



THE EMPLOYMENT TRIBUNALS

Claimant: Mr T Brown

Respondent: Sodexo Limited

Heard at: North Shields Hearing Centre **On:** 26th February & 11th March 2019

Before: Employment Judge Martin

Members:

Representation:

Claimant: Ms Robinson (CAB Representative)

Respondent: Miss Carse (Counsel)

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is well-founded. The claimant's request for reinstatement and/or re-engagement is refused. A remedies hearing will be convened to determine remedy.

REASONS

Introduction

1. Mr Mark Nightingale, Head of Residence; Ms Jill Barr, HR Business Partner; and Ms Samantha Pariser, Deputy Director all gave evidence on behalf of the respondent. The claimant gave evidence on his own behalf.
2. The tribunal was provided with an agreed bundle of documents marked Appendix 1. The tribunal also reviewed various footage of CCTV recorded on the 6th April 2019.

The Law

3. The law which the tribunal considered was as follows:

Section 98(1) of the Employment Rights Act 1996 “In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:- (a) the reason (or if more than one, the principal reason) for the dismissal and (b) that it is either a reason falling within subsection 2 or some substantial reason which could justify the dismissal of an employee holding the position which the employee held.

Section 98(2) “a reason falls within this subsection if it:-

(c) relates to the conduct of the employee”.

Section 98(4) ERA1996 “The determination of the question whether the dismissal is fair or unfair having regard to the reasons 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

Section 116(1) of the Employment Rights Act 1996 “.....The tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account:-

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) whether the complainant caused or contributed to some extent to the dismissal, and whether it would be just to order his reinstatement

Section 116(2) ERA1996 “if the tribunal decides not to make an order for reinstatement, it shall then consider whether to make an order for re-engagement and, if so, on what terms.

Section 116(3) in doing so the tribunal shall take into account:-

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, and whether it would be just to order his re-engagement and, (if so) on what terms.”

The case of British Home Stores Limited -v- Burchell 1978 IRLR378 where the EAT held that in cases of misconduct:- first the employer must establish the fact that they believe that the employee did commit an act of misconduct; secondly it must be shown that the employer had reasonable grounds on which to sustain that belief and thirdly that the employer did as much investigation as was reasonable in all the circumstances.

The case of Sainsbury's Supermarkets Limited -v- Hitt (2003IRLR23) where the Court of Appeal held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss.

The case of Iceland Frozen Foods Limited v Jones 1982 IRLR439 where the EAT held that the function of the employment tribunal is to determine whether in the particular circumstances of each case the decision to dismiss fell within the bounds of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the bands, the dismissal is fair; if the dismissal falls outside the band it is unfair.

The case of Abernethy -v- Mott Hay and Anderson 1974 ICR323 where the EAT held that, although the employers had erred in law by telling the employee that his dismissal was by reason of redundancy, the wrong legal label did not matter so long as there was a set of facts (per Lord Denning MR, made known to the employee before or when he was given notice) which the tribunal could find was the principal reason for the dismissal.

The tribunal was referred to Lord Denning's comments in that judgment which stated that the employer has to "show the reason for the dismissal. It must be a reason in existence at the time when the employee was given notice. It must be the principal reason which operated on the employer's mind. It should be known to the employee already, namely before he is given notice or he must be told it at the time. However, Lord Denning said that he did not think that the reason had got to be correctly labelled at the time of dismissal. It may be that the employer is wrong in law as labelling it as dismissal for redundancy. In that case the wrong label can be set aside. The employer can only rely on the reason in fact for which he dismissed the employee, if the facts are sufficiently known or made known to the employee. A wrong label (in this case of "redundancy) does not affect the point.

The case of Nelson -v- BBC No. 2 1972 IRLR346 where the Court of Appeal held that, in considering issues of contributory fault, the tribunal had to consider whether conduct on the part of the employee was culpable or blameworthy. Conduct in this context includes conduct which is perverse, foolish, bloody-minded and unreasonable depending on the degree of unreasonableness. Secondly, whether that conduct had caused or contributed to some extent to the employee's dismissal; and thirdly consider whether it was just and equitable to reduce any award.

The case of Hollier -v- Plysu Limited 1983 IRLR260 where the Court of Appeal held that the tribunal's function is to take a broad approach in relation to reduction

of any compensation on the grounds of contribution and consider how much the employee's own conduct might have contributed or caused his dismissal and then consider the apportionment of responsibility for the dismissal.

The issues

4. The Tribunal had to consider the reason for dismissal; whether it was a fair reason under section 98(2) of the Employment Rights Act 1996.
5. The respondent relies on conduct. In that regard the tribunal had to consider whether the respondent had a reasonable belief that the claimant had committed an act of misconduct; whether they had reasonable grounds for believing that the claimant had committed an act of misconduct; and whether they had undertaken a reasonable investigation in all the circumstances.
6. The Tribunal also had to consider whether the respondent followed a fair procedure and whether dismissal was a reasonable response in the circumstances of the case, in particular whether the claimant was treated consistently with the treatment given to other employees.
7. The Tribunal had to then go on to consider whether the claimant should be reinstated or re-engaged. In that regard the Tribunal had to consider whether it was practicable for the claimant to be reinstated or re-engaged; whether he had contributed in any way to his dismissal. The Tribunal also had to consider whether the parties had lost trust and confidence in each other.

Findings of Fact

8. The claimant was employed as a prison custody officer at HMP Northumberland. He was originally employed by Her Majesty's Prison Service in 2007. His employment was transferred to the respondent in 2013. His terms and conditions of employment were more attractive than those of his colleagues who were employed directly by the respondent.
9. The respondent is a facilities management company who operate, amongst other activities, a number of prisons including the prison at HMP Northumberland. They operated HMP Northumberland on behalf of Her Majesty's Prison and Probationary Service.
10. The claimant had an unblemished disciplinary record.
11. The claimant worked as a custody officer on house block 5.
12. It is acknowledged that prison officers are in a position of trust. They have a responsible role. It was acknowledged by both parties that prison officers would be viewed as role models for the prisoners for whom they are responsible.
13. The respondent's policy on Rules of conduct is at pages 235 – 238 of the bundle. At page 237 it states that employees must be honest at all times in connection with

their employment and must not breach the trust and confidence that is provided to them by the company or client.

14. The respondent's disciplinary procedure is at page 244 – 247. The policy states that, in cases involving gross misconduct, an employee may be suspended from work on full pay whilst the case is being investigated. It states this is not meant as an assumption of guilt and not meant to penalise the employee.
15. The policy also states at page 246 that employees are entitled to be accompanied by a work colleague or trade union representative at all disciplinary hearings.
16. The policy also states at page 246 that employees may question witnesses in (disciplinary hearings) via the meeting/hearing manager where appropriate.
17. The respondent's grievance policy is at pages 240 – 243 of the bundle. It states at page 241 that, upon receipt of a formal grievance, a meeting will be arranged to discuss the grievance. It also states that a letter confirming the outcome of the grievance and the right of appeal will be provided to the employee.
18. On 26th May 2018 Mr Andrew Carr, the front of house senior prison custody officer, discovered a number of items missing from the storage cupboard in the visitors area. This included two play stations, four consoles, three play station controllers and one play station headset. The last time all the items in the storage cupboard had been accounted for was on 5th April 2018 after a father and son visit.
19. Mr Carr reviewed the CCTV footage to ascertain who had removed the items. The video footage of 6th April showed an individual carrying a post room folder and carrier bag from the storage cupboard. Mr Carr was not able to identify the person from that footage.
20. Mr Carr arranged for some further investigation to be undertaken to try and identify the individual shown leaving the storage cupboard on 6 April 2018. Mr Carr was able to identify some limited physical features from the footage. He arranged to check the footage of individuals arriving and leaving the visitors area at the relevant times.
21. On checking the CCTV footage for 6th April Mr Carr noted another individual was seen on CCTV in the visitors' area and going into house block 5. This appeared to be the same individual. The person appeared to be carrying the same items.
22. Mr Carr reviewed the rotas to cross reference to staff movements. He reviewed the rota of staff on duty in house block 5. He had already identified the individual to be male, about middle aged, and had some indication of the individual's height and build. There were 6 potential of staff working on house block 5, 2 of them were women. One was the senior police custody officer who had been seen elsewhere on the CCTV footage so was not present on house block 5. Of the other individuals he thought two of the men were younger and not of the same build. He concluded that the individual on the CCTV appeared to be the claimant who matched the description of the person on the CCTV footage.

23. Mr Carr reported the matter to Mr Nick Leader who was the director of the prison. Mr Leader sent an e-mail to Mr Carr on 27th May referring to the subject of theft and asked that the CCTV be produced to show the theft from the office and the movement of the person to the house block. He also asked if the exits for that member of staff could be tracked. He goes on to ask Mr Carr to indicate exactly the time, place and date of the theft and exactly what was stolen. It was clear that the member of staff who had had been identified as the suspect was the claimant. That e-mail is at page 40 of the bundle.
24. In his reply to the email Mr Carr indicates that he has checked the movements of the other members of staff house block 5 on that day. He cites that one member of staff is seen leaving the house block and then going into the storage cupboard in the visitors area. He concludes that, of the members of staff present during the incident, two members of staff are female, one of the male members is shorter and clean shaven, and the other members of staff is not tall enough. He states that all the evidence points to the claimant. The email is at Page 39-40 of the bundle. There is a response from Mr Leader asking Mr Carr to set out the situation. Mr Leader goes on to indicate that there is no need to indicate other dates for equipment - " why do it – what are you trying to achieve?" Page 38 – 40 of the bundle.
25. The claimant said in evidence that he had taken a play station at some point in the early part of 2018 but he was not sure when that happened. He acknowledged in his evidence that he was not actually allowed to take a play station and that it was a conduct issue for which disciplinary action could be taken. He said he had returned the play station, but again could not say when.
26. The claimant says that the first time he was aware that there was an issue was when he started his night shift on 28th May and was called into a meeting with the director of the prison Mr Nick Leader. The claimant was not given the opportunity to be accompanied to that meeting. Mr Ian Kayll another senior officer was in attendance at the meeting with the director.
27. The respondent said that notes were made of that meeting. Those notes are at page 53 – 54 of the bundle. In their evidence the respondent describes this meeting as an initial fact find meeting. In the notes it is stated that the reason for the meeting was explained. It was explained that CCTV on 6 April shows the claimant going into the storage cupboard in the visitors' room and goes to indicate that items have been removed / stolen from that area. It is indicated in the meeting that the claimant is likely to be suspended due to the seriousness of the incident depending upon his explanation. It is noted that the claimant is told he is being given one chance to explain what he was doing and has the opportunity to take responsibility for the offence. If so, there will not be a police referral. At page 54 the respondent has noted the comments by the claimant. It is noted that the claimant stated that he did go in the room and take out a play station, but didn't steal it, but borrowed it for use on the evening duty shift. It is also noted that he said he did return it but didn't put it in the storage room as the lights were on, so he left it on a table in the visitors' room hoping that someone would put it back. He is said to have said that this was on a Sunday after his weekend shift. He is attributed to have said that he didn't take all the items saying that they wouldn't fit

in the bag and that others must have gone in and removed the items as it was not him.

28. The claimant was then suspended and escorted from the premises.
29. The claimant says that no notes were made of the meeting. He said that nobody was making notes at the meeting. He said in evidence that he did not say what he is alleged to have said in the notes at page 54 of the bundle.
30. The claimant said that he was told that there was CCTV of 6th April showing him removing items and was asked by the director to responsibility for the matter or the matter would be reported to the police.
31. The claimant said in evidence that he told the director that he had borrowed a play station, but had returned it. He said that he did not admit that he had gone into the store room on that day and taken the play station or any other items. The claimant says that no notes of that meeting were given to him and he did not sign any notes. The claimant said that in evidence that he had admitted to borrowing a play station previously. He said he wanted to be honest at the outset. And had effectively admitted this at the outset.
32. On 30th May 2018 the director, Mr Leader, wrote to the claimant to confirm his suspension. In that letter he confirmed that the reason for the claimant's suspension was because it was alleged that he had stolen items from the prison visits room 6th April 2018. The claimant was informed that he was to be invited to an investigatory meeting with Claire Hutchings-Budd head of security and operations at the Prison. That investigatory meeting was arranged for 1st June 2018. The letter from Mr Leader is at pages 73 – 74 of the bundle.
33. An investigatory meeting took place with the claimant which was taken by Ms Claire Hutchings-Budd 1st June 2018. The claimant was accompanied by Mr Steve Laing a senior custody officer and the claimant's line manager. The notes of that meeting are at pages 76 – 78 of the bundle.
34. During the course of the investigatory meeting the claimant was given a copy of the notes from his meeting with Mr Leader. Ms Hutchings- Budd asked the claimant about what he said at that meeting with Mr Leader. He is recorded as having said to Ms Hutchings - Budd that he had told Mr Leader that he had borrowed a play station but did not recall when it was but that it could have been March or April. At that point the claimant asked to see the CCTV footage. In the the investigatory interview the claimant said that he did not take any of the other items. He acknowledged that he did not have permission to go into the visitors' area and take any items. He said it was a spur of the moment decision. He said that he put the play station back and said he could not recall when. He said that he had said when he had put it back in the meeting with Mr Leader because he was under pressure and he was being pressed on it. He said had when he thought he had put it back, but he said that at the investigatory meeting with Ms Hutchings-Budd that he could not recall when he put it back.

35. In evidence the claimant said that he did not say had taken the console in March or April. He said in evidence that that he had told her that he had taken the play station some months earlier.
36. During the course of the investigatory meeting the claimant was shown the CCTV footage. He said that it did not identify him. When it was put to him that the account he had given was compatible with the CCTV footage, the claimant appeared to agree but said that it was not him. In his evidence to the tribunal he indicated that he did not agree that his account was compatible with the CCTV footage.
37. The claimant signed the notes of the interview. In evidence to the tribunal he said that he had not read the notes. He didn't understand that he was acknowledging the accuracy of the notes and thought that it was simply an administrative process. He said that he did feel that like he could refuse to sign the notes, as they were made by a senior person at the Prison and suggested that he was used to just simply agreeing to things when he was asked by more senior officers at the prison to do so
38. In his evidence the claimant said that he had told the investigating officer that he had borrowed one console and taken it back, but he couldn't recall when. The claimant also said that Mr Laing had said to him that the respondent couldn't be sure it was the claimant in the CCTV footage. The claimant said that afterwards Mr Laing had told him that the respondent wouldn't be able to identify anyone from the CCTV.
39. On 5th June 2018 Miss Hutchings-Budd interviewed Mr Carr about the incident. The notes of that interview are at pages 86 – 90 of the bundle. In his meeting Mr Carr explained the process that he had followed when he discovered certain items were missing and the process which he had followed to review the CCTV footage and how he had identified the claimant from that CCTV footage. He said that he initially could not identify the person on the CCTV footage, but he said it seemed to be someone who was an officer male, about six foot officer, who was clean shaven and was middle-aged. Page 87 of the bundle. He explained the investigation undertaken to identify the person and how he had that he had identified a member of staff coming out from house block 5 around that time on 6 April He said that he had then looked at the rotas to try and identify who was on duty on that occasion in house block 5. He said that he had then narrowed it down to the claimant, who fitted the description the person identified on the CCTV footage. Mr Carr said that the CCTV footage at House block 5 had been wiped for the date of the incident on 6th April 2019.
40. The claimant annotated the notes from his investigatory meeting with Miss Hutchings-Budd and her interview with Mr Carr and other witnesses. He did not agree with those notes albeit that he had signed the investigatory notes with Miss Claire Hutchings-Budd. His annotated notes are in the bundle of documents.
41. On 8th June 2018 the claimant raised a grievance about the way he was being treated. That grievance is at page 105 – 106 of the bundle. The claimant raised concerns that he was being falsely accused of theft and that there had been a

breach of confidentiality. He said that people were aware of the allegations both other staff and prisoners. He raised concerns about the timescales involved in his suspension.

42. The respondent's HR department considered how to deal with the claimant's grievance. They concluded that, as it related to the disciplinary matter which was being investigated, the grievance should be dealt with by the investigating officer Miss Hutchings-Budd as part of the investigation because the two matters were inter-linked.
43. The HR department did note that there were some concerns raised about Miss Hutchings-Budd but largely the concerns did not relate to her involvement.
44. The respondent wrote to the claimant to inform him that his grievance was being dealt with by Miss Hutchings-Budd at page 124 -125 of the bundle.
45. In evidence to the tribunal the claimant stated that he did not consider it fair for his grievance to be dealt with by Miss Hutchings-Budd because part of the grievance related to the investigation as well and the way she was conducting it. He said that there was no separate grievance meeting with him.
46. On 4th July 2018 Miss Hutchings-Budd undertook an investigation with Mr Laing. The notes of that investigation meeting are at pages 128 – 129 of the bundle. In that investigation meeting Mr Laing was asked to view the CCTV footage of the 6th April and asked to identify the person on the CCTV footage. Mr Laing indicated that he believed that the person was the claimant. He said that it was definitely not one of the other male officers on the house block 5.
47. Miss Hutchings-Budd undertook some investigation into the grievance. As part of that she interviewed Mr Ian Kayll who attended the meeting with Mr Leader when the claimant was called into the fact find meeting at the end of May 2018 when he was suspended. Notes of that meeting are at pages 137 – 140 of the bundle. At that meeting, Mr Kayll was asked to confirm what was discussed at that meeting with Mr Leader the director of the prison and the claimant. Mr Kayll said that the claimant had admitted taking the items. He said that the reason the claimant had not admitted it at the outset was because he knew he would be in trouble because he was on patrol in the wing. Mr Kayll said that the claimant had said that he had taken the items and then returned them and left them on the table. Mr Kayll said that Mr Leader had told the claimant that it was a serious matter and did say that he would consider calling the police. He said that the CCTV footage was not shown at that meeting.
48. On 27th July 2018 the claimant was invited to a disciplinary meeting. The invite letter is at page 166 – 168 of the bundle. The letter states that the disciplinary hearing is to consider the allegation that on 6th April 2018 the claimant stole a number of items from the prison visits room which included a number of play station consoles, controllers and a headset. The letter is stated that the allegation is a potential breach of the rules of contract namely that employees must be honest at all times in connection with their employment and must not breach the trust and confidence that is provided to them by the company or client. The

claimant was provided with a copy of the respondent's disciplinary procedure. He was informed that the allegation was potentially a matter of gross misconduct and could result in his dismissal. The claimant was also provided with copies of all the investigatory notes including his own and those of Mr Carr, Mr Laing and Mr Kayll and the notes from his meeting with Mr Leader. He was also provided with a copy of the rules of conduct as well. He was told that the CCTV footage would be available on the day.

49. The disciplinary hearing took place on 3rd August 2018. Mr Mark Nightingale conducted the disciplinary hearing. The claimant wanted Mr Laing to accompany him but at the last minute Mr Laing said he was not able to make it.
50. The claimant said that he had received a text from Mr Laing saying that the contents of his statement was not true and that he had tried to speak to Miss Hutchings-Budd to amend his statement, but she had not been in the office. Page 170 of the bundle.
51. The claimant attended the disciplinary hearing. He did not bring anyone to accompany him. Mr Richard Wade was in attendance and made notes of the meeting. The notes of the meeting are at page 171 – 183 of the bundle.
52. The CCTV footage was played during the disciplinary hearing. The claimant stated that it was not him in the CCTV footage and that he was not in the visitors' area on that day. At the disciplinary hearing, the claimant admitted that he went to the visitors' area and borrowed a play station in the past, but not on that day, rather on a previous occasion. The claimant said that he could not recall when he returned that play station, but that he had returned it before 6th April 2018.
53. During the investigatory meeting the claimant was asked about the different versions of events that he had given to Mr Leader and Miss Hutchings-Budd. The claimant said that he had panicked when he had spoken to Mr Leader and that he could not recall when he returned the play station or the date that he actually borrowed it.
54. During the disciplinary meeting the claimant said that Mr Laing had been trying to contact Miss Hutchings-Budd to correct his statement. He referred Mr Nightingale to the text received from Mr Laing, who he said did not want to look at it.
55. During the course of the disciplinary hearing the claimant admitted that he had removed a play station previously from the visitors' room without authorisation. In evidence before the tribunal he acknowledged that was conduct which that could result in disciplinary action being taken against him as he was not authorised to be in the visitors' area or remove any items from it.
56. Mr Nightingale indicated to the claimant that he thought he had given two different versions of events and asked the claimant to explain. He went through the steps taken to identify the claimant and noted that two separate people had identified the claimant as the person on the CCTV footage. In evidence before the tribunal, Mr Nightingale said that Mr Carr had a lot of experience in identifying people from CCTV footage in his role at the prison.

57. On cross examination, Mr Nightingale said that he did not think it was necessary to undertake any further investigation with Mr Laing because he had already got the signed statement which he took as sufficient proof.
58. In evidence to the Tribunal, Mr Nightingale stated that the CCTV footage for House block 5 from the day in question was not available. It had been wiped. In his evidence Mr Nightingale, said that he did not think it was necessary to interview the claimant's colleagues who were on shift with him at the time to confirm the claimant's whereabouts because he did not think they would be able to recall the whereabouts of the claimant at the time.
59. The claimant himself did not raise the issue about why colleagues had not been interviewed at either the investigatory or disciplinary meeting.
60. In his oral evidence to the tribunal, the claimant said that he knew that he had not been in the visitors' room on 6th April, because it was a Friday and he and Donna Hay were the only two officers working on a Friday. He said that they had sixty prisoners who were unlocked and that he would not have left Donna Hay her on her own. He said he wouldn't have left House block 5 on that occasion with only one officer in charge of sixty unlocked prisoners. The claimant did not refer to this evidence in his witness statement nor indeed has he referred to it at any stage during the fact find meeting, investigatory, disciplinary or appeal hearings. When he was questioned as to why he had not raised this previously, he suggested that the onus was on the respondent to prove it was him in the CCTV and prove the allegations. He did not seem to appreciate that he should have been trying to exonerate himself and produce any evidence that would help to exonerate him.
61. The meeting was adjourned then reconvened. After the meeting was reconvened the claimant said that he had told the director that he had taken a play station months ago and didn't recall when. The claimant did not ask for any witnesses to be brought to the disciplinary hearing to be questioned by him. In evidence to the tribunal he said that he thought that they would be there but he did not raise the matter with the respondent, who in turn also did not raise the matter as to whether the claimant wanted to question any witnesses.
62. The claimant said that when the meeting was adjourned he was asked by Mr Wade to sign the meetings. He said that he signed the notes without reading them. When he was cross examined about this tribunal, he could not explain why he signed these notes bearing in mind that previously he had disputed the notes of the fact finding interview and the earlier investigatory meeting, yet went on to sign the notes of this disciplinary meeting with which he also did not agree with as indicated in his evidence to tribunal.
63. The claimant said in his evidence to the tribunal that after the further adjournment he subsequently refused to sign the notes of the meeting. He said that he thought they were inaccurate.
64. The hearing was adjourned again. When It was reconvened the claimant was summarily dismissed. It was noted that he was told he was dismissed for breach

- of trust and confidence and was informed that he could appeal against the decision.
65. The respondent wrote to the claimant to confirm his dismissal and informed him of his right of appeal. That letter is at page 186 – 187 of the bundle. In that letter Mr Nightingale states that the purpose of the disciplinary hearing was to consider an allegation of gross misconduct, namely that on 6th April 2018 the claimant stole items from the prison visits room. He set out details of the items concerned being the play station consoles, controllers and headset. He states that that allegation is a potential breach of the Rule of conduct which provides that employees must be honest at all times in connection with their employment and must not breach the trust and confidence that is provided to them by the company or client. In the letter Mr Nightingale indicated that the claimant had stated during the meeting that he had previously taken a play station and returned it undetected and used it during his shift. He referred to the contradictory evidence in the earlier interviews and to the CCTV footage and identification of the claimant from that CCTV footage. He concluded that the claimant had taken items that did not belong to him, which amounted to gross misconduct resulting in the claimant's summary dismissal. The claimant was informed of his right of appeal.
 66. In his evidence to the tribunal Mr Nightingale confirmed that the reason for the claimant's dismissal was theft of the items taken on 6th April 2018 from the visitors' room.
 67. The claimant appealed against the decision to dismiss him.
 68. His letter of appeal is at pages 189 – 190 of the bundle. He refers to his unblemished record and being wrongly accused of theft. He admits that he borrowed a play station earlier and said that others did so to. He indicates, in his letter of appeal, that the director accused him of theft. He complains that the only CCTV footage which was checked was his shifts and that no CCTV footage was checked with regard to other staff. He said everyone's shifts should have been checked.
 69. The respondent wrote to the claimant to invite him to the appeal hearing and summarised his points of appeal (page 192 – 193 of the bundle).
 70. The claimant asked if he could be accompanied to his appeal by his wife as Mr Laing had been part of the investigatory process. The respondent did not agree to the claimant's wife accompanying him to the appeal hearing.
 71. The appeal hearing took place on 31st August 2018. Miss Samantha Pariser, the deputy director of the prison conducted the appeal hearing. Notes were made of the appeal hearing which are at pages 198 – 204 of the bundle.
 72. At the start of the appeal hearing, the claimant handed the appeal officer a letter from his advisor which is at page 204a – 204c of the bundle. The main points in that letter were that investigation was not robust enough and insufficient to warrant him being dismissed; and that the disciplinary process was not fair. In that letter, he complains that the only CCTV footage which was checked was that of 6th April.

No further CCTV footage was checked other than for his shifts. He also complains that no attempt was made to investigate his whereabouts at the time of the theft. He complains about Mr Laing providing a statement as he had accompanied him to his investigatory hearing. He also complains about the fact that, because he had admitted borrowing the play station, the investigation reports suggests that he had admitted to borrowing it on that day. The claimant also complains that the disciplinary process being unfair because of the timescales involved and Mr Laing being interviewed as part of the investigation. He further complains about the way that his grievance was dealt with. He also suggests that, if this was a matter of theft, it should have been reported to the police. That letter was read and reviewed during the appeal hearing. The claimant was given the opportunity to make some further comments. He referred to what Mr Laing had said to him, namely he said that Mr Laing had agreed that there was nothing on the CCTV footage to identify the claimant.

73. During the disciplinary hearing, the claimant disagreed with the notes of the interview with Mr Leader and Miss Hutchings-Budd. He also said that he was not identified on the CCTV footage.
74. During the course of the appeal hearing, Miss Pariser said that the claimant had been dismissed for dishonesty and a breach of trust and not for stealing -page 201 of the bundle.
75. In the appeal hearing, the claimant referred to the face book messages which that he had received from Mr Laing. He said that the meeting with Mr Leader had not been comfortable. He had felt pressurised.
76. At the end of the meeting the claimant is noted as having acknowledged that he had the opportunity to put forward his case.
77. The claimant signed the notes of the appeal hearing.
78. The appeal hearing was then adjourned.
79. Ms Pariser said that she reviewed the CCTV footage after the appeal hearing and discussed the situation regarding the grievance with the HR department.
80. In his evidence to the tribunal, the claimant indicated that the respondent had not reviewed any CCTV footage after 6th April and only reviewed CCTV footage for the days when he was on shift which he considered to be unfair. In her evidence Miss Pariser indicated that the respondents had only viewed the CCTV footage when the claimant was on shift, because the claimant had indicated that he had taken a console and returned it. She said they were viewing the CCTV footage to establish the date when the console had been taken. She said in evidence to the tribunal that she thought it would have been disproportionate to review all the CCTV footage from 6th April 2018 because the claimant had admitted removing a play station.
81. Ms Pariser also said that she understood the CCTV footage from House Block 5 on the day in question had been wiped. She said that she did not consider it

necessary to interview the people who were on shift with the claimant on 6th April, as she said that she did not think that they would be able to recall the claimant's whereabouts at that time. She said that it would be too extensive an investigation and unnecessary to review all the CCTV footage for the period 5 April to 26 May 2018.

83. It should be noted that the claimant did not raise these issues during the course of the investigatory or disciplinary meeting. In evidence when he was asked to explain why that was the case he seemed to suggest that it was up to the respondents to undertake the necessary investigations and seemed to suggest that it was unnecessary for him to put forward any evidence to exonerate himself because it was up to the respondent to prove their case against him.
84. Miss Pariser said that after the appeal hearing she met Mr Laing. It appears this happened by chance after the appeal hearing itself. When she met him, Miss Pariser said she asked Mr Laing about the face book message that the claimant had referred to. Mr Laing said that he had said it. She considered this to be a conversation outside work and did not think it undermined Mr Laing's evidence in the investigatory interview. No notes were made of Miss Pariser's discussion with Mr Laing.
85. Miss Pariser in her evidence indicated that she was concerned about the inconsistencies in the claimant's evidence from the various investigatory and disciplinary meetings.
86. In the appeal hearing, the claimant raised issues about witnesses not being called. In her evidence Miss Pariser said that the claimant could have asked for witnesses could be called but he chose not to do so.
87. In her evidence, Miss Pariser said there was some confusion about the reason for dismissal. She did not think that the claimant had not been dismissed for theft. There was no evidence he had actually stolen the items. She thought that he had been dismissed for a breach of trust. She had sought to clarify the position in her letter.
88. The respondent upheld the decision to dismiss the claimant and dismissed his appeal. However in her letter dismissing the appeal, Miss Pariser states that the reason for dismissal was not for stealing the items but she nevertheless upheld the decision to dismiss the claimant. She said she did so because of the breach of honesty and the confidence that one would expect as an employer in the employee relationship. She said that trust and confidence between employer and employee had irreconcilably eroded. She concluded that part of that decision related to the various inconsistent versions of events given by the claimant during the disciplinary process which she said raised questions about the claimant's honesty. Her letter upholding the appeal is at pages 211 – 214 of the bundle.
89. In cross examination Miss Pariser said that she believed that Mr Nightingale dismissed the claimant for breach of trust but was not able to identify the actual breach of that rule of trust and confidence. Her evidence in that regard

contradicted that of Mr Nightingale who specifically stated in evidence that he had dismissed the claimant for theft.

90. On cross examination Miss Pariser did not accept that she should have considered an alternative sanction to dismissal, if she did not uphold the reason to dismiss theft. She also stated that she did not consider that further investigation into the issues needed to be considered. She said that the facts of the dismissal were the same and that her conclusions were consistent with Mr Nightingale's decision to dismiss the claimant. She acknowledged on cross examination that Mr Nightingale said he had dismissed the claimant for theft but she did not consider that the claimant had been dismissed for theft.
91. When Miss Pariser was cross examined about what the claimant understood to be charge against him she indicated that the facts, whether they were described as theft or something else, were the same namely, in relation to the removing of items from the prison visitors' area. She referred to that as a breach of trust. She did however also rely upon the claimant's differing accounts during the disciplinary process which she said impugned his honesty.
92. She did not accept on cross examination, that there should have been any further investigation into the claimant's conduct during the investigation/disciplinary process which appeared to form part of the decision to dismiss him when she upheld his dismissal and upheld his appeal.
93. In his evidence the claimant said that there was no grievance meeting with him. He also said that no outcome letter was sent to him nor was he given the opportunity to appeal the grievance.
94. The respondent did not report the matter to the police.
95. In his claim form the claimant indicated that, if he was now to take it that he was dismissed for breach of trust as opposed to theft, he considered that he had been treated inconsistently with other employees who had not been dismissed for much more serious offences. He referred to two other employees who posted pictures on social media when they took a prisoner to hospital. He said that that would have been a serious breach of confidentiality. He also referred to another employee who had used a baton against a prisoner but had not been dismissed. He referred to another officer who had fallen asleep in a prisoner's room. In his evidence the claimant said that the posting of photographs through social media was a serious breach of confidentiality and use of force with a prisoner was a very serious matter and yet she said those employees had not been dismissed.
96. The respondent said that they had reviewed those cases. They said that those cases were not the same as the claimant's case as those employees had admitted their mistakes from the outset and had been consistent. Miss Barr said that those employees had been given final written warnings because they had admitted those offences.
97. The claimant said in evidence that he had admitted taking the play station at the very first meeting which should have been taken into account as well. Therefore he

considered that he had been treated differently for less serious offence than the other employees.

98. The claimant is seeking reinstatement or re-engagement. He says that the respondent has been advertising to appoint additional prison officers at his previous place of work.
99. The respondent says that they are recruiting as part of their usual process. They confirmed that there is a vacancy at HMP Northumberland. Miss Barr from the respondent's HR department, says that HMPS would have to approve the reinstatement of the claimant. She said that they were aware that the claimant had been dismissed and the reasons for his dismissal. She suggested that any reinstatement may cause problems with the relationship between the respondent and HMPS.
100. However of more concern the respondent believes that there is a breakdown in the trust and confidence which they have in the claimant. The respondent says that the reason for the claimant's dismissal was because of concerns about him taking a play station without authorisation which he in fact admits to and concerns about the way he behaved during the investigatory and disciplinary process. He gave different versions of events at different times. The respondent says that trust is fundamental in the role of a prison officer and their concerns about their trust and confidence in the claimant still exist.
101. They also suggest it would be difficult for him to return to colleagues who were aware of his dismissal. The claimant himself suggested that he is still in touch with some of his colleagues.
102. In his evidence, the claimant indicated throughout that he believed that the notes made by the director of the prison and another senior officer were in some way effectively fabricated even though he had signed them. He acknowledged that he had lost trust and confidence in the respondent. Indeed it is difficult to believe he could suggest that he did still have trust and confidence in them as he is suggesting that their notes were inaccurate and misleading and that therefore they were effectively fabricating evidence against him.
103. Furthermore in his evidence the claimant did admit that he took a play station without authorisation which he acknowledged to be a conduct issue for which he could be disciplined.

Submissions

104. The claimant's representative submitted that the dismissal was unfair. She submitted that there was insufficient investigation. She relied on the failure to review any further CCTV investigation other than the claimant's shifts and any further investigation with Mr Laing.
105. The claimant's representative also submitted that the procedure was unfair in relation to both the grievance procedure and the lack of opportunity to question

witnesses. She also relied on the decision to change the reason for dismissal at the appeal hearing.

106. The claimant's representative further submitted that dismissal was not within the band of reasonable responses. She relied on the other cases where employees had not been dismissed for more serious offences.
107. The claimant's representative is seeing reinstatement and suggested that it was practicable for the claimant to be reinstated.
108. The respondent's representative submitted that the dismissal was fair. She submitted that there had been a reasonable investigation. She said that it would have been excessive to review all the CCTV footage over a much longer period. The respondent's representative submitted that the respondents did have a reasonable belief that the claimant had committed an act of misconduct which was based on reasonable grounds. She said that there was a reasonable investigation. She submitted that the respondent had based their investigation on the explanations given by the claimant which he now disputed.
109. The respondent's representative submitted dismissal was within the band of reasonable responses. She said that the difference in treatment to other employees was because the claimant, unlike them, had not admitted the offence.
110. The respondent's representative referred to the case of Abernethy. She indicated that this was simply a labelling issue. She said that the facts for the claimant's dismissal were already known to the claimant.
111. Finally the respondent's representative submitted that the claimant had contributed 100% to his dismissal. She argued that he should not be reinstated. She said that he had contributed to his dismissal and there was a lack of trust and confidence on both sides.

Conclusions

112. This tribunal finds that the reason for the claimant's dismissal was theft of a number of items which is a breach of the respondent's rules of trust and confidence.
113. Theft or a breach of trust and confidence can amount to misconduct. Conduct is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.
114. Although the Tribunal accepts that the respondent may have had reasonable grounds to believe that the claimant had committed an act of misconduct, the Tribunal does not consider that the respondent undertook a reasonable investigation into the allegations.
115. The Tribunal considers that the respondent did not consider any evidence that might have exonerated the claimant, but only considered evidence that might prove the allegations against him. In that regard the Tribunal accepts that the way in which the claimant conducted himself in the investigatory and disciplinary

process, significantly contributed to the way that the respondent undertook their investigations.

116. The Tribunal consider that the investigation undertaken was not reasonable as follows:-

116.1 The Tribunal consider that it would have been reasonable to undertake an investigation of the CCTV footage from 6th April through to 28th May to consider whether anybody else may have taken the items. The respondent limited their review of the CCTV footage to those days when the claimant was on shift. The Tribunal does not consider that was reasonable.

116.2 The Tribunal consider it would have been reasonable for the respondents to undertake some investigations with the claimant's colleagues to ascertain his whereabouts on the night in question. It may well be as the respondent suggested that those employees would not be able to recall the particular evening, but such an investigation would have been very short and easy to undertake.

116.3 The Tribunal also consider that it would have been fair and reasonable to reinvestigate Mr Laing. He should have been re-interviewed as part of the investigatory process after the claimant indicated in the disciplinary hearing that his evidence was different to that which had been given by him as part of the investigatory process. The dismissing officer did not attempt to re-interview Mr Laing. The appeal officer did not do so properly as part of any formal investigation or with any proper consideration of his evidence. She merely dismissed his admission without exploring matters further.

117. The Tribunal also considers that the procedure adopted was not fair.

117.1 The Initial fact find undertaken by the most senior person at the prison, namely the Director, suggested from a review of emails between the Director and Mr Carr that the decision about the claimant's guilt had already been made without any investigation with the alleged perpetrator. It appears that the purpose of that meeting was not to undertake any investigation, but to try and effectively ask the claimant to admit the offence.

117.2 The Tribunal accept that it would not be unfair for a person who accompanies an employee to a disciplinary investigation to be interviewed as part of any investigatory process. However, in the circumstances of this case, the Tribunal consider that it was unfair for the respondents to investigate Mr Laing as part of the investigation. He had already accompanied the claimant to the first investigatory meeting and viewed the CCTV with the claimant. He knew that the respondent believed that the person in the CCTV footage was the claimant, so when Mr Laing was asked that question his evidence was already tainted.

- 117.3 The grievance process was not properly undertaken. There should have been a separate investigation. Further, the grievance should not have been undertaken by the person against whom part of the grievance related.
- 117.4 The claimant was not given the opportunity to question the witnesses. Although he was provided with the disciplinary procedure setting out the process, the position was not made clear to him either in the correspondence or at the hearing, namely that he could ask witnesses to be present if he wished to do so.
- 117.5 The decision by the appeal officer to change the basis of dismissal at the appeal stage was unfair. This was not a relabelling exercise as suggested by the respondent's representative. The claimant was dismissed for theft. He believed that he was accused of theft. By the time of the appeal, it was suggested that he was not dismissed for theft, but the appeal officer also relied on the way that the claimant had conducted himself during the investigatory and disciplinary hearing as well. However, she did not indicate that was a potential basis or part of the basis for his dismissal. He was never given the opportunity to respond to that allegations which is unfair.
118. Further the tribunal does not consider that dismissal was a reasonable response in the circumstances of this case.
- 118.1 The claimant had a long unblemished record with the respondent. His dismissal was upheld, even though the appeal officer concluded that he had not committed theft. She did not consider alternatives to dismissal at that stage.
- 118.3 This Tribunal finds that the claimant was treated inconsistently with other employees who were not dismissed for much more serious offences than him, bearing in mind that on appeal his dismissal was upheld for removing a play station and his conduct during the disciplinary process. Other employees were given final written warnings, rather than summarily dismissed for a serious breach of confidentiality namely sharing photographs on social media of a prisoner and prison officers outside prison; and for using force against a prisoner. Both of those offences are more serious offences than the reason for which the claimant was dismissed on appeal and show an inconsistency of treatment towards the claimant.
119. For those reasons this tribunal finds that the claimant's dismissal was unfair.
120. However the tribunal considers that the claimant contributed substantially to his own dismissal.
121. Firstly he admitted he had taken a play station. He acknowledged that he was not authorised to do so. He had taken it to use during his shift when he was on duty,

which he was not permitted to do. He acknowledged this was conduct issue and could lead to disciplinary action.

122. Secondly his approach and actions during the investigatory and disciplinary process contributed significantly to his dismissal. He changed his version of events a number of times both during the fact find, the investigatory meeting and the disciplinary meeting. He signed the notes of those meetings suggesting that they were accurate, yet subsequently disputing them. The respondent followed a trail based on what the claimant had apparently acknowledged to be the case, but he then changed his view on several occasions during the process. This led to various inconsistencies in what the claimant was saying which led the respondent down a path which may not have been the correct route to have followed. Indeed the claimant continued to sign the notes of disciplinary meetings even after he had received the notes from the initial fact find which he did not accept and then then went on to dispute the notes from investigatory meeting, yet still went on to sign the notes of the disciplinary meeting. His behaviour was at best wholly unreasonable. He also never put forward any suggestions or evidence to try and exonerate himself. In his oral evidence in Tribunal, which was not even contained in his witness statement, he suggested that he could not have been him on the video, because he would not have left one female colleague alone with 60 unlocked prisoners. His explanation for failing to put forward this evidence before suggested he was being difficult and bloody minded in the way he was dealing with this disciplinary process.
123. This Tribunal considered that the claimant contributed 70% to his own dismissal.
124. The Tribunal have considered whether an order for reinstatement or re-engagement should be made in this case. The Tribunal does not consider that it is appropriate to do so. Firstly, because the claimant has contributed significantly to his own dismissal.
125. However, furthermore the Tribunal consider that an order for reinstatement in this case is clearly inappropriate. It is clear from the claimant's own evidence that he has lost trust and confidence in the respondent. He disputes notes made by the most senior person at the prison, namely the Director and another senior officer. He states that those notes are wrong and misleading and effectively fabricated. He could not possibly go back and work with these individuals. The respondent themselves have made it clear that they have lost trust and confidence in the claimant because of his behaviour in removing items without authorisation (which he admits although not the specific items for which he was dismissed) and because of the inconsistencies in his evidence during the investigatory and disciplinary process.
126. It is clear in this case there is no trust and confidence left between the claimant and respondent or vice versa. It is almost inconceivable that the claimant could go back and work with officers at the prison and is somewhat surprising that he is seeking to be reinstated bearing in mind what how he has conducted these proceedings.

127. For those reasons this tribunal is not minded to order reinstatement or re-engagement. A further remedy hearing will be fixed with a time estimate of half a day.

EMPLOYMENT JUDGE MARTIN

JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 5 April 2019

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