EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENTS**
MR G FORSTER	**V**	**EUI LIMITED**

HELD AT: **CARDIFF** **ON:** **28 MARCH 2018**

BEFORE:
EMPLOYMENT JUDGE W BEARD

REPRESENTATION:
FOR THE CLAIMANT: **MISS RANDALL (COUNSEL)**

FOR THE RESPONDENTS: **MISS BRACE (SOLICITOR)**

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal pursuant to section 94 of the Employment Rights Act 1996 is not well founded and is dismissed.

PRELIMINARIES

1. This is a claim for unfair dismissal. The respondent contends that the dismissal was for conduct and followed the respondent conducting a reasonable investigation, an appropriate disciplinary hearing and an appeal. The claimant contends that the respondent was unreasonable in treating this as a a conduct and not a capability matter.

2. The claimant gave oral evidence on his own behalf. The respondent called oral evidence from Mr White, who conducted the disciplinary hearing and dismissed the claimant and Mr Gedrych, who conducted an appeal hearing, in which he upheld the dismissal of the claimant. I was also provided with a bundle of documents running to some 269 pages. I made clear to the parties I would only take account of those documents that were referred to within witness statements and, in addition, those to which I was referred during the evidence and submissions.

3. The issues were considered at the outset of the hearing and were:
   3.1. If the reason for dismissal was conduct:

3.1.1. Whether the respondent held a reasonable suspicion/belief the claimant was guilty of misconduct, based on reasonable grounds, following a reasonable investigation and:

3.1.2. If so, did the respondent act within the "band of reasonable responses" in treating conduct as a sufficient reason for dismissing the claimant, including:

3.1.2.1. Did the respondent give sufficient weight to the claimant's submissions in relation to mitigation; and

3.1.2.2. Was there a disparity of treatment between the claimant and other members of the respondent's workforce that had been identified by the claimant?

3.2. If the dismissal was for the reason of capability:

3.2.1. Did the respondent follow a fair procedure when dismissing the claimant; and

3.2.2. If so, did the respondent in all respects within the "band of reasonable responses" dismissing the claimant:

3.2.2.1. Did the respondent give sufficient weight to the claimant submissions in relation to mitigation; and

3.2.2.2. Was there a disparity of treatment between the claimant and other members of the respondent's staff who had been identified by the claimant?

3.2.2.3. Were the procedural steps in the ***Daubney*** guidance followed and if not was there reason to depart from them.

The Facts

4. The respondent is engaged in the insurance business, operating mainly a telephone call centre based operation. The claimant was employed to deal with customers, again generally on the telephone. The claimant was employed by the respondent for a period of ten years. The claimant's record included an earlier warning, however that was for a very different matter in comparison to that for which the claimant was dismissed. The claimant, following a period of long term sickness absence was moved to a new workplace, albeit carrying out the same role. He returned to work in February 2017 and was moved to the new workplace in early March.

5. The claimant's workload was significant because staffing levels had been reduced. The claimant had a dedicated telephone line (unlike most other staff) which could record voicemail messages. The claimant was expected to deal with voicemail messages as there was no back up recording. In my judgment this placed the claimant in a position of trust with regard to ensuring these calls were dealt with. The claimant made a deliberate decision to delete voicemails; this was because of his workload and an instruction he was given to deal with matters in date/time order. He did not inform management about this decision but he did complain about workload levels. The deleting of voicemail messages came to the attention of the claimant's managers and a disciplinary investigation was commenced. The claimant admitted that he had deleted the voicemail messages. Telephone records demonstrated that the claimant had deleted voicemails, in most cases, without listening to any significant part of the details. A disciplinary hearing was convened.

6. The claimant was invited by letter to attend a disciplinary hearing. The disciplinary letter sets out what might be described as the charge and its particulars. The charge is given as work avoidance including call avoidance and the particulars refer to the claimant deleting voicemail messages.

7. In the disciplinary hearing the claimant accepted that what he had been doing was wrong. He did not, however, overtly apologise for his actions but instead justified them by reference to his workload and the instruction to work in date/time order. Mr White concluded that the claimant was not remorseful. The claimant, during the disciplinary process, accepted that he had also been given an instruction to prioritise calls above other tasks. The claimant contended during the disciplinary process that voicemail calls would simply be dealt with in order during his normal calls because the client would only have the claimant's direct line if the claimant had a file on the customer's claim. The claimant accepts before me that this was not correct as some messages would relate to files which had been concluded or because the client had the claimant's direct line number by some other method. Mr White concluded that the claimant was deliberately not following the instruction to take calls.

8. During the course of the disciplinary meeting the claimant was asked about the length of time he had been deleting voicemails. The claimant was noncommittal in his answers. The claimant accepted that he had been doing this for a significant period, would not admit to a period of three months, but said that it was for more than several weeks. Mr White concluded that the claimant was not candid in his responses. Before me the claimant was clear that he had begun deleting voicemails before moving in March 2017. I concluded that this is something he would have been aware of at the time of the disciplinary hearing. In his evidence the claimant told me that, at the time, he considered voicemails to be in the same category as emails, I did not consider that plausible in a call centre environment.

9. The disciplinary hearing concluded with Mr White carrying out a further investigation into the claimant's workload. In evidence Mr White told me that answering telephone calls was fundamental to the claimant's role. He came to the conclusion that the level of work that the claimant was undertaking was not sufficient to justify the claimant deleting calls. This was because that aspect was so basic to the claimant's role. The claimant maintained he was carrying out other aspects of his work and so not avoiding work. Mr White considered that answering calls was so fundamental that this was not an answer to the deleting of voicemails.

10. Mr White dismissed the claimant. His reasons were: that the claimant showed no remorse; that the claimant had not listened sufficiently to voicemails to know that he would be dealing with them later in his call back work; that the claimant was not open about how long he had been deleting voice-mails; that the volume of work was an insufficient excuse for deleting calls; that working in date and time order was irrelevant given the other instruction that the claimant ought to deal with calls as a priority: that this caused detriment to customers and that the claimant had opportunity to raise matters with his manager. He concluded that the claimant was guilty of gross misconduct.

11. The claimant appealed the decision to dismiss him. Mr Gedrych conducted the appeal as a review of the decision made by Mr White whilst, also, dealing with the claimant's specific grounds of appeal. He held an appeal meeting with the claimant giving the claimant the opportunity to raise any new matters. Mr Gedrych dismissed the appeal. He considered that deleting voice-mails in a call centre did amount to gross misconduct; that proper recognition had been given to the workload the claimant was dealing with at the time; that Mr White had not acted inappropriately in the disciplinary meeting; that the claimant's mitigating circumstances, length of service and disciplinary and work records had been considered and that others who had been dismissed were in a different category to the claimant.

12. An appeal hearing was held on 30 December 2015, with Mr Bradley. The claimant was given the opportunity to present his reasons as to why he considered he should not be dismissed. Mr Bradley made the assumption that the claimant had received all the documentation required by the policy in advance of the disciplinary hearing on 3 December 2015. He also made the assumption that the claimant was aware of the disciplinary before the hearing, and that the claimant had received the letter. This was because he was told that someone had signed for the recorded delivery letter on 2 December 2015. He had not seen the letter envelope or any documentation as to who had signed for the letter. Mr Bradley conducted the appeal, listening to the claimant's complaints effectively allowing the claimant to make the running. In a detailed letter Mr Bradley set out his reasons for rejecting the claimant's complaints in regard to the disciplinary and upheld the dismissal.

13. The claimant relied on the fact that another person deleting calls had not been dismissed by the respondent. He also contended that others were not dismissed despite being involved in other disciplinary issues of assault. The respondent's evidence was that the individual who was deleting voicemails was contrite and that there were specific mitigating factors. In respect of the other individuals the respondent argued there was no comparison with the claimant's position.

THE LAW

14. The law that I must apply begins with section 98 of the Employment Rights Act 1996. *(1) 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—*

14.1. *the reason (or, if more than one, the principal reason) for the dismissal, and*

14.2. *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it—

14.2.1. -------

14.3. *relates to the conduct of the employee*

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
(b) *shall be determined in accordance with equity and the substantial merits of the case.*

15. I remind myself in particular, the words of His Honour judge McMullen QC delivered in his judgement in ***Mitchell v St Joseph's School UKEAT/0506/12*** in the Employment Appeal Tribunal. He makes it clear that an employment Judge, who now generally sits alone in unfair dismissal cases, has to be careful to remember that the law remains at it was. It remains the case that it is not the subjective view of the employment Judge that is important, what is being examined is the employer's reason for dismissal and the objective reasonableness of that decision. It is a review of the employer's decision. That proposition is set out very clearly in ***Turner v East Midlands Trains [2013] IRLR 107:***

> *For a good many years it has been a source of distress to unfair dismissal claimants that, with rare exceptions, they cannot recanvass the merits of their case before an employment tribunal. In spite of the requirement in s.98(4)(b) that the fairness of a dismissal is to be determined in accordance with equity and the substantial merits of the case, a tribunal which was once regarded as an industrial jury is today a forum of review, albeit not bound to the* ***Wednesbury*** *mast.*

16. Guidance has been given to tribunal in dealing with misconduct cases beginning with that given in ***Burchell v British Home Stores [1978] IRLR 379*** as updated in ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439; ICR 17***. The cases guide tribunals to consider the following: whether the respondent has a genuine belief in the misconduct; whether that genuine belief is sustainable on the basis of the evidence that was before the respondent; whether that evidence was gained by such investigation as was reasonable in all the circumstances of the case. Finally, I must consider whether, in short, the punishment fits the crime, in other words whether dismissal was a reasonable decision to take given the genuine belief and the evidence upon which it was based. The examination the issue of reasonableness is based on the band of reasonable responses; that range includes the lenient and the harsh but fair employer. ***Sainsburys Supermarkets Ltd* v *Hitt [*2003*] IRLR 23*** makes it clear that the test to be applied to the extent of an investigation carried out by an employer is also the band of reasonable responses. The respondent also referred me to the ***Royal Society for the Protection of Birds -v- Croucher [1984] ICR 604***. In that case makes it clear where an admission has been made the level investigation that is required by a reasonable employer is much more limited.

17. Therefore, the process that I am required to engage in is to look at the evidence as it was before the respondent at the time when the decision to dismiss was made. I am to decide whether that evidence is sufficient for a reasonable employer to hold the belief in the claimant having committed the misconduct. Then I am required to ask whether the investigation which led to the evidence is reasonable in a

Sainsbury sense. However, that also means that the tribunal must consider the limits set out by Lord justice Longmore in ***Bowater v North West London Hospitals NHS Trust [2011] IRLR 331*** where he said;

> *I agree with Stanley Burnton that dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The Employment Appeal Tribunal decided that the Employment Tribunal has substituted it's own judgment for that of the judgment to which the employer had come but the employer cannot be the final arbiter of it's own conduct in dismissing an employee, it is for the Employment Tribunal to make it's judgment always bearing in mind that the test is whether the dismissal is within the range of reasonable options open to a reasonable employer. The Employment Tribunal made it more than plain that that was the test which they were applying.*

18. In **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352** expressly approved by the Court of Appeal in **Paul v East Surrey District Health Authority [1995] IRLR 305** the following was set out about comparing previous disciplinary cases:

> *"Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will not be dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for a dismissal.... Thirdly, ... evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances."*
>
> And
>
> *"… tribunals would be wise to scrutinise arguments based on disparity with particular care …there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues raised by section 57(3) of the Act of 1978* (now section 98 of the 1996 Act)*. The emphasis in that section is upon the particular circumstances of the individual employee's case."*

19. I am also required to consider the so called ***Polkey*** question. That requires me to examine, if there has been a procedural defect making the dismissal unfair, what the prospect of the claimant being dismissed in any event would be had the procedural defect been corrected.

20. I also have to consider the question of contribution. The Employment Rights Act 1996 provides as follows:

> *Section 122*

> *----------(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

Section 123

> *----------(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

21. The case law dealing with the issue began with ***Nelson v BBC (No 2) [1980] ICR 110*** which guides me to look at the conduct of the claimant as I find it to be, and ask whether the claimant's conduct caused or contributed to his dismissal. I must consider whether there is blameworthy and causative conduct. Blameworthy in this sense can encompass behaving perversely, foolishly or in a bloody-minded manner. It must however be improper behaviour and not simply unreasonable.

Analysis

22. I can begin by saying the claimant deliberately deleted voicemails. The claimant did so when he had been instructed to answer calls as a priority. The claimant made this decision without consulting his managers and in circumstances where he was in a position of trust in having his own telephone line. In my judgement that conduct certainly can be considered gross misconduct. It is behaviour which is likely to undermine the implied term of trust and confidence required to exist between an employer and employee. On that basis I conclude that it was reasonable for the respondent to conclude that it was dealing with a matter of conduct and not capability.

23. Dealing with the issues of substantive unfairness and begging with whether the belief was genuine and reasonable.
    - 23.1. The respondent drew a reasonable conclusion, on the basis of the admission by the claimant, that the claimant had deliberately deleted calls.
    - 23.2. The respondent was reasonable in concluding that the claimant lacked remorse. Whilst not every employer would have drawn that conclusion given the claimant's admissions, in circumstances where the claimant was justifying actions it was within the band of reasonable conclusions.
    - 23.3. The respondent was reasonable in concluding that the claimant had not listened sufficiently to calls to understand whether he would be dealing with them in his ordinary work; the telephone records indicated as much.
    - 23.4. The respondent was reasonable in concluding that the claimant had not been candid about how long he had been deleting calls. Again, whilst not every employer would have considered that to be a lack of candour it was a conclusion within the reasonable band.
    - 23.5. It was also reasonable for the respondent to conclude that working in date and time order did not excuse deleting voicemails given the other

instruction that the claimant had been given that he ought to deal with calls as a priority.

23.6. Given that this was a call centre, the primary function of which was to answer customer calls, it was not unreasonable for the respondent to conclude that answering calls was fundamental. Further it was not unreasonable for the respondent to conclude that there was no real distinction between voicemails and calls. The claimant had been instructed to answer calls as a priority. In those circumstances concluding that the claimant's workload did not excuse deleting voicemails was not unreasonable.

23.7. Given the fact that voicemails had been deleted from customers that the claimant might not contact as part of his normal work the respondent was reasonable in concluding that customers would suffer a detriment.

23.8. The respondent reasonably concluded that the claimant had the opportunity to raise the issues with his manager as he had clearly raised the issue of workload.

23.9. Given the above and that there was no indication in the evidence to the contrary I consider that the respondent had a genuine belief that the claimant was guilty of the misconduct in question.

23.10. There was sufficient evidence upon which the respondent was reasonable in holding a genuine belief on those issues.

23.11. In those circumstances the respondent was reasonable in concluding that the claimant was guilty of gross misconduct.

24. The investigation carried out was reasonable in all the circumstances. The claimant had admitted the conduct. The telephone records had been obtained. What was being explored was the claimant's reasons for the conduct. In those circumstances once those reasons were given and a further check into the claimant's workload was carried out the respondent was reasonable in considering that it had covered the relevant areas of investigation and the investigation fell within the range of reasonable investigations.

25. I'm also clear that it would be reasonable for an employer who considers that an employee who fails to answer calls in a call centre despite a direct instruction to do so to consider this to amount to conduct for which dismissal is an appropriate response. The claimant's previous employment record, workload difficulties, explanations and/or mitigation is not sufficient, in my judgment, for me to conclude that the decision to dismiss falls outside the band of reasonable responses. Whilst another employer might have reached a different conclusion and the tribunal might consider dismissal harsh, that does not take the decision outside that band of responses.

26. That leaves the question of disparity of sanctions meted out to other employees in comparison to the claimant. I deal with this for completeness as it was not pressed, properly so in my judgment, by Ms Randall during her closing submissions. The examples raised are clearly lacking the similarities that I am urged to look for in **Hadjioannou** and **Paul** above. I do not consider that this points to unfairness.

27. The appeal took the form of a review. It dealt with the issues raised by the claimant in his appeal and looked over the evidence and decisions made at the disciplinary stage. Looked at in conjunction with the disciplinary process in my judgement the procedure adopted by the respondent was within the range of procedures the respondent might reasonably adopt.

28. Strictly speaking, given my findings I do not need to consider the question of contribution, however for completeness I would consider that there is certainly a significant level of blameworthy conduct in the claimant deleting voicemails and it was this conduct that led to the claimant's dismissal. Further to this the claimant's lack of candour about the length of time he had been deleting calls also was blameworthy and contributed to the decision to dismiss the claimant. Were it necessary to do so I would have concluded that the claimant contributed to his dismissal to the extent of 60%.

_____

Employment Judge Beard
04 April 2018

JUDGMENT SENT TO THE PARTIES ON
……20 May 2018……

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS