invalid messages on the [gun], and have circumvented normal processes either negligently or willingly, and this action directly led to the loss of the iPhone stock".

THE LAW

62. The following principles are material:

a. When considering whether or not a dismissal was fair for s.98(4) purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of responses reasonably open to the employer. See for example **London Ambulance Service NHS Trust v. Small** [2009] IRLR 563, CA, para 43 *per* Mummery LJ.
b. The same 'band of reasonable responses' test (and prohibition on substitution by the tribunal) applies to the investigatory process adopted by an employer. **Sainsbury's Supermarkets Ltd v. Hitt** [2003] IRLR 23, CA.
c. As regards that process:
    i. It is incumbent upon an employer conducting an investigation both to seek out and take into account information which is exculpatory as well as information which points towards guilt.
    ii. Serious allegations of criminal behaviour, at least where disputed, must always be the subject of "*most careful investigation*" -albeit one must also bear in mind that the investigation is usually being conducted "*by laymen and not lawyers*". **A v. B** [2003] IRLR 405, EAT, para 64 *per* Elias J.
    iii. Section 98 of ERA does not require an employer to be satisfied on the balance of probabilities that the employee whose conduct is in question had actually done what he or she was alleged to have done. It is sufficient for the employer to have a genuine belief that the employee has behaved in the manner alleged, to have reasonable grounds for that belief, and to have conducted an investigation which is fair and proportionate to the employer's capacity and resources. **Santamera v. Express Cargo Forwarding t/a IEC Ltd** [2003] IRLR 273, *per* Wall J, at paras 35 & 36.
    iv. It does not follow that an investigation is unfair because individual components might have been dealt with differently, or were arguably

unfair. A "*forensic or quasi-judicial investigation*" is not required. **Santamera.**

v. An employer does not need to pursue every line of enquiry signposted by the employee in the context of a disciplinary process. The question for a tribunal when considering the reasonableness of an investigation for misconduct is not, could further steps have been taken by the employer? Rather, it is, was the procedure which was actually carried out reasonable in all the circumstances? **Rajendra Shrestha v Genesis Housing Association Limited** [2015] EWCA Civ 94.

d. Following **OCS Group Ltd v A J Taylor** [2006] EWCA Civ 702, "*….the ET must … look at the substance of what had happened throughout the disciplinary process.*"[2] "*What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair*"[3].

e. In relation to 'gross negligence' proper (i.e. not recklessness) as a potential basis for summary dismissal, see further **Adesoken v Sainsbury's Supermarkets Ltd** [2017] IRLR 346. That case is authority for the proposition that summary dismissal in such cases is possible, albeit a court should be slow in practice to uphold it. Citing **Neary v Dean of Westminster** [1999] IRLR 288, SC, the Court of Appeal held that:
"…The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence… [even though] it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal."

f. In the event of a finding of unfair dismissal:

iii. If the dismissal was 'procedurally unfair' but the tribunal is satisfied that the employee would or could have been fairly dismissed at a later date or if the employer had followed a fair procedure, this may merit a reduction, of up to 100%, to any compensatory award under s.123(1) of ERA.

iv. If an employer has unreasonably failed to comply with the Code, it is open to a tribunal to increase any compensatory award by up to 25% pursuant to s.207A(2) of TULCRA to take into account the Respondent's unreasonable failure to follow the Code[4].

[2] Paragraph 43 of the Judgment.
[3] Paragraph 46 of the Judgment.
[4] Non-compliance with the Code does not of itself render a dismissal unfair.

v. If the tribunal finds that a claimant by his own culpable or blameworthy conduct contributed to his dismissal, compensation may be reduced under s.123(6) of ERA -by as much as 100% in an appropriate case.
vi. Any basic award also falls to be reduced, by up to 100%, under s.122(2) of ERA if it is just and equitable to do so having regard to the conduct of the employee before the dismissal. (The test is different to that set by s.123(6) of ERA, which requires a 'blameworthy' causal link with the dismissal.)

b. An unfair dismissal is not necessarily wrongful, and vice versa. In the case of a wrongful dismissal claim, it is for the respondent to show, on the balance of probabilities, that the claimant was in repudiatory breach. (In that respect the evidential test and burden on the respondent which applied in wrongful dismissal claim is different to an unfair dismissal claim.)

APPLICATION TO THE FACTS

Unfair dismissal

63. The only reason for the claimant's dismissal for (the potentially fair reason of) misconduct. Any argument to the contrary is, as I see it, hopeless. In particular, I reject any assertion that the dismissal was a 'costs saving exercise', or -as had been suggested- somehow part of some kind of conspiracy or 'fit up'.

64. Applying the above principles to the facts, I also have no hesitation in finding that the dismissal was fair for s.98(4) ERA purposes, too.

65. There were arguably some minor flaws in the investigatory process. As I have said, Mr Iqbal should have been a bit more measured in his questions during the 24 January meeting. It might also have been possible to have initially interviewed the claimant a few days earlier than 22 January 2018.

66. However, these matters cannot sensibly negate the fact that, after an unusually exhaustive investigation, and very thorough disciplinary process, the respondent had an abundance of evidence strongly to suggest that the claimant had either committed an act of gross negligence by somehow 'picking' and packaging iPhones for which there was no order without properly scanning them, or ignoring obvious 'error' warnings from his gun, or had knowingly selected those high-value items from any area in which he had no reason to be notwithstanding the absence of any legitimate customer order. In either such case, the respondent had reasonable grounds for its

belief, based on a reasonable investigation, that the claimant had committed gross misconduct, losing the company some £8,000-worth of stock in the process.

67. Ms Wisniewska sought to assert that such a figure was very modest compared to the respondent's significant turnover. Though that may well be right, with respect to her that cannot possibly be an answer. On any reckoning, £8,000+ was a sizeable loss.

68. Given:

    a. the need for me to abjure a "substitution mindset" for these purposes;
    b. the inculpatory evidence which was gathered by the respondent; and
    c. the exhaustive detail into which the respondent's process of investigation undoubtedly went

    I consider the dismissal clearly to have been 'fair' for the purposes of s.98(4) of ERA.

69. Even if I am wrong in my assessment as to the fairness of the dismissal, I do not think that any of the Respondent's procedural failings made any difference to the inevitable final outcome. For that reason, a 100% **Polkey** reduction would apply. In any event, given my findings in relation to the wrongful dismissal claim (see below), I would have considered it just and equitable for a 100% deduction to be made pursuant to both s.123(6) and s. 122(2) of ERA.

Wrongful dismissal

70. In the light of the evidence which had been gathered by the respondent, and given my factual findings above, I find the respondent has shown on the balance of probabilities that the claimant was in repudiatory breach of the terms of his employment.

71. I consider that the claimant probably either *knowingly* selected and took the phones in circumstances where he appreciated there was no legitimate order; or *negligently* selected and took the phones. If that latter scenario applies, the selection would have been despite the absence of any order. The claimant would have gone to aisle E03 for no obvious reason. And he would probably have had to not scan the items at all, or somehow missed clear error messages from his gun (or completely mishandle the scanning, despite his experience in using a gun). Such negligence would have been "gross", fundamentally undermining the respondent's confidence in him and entitling the respondent to dismiss him without notice. Sadly, I think the former 'knowing' scenario is more likely, though the issue is not entirely free from reasonable doubt.

OTHER MATTERS

72. It follows that the 13 May 2019 hearing date which was provisionally set for remedy may now be vacated.

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Employment Judge Michell, Cambridge
20th February 2019

JUDGMENT SENT TO THE PARTIES ON

27 February 2019

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FOR THE SECRETARY TO THE TRIBUNALS