EMPLOYMENT TRIBUNALS

Claimant: Mr W Ryan

Respondent: University of Salford

Heard at: Manchester **On:** 17 July 2019

Before: Employment Judge Whittaker

REPRESENTATION:

Claimant: In person
Respondent: Mrs R Eeley, Counsel

JUDGMENT having been sent to the parties on 20 August 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant brought a single claim of unfair dismissal.

2. The respondent relied upon the ground of conduct within section 98 of the Employment Rights Act 1996. The issues for the Tribunal were therefore straightforward and are well-known. The Tribunal had to decide whether or not the respondent honestly believed on reasonable grounds and after a proper and reasonable enquiry that the claimant had been guilty of gross misconduct. The Tribunal also had to consider whether or not the decision to dismiss the claimant fell within the band of reasonable responses available to a reasonable employer after considering the statutory language of section 98(4) of the Employment Rights Act 1996.

3. There was a further issue which was specific to the facts of this case. The claimant was very clear throughout the investigation and disciplinary process, and equally clear when presenting his evidence to the Employment Tribunal, that in his "mind" he had not done anything wrong and that in his "mind" he had permission to remove the printer which was the subject of the allegation of misconduct and which

led to his dismissal. The Tribunal, applying the rationale of the Supreme Court in **Ivey v Genting Casinos [2017] Supreme Court 67** reminded itself that the conduct of the claimant must be viewed from the perspective and by the standards of the ordinary reasonable and honest individual having the same information available to them as was available to the claimant at the time that he removed the printer from the premises of the respondent. The issue to be decided by the Tribunal, therefore, was whether or not the thoughts and conclusions of the claimant about having permission to remove the printer would match those of the ordinary reasonable person presented with all the facts and knowledge available to the claimant.

4. The Tribunal was presented with a bundle of documents in excess of 500 pages. It was very clear to the Tribunal that the majority of these documents could not possibly be relevant to the claim or to the issues to be decided by the Tribunal. The Tribunal had already refused permission to the claimant to amend his claim to seek to re-open the circumstances of a final written warning which had been issued to him for conduct on 17 March 2017. Nevertheless the claimant had clearly insisted, in his position as someone who was unrepresented, that all the documents relating to that final written warning should be included in the bundle. The Tribunal made it clear to the parties that it would not read or consider those documents other than to read the tone and content of the letter issued to the claimant by way of final written warning. The claimant did not appeal the decision to impose the final written warning which he was told would remain active on his personnel file for a period of 12 months. It was not disputed that the misconduct which led to the dismissal of the claimant occurred within that active/live period of 12 months, occurring as it did on 7 March 2018 when the 12 month period would expire on 16 March 2018. The Tribunal therefore read the documents to which it was referred in connection with the investigation of the allegation of misconduct and the disciplinary and appeal process.

5. The claimant gave evidence on oath by reference to a witness statement and was cross examined. The respondent presented two witnesses, namely Kelly Morton, the HR Adviser who was present at the disciplinary hearing and Mr Withnell, who took the decision to dismiss the claimant. There was no statement from the manager who considered and rejected the appeal of the claimant against the decision to dismiss him. The Tribunal did however read, consider and take into account the documents produced in the bundle relating to the appeal of the claimant.

6. The Tribunal discussed with Mrs Eeley, who represented the respondent, why it was appropriate for Kelly Morton to give evidence when the decision to dismiss had been taken by Mr Withnell alone. Kelly Morton made clear in her statement that she was simply there to provide support and guidance in connection with HR policies and procedures.

7. The claimant indicated that he had a significant number of questions for Ms Morton. The Tribunal indicated to the claimant, however, that it would not be appropriate to put such a significant number of questions to Ms Morton bearing in mind that the relevant questions should be put to Mr Withnell. The claimant then indicated that he would have only a short number of questions and the Tribunal therefore agreed to Ms Morton giving evidence by reference to her statement and answering a limited number of questions from the claimant.

Findings of Fact

8. After considering the relevant documents and the evidence given by the witnesses, both in their statements and under cross examination, the Tribunal made the following findings of fact:-

(1) The claimant was employed by the respondent as a Lecturer in Tourism and Event Management. His employment began on 13 October 2015 (page 72). He was issued with a contract of employment (pages 72-77). This was issued approximately two months prior to his commencement date. At paragraph 19 of that policy the attention of the claimant was specifically drawn to the disciplinary procedures of the claimant's employment and he was told that the procedure was available from the Human Resources Division. He was also told that these procedures did not form part of his contract of employment. There was no question, therefore, of any breach of those policies amounting to an allegation of breach of contract.

(2) On 17 March 2017 (pages 339/342) the claimant was issued with a final written warning having attended a disciplinary hearing on 22 February 2017. At the conclusion to that letter the claimant was told that, “This warning shall remain active on your personnel file for a period of 12 months from the date of this letter, after which time it will lapse”. The claimant was told that he had the right to appeal the decision. He did not exercise that right. He was however given an email address to write to if he had wanted to exercise that appeal and alternatively he was given a postal address to write to if he wanted to appeal.

(3) The disciplinary procedure of the respondent was included in the bundle at pages 51-65 inclusive. At paragraph 17.3 of that policy (page 57) the policy read that, “The employee should be advised how long the warning will remain current and the consequences of further misconduct within the set period following the warning”. The letter advising the claimant that he was subject to a final written warning did not make this reference. It advised the claimant that his warning would remain active for a period of 12 months but it did not warn the claimant of the consequences of further misconduct. However, at page 18.2 of the disciplinary procedure (page 58) the disciplinary policy of the respondent reads “Where an employee has a current final written warning, further misconduct or failure to improve conduct within a set period following the warning may result in dismissal”. The relevance of the disciplinary policy had been pointed out to the claimant at the time that he was offered employment, and he had at that stage been advised as to how he could access a copy of that policy. The claimant did not appeal the final written warning and neither did he at that time seek any clarification or explanation as to what the wording of the final written warning meant.

(4) Sometime towards the end of February 2017 the claimant had discussions with his wife who asked the claimant to help her complete some double-sided printing in connection with a project that she was

personally involved in. The printers that the claimant and his wife had at home did not perform double-sided printing. The claimant had observed that there were a number of printers set aside in an area of the university premises and he thought that he might be able to use one of these printers at home to complete the printing which his wife had asked him to assist with.

(5) Pages 362, 363 and page 421 were then crucial to the following findings of fact made by the Tribunal. The findings of fact represent the evidence of the claimant in his own words.

(6) The claimant approached someone who the claimant believed was either a member of the security department of the university or was alternatively a porter. The claimant did not ask the name of the person that he spoke to. He did not ask anything about the person. He did not ask anything about their job or their level of responsibilities or indeed what ability, if any, they had to give him permission to remove one of the printers, take it home, use it and then bring it back once the printing had been completed by the claimant on behalf of his wife. The claimant held a brief chat in passing with this unidentified person. The claimant confirmed that it was not even a face to face discussion. The claimant was not told specifically that he was given permission to remove a printer. In the words of the claimant, at the foot of page 362, the individual replied, "can't see a reason as why?". There was, in the opinion of the Tribunal, a mistake in the notes which was not picked up or discussed during the course of the hearing. It was, however, clear in giving evidence that what in fact the claimant meant to say, and perhaps even said but his words were not accurately recorded, was "can't see a reason as to why not?". This was the extent of the words which were used in response to the claimant asking whether or not he could borrow a printer for a couple of hours. The claimant, however, confirms that he did not know whether the person he spoke to was a member of security or whether they were a porter. The claimant assumed the person to be a member of security but asked no questions at all of the person that he spoke to to check or benchmark that assumption. The claimant confirms at the foot of page 362 that the discussion which he held was "in passing".

(7) At the foot of page 421 the claimant again confirmed during the course of the disciplinary hearing that it was towards the end of February, the very beginning of March 2017, when the claimant had asked "a member of security/a porter" if he could take the printer. The claimant took no steps whatsoever to identify the individual in question or to ask anything about their extent or ability to give permission to the claimant to remove the printer from the premises of the respondent.

(8) On 6 March 2018 the claimant attended at the university and presented himself at the security barrier which blocked his way to the area where the printers were being stored. The claimant told security that he was coming to pick up a printer. The claimant was never able to identify who on security he spoke to. The claimant's assertion, however, that he was

simply present to pick up a printer was not challenged by security. The claimant was therefore given access to the area where the printer was being stored. He arrived in his own car which was being recorded on CCTV. The claimant was aware of the operation of CCTV in the area in question.

(9) The printer was large. At the time it had a note attached to it indicating that it was to be returned to Rico, a well-known photocopying manufacturer. There was a dispute about whether the claimant read the content of the note at the time that he removed the printer to his home address. When giving evidence to the Tribunal the claimant denied that he read the note until he got home. However, when the claimant was first interviewed on 9 March about this incident (page 351) the notes show that the claimant said at that meeting, following which the claimant was suspended, that "saw piece of paper to be returned to Rico". When giving evidence the claimant indicated that the paper was not fixed to the printer, for example by some form of tape, but was allegedly placed face down in the area where you would feed paper into the printer, and that it was only in those circumstances when the claimant got the printer home that he removed the paper and saw what was written on it. The claimant was not questioned in this way, either during the investigation or the disciplinary hearing, about the circumstances in which he came to read the note. The Tribunal finds that the note made at page 351 about the claimant seeing the piece of paper indicating that it had to be returned to Rico was made after the claimant had himself said that he had seen the note when it was at his home address, and 9 March was the day after the printer had been returned. The note at page 351, therefore, does not indicate that the claimant was telling the respondent that he had seen the note at the time that it was removed. There was no evidence therefore from the respondent to contradict the evidence of the claimant about only realising that the printer was to be returned to Rico when he got home. The Tribunal in any event finds that this evidence is of little if any consequence or significance. The Tribunal however finds as a fact that the claimant only read the note when he got the printer home.

(10) The claimant actually found that he could not get the printer to work when he got it home and so he returned it to the premises of the university. However, before doing so there was a few days of extremely snowy weather when the claimant was not able to get into work. The claimant had, however, returned the printer back to the premises of the respondent by repeating the process of approaching the security barrier and explaining that he was returning a printer by the time of the suspension meeting which took place on 9 March.

(11) On 8 March the Digital Team within the university stated that a printer within the Reprographics Office had gone missing. They said that it had been left in the foyer with a note to be collected by Rico for the deletion/cleansing of data which had been stored on the machine. On 8 March a member of the Digital Team had visited security to look through CCTV and having seen the printer being loaded into the back of the

claimant's car they contacted the police to report the printer as having been stolen. CCTV footage of the claimant removing the printer was supplied by the security office and still shots were presented to the Tribunal at pages 344 onwards. However, it was not necessary to consider those in any detail because the claimant admitted throughout that he had attended at the premises of the respondent and had removed the printer. He remained however adamant that he had only done so having obtained permission to do so.

(12) On 9 March the claimant was suspended by his line manager, Gordon Fletcher. Confirmation of that suspension was included at page 350. Notes of that meeting were taken and were presented to the Tribunal at page 351. The claimant alleged during that meeting that "Security gave permission to take things off the premises". The claimant was told that this was a serious matter and that he was being suspended.

(13) The claimant alleged that he was told at the meeting on 9 March that he was being suspended whilst an allegation of "theft" took place. The respondent denied that the claimant was told that he was being investigated for theft and maintained all along that he was investigated for removing university property without permission. The Tribunal did not find this disagreement to be of any importance or relevance. The claimant at all times was fully aware that the facts relating to the removal of the printer were what was being investigated by the respondent and which led to a further detailed investigation meeting and a formal disciplinary hearing. The Tribunal therefore did not make any finding of fact as to whether the claimant was or was not told that he was being investigated for theft.

(14) Under the disciplinary procedures of the respondent, the claimant should have been given a letter confirming his suspension and the circumstances and reasons for it. Such a procedure would also have complied with the ACAS guidelines and Code of Practice relating to the conduct of disciplinary procedures. The respondent admitted that by mistake no such letter was sent but that letter was sent to the claimant on 23 March, some two weeks later (pages 366/367). In that letter the university made it clear that the allegation was one of gross misconduct and that it was specifically, "that you removed university property from university premises without permission". That wording remained exactly the same up to and including the decision to dismiss the claimant.

(15) The disciplinary procedure of the respondent (page 54) indicated that suspension should only occur where the allegation may constitute gross misconduct. That was the view at the time that the claimant was suspended. However, at paragraph 8.2 the policy (which is not contractual) indicates that a decision to dismiss can only be made by the Deputy Vice Chancellor or a designated alternative or registrar. However, the language of the policy says that those are the people that can "only ordinarily" make the decision to dismiss. However, in order for it not to be ordinary the clause goes on to identify situations such as

suspension out of hours or an absolute emergency, which the circumstances relating to the claimant were not. It also goes on to say that the suspension will be reviewed from time to time. The claimant was not suspended in accordance with that policy but was instead suspended by his line manager, Mr Fletcher. However, by the date of the letter on 23 March (page 366) the university confirms that by now the process of suspension has been referred to and approved and authorised by the Deputy Vice Chancellor. Any further suspension of the claimant, therefore, met the requirements of the university disciplinary procedure. The claimant remained on suspension for a further period of approximately one month until his disciplinary hearing on 20 April and then remained on suspension for a further period until the claimant was told that he was being dismissed by a letter sent to him on 3 May. Throughout those periods of time the claimant's suspension met the requirements of the university's disciplinary procedure.

(16) The claimant also attended and fully participated in an investigation meeting which took place on 23 March. Detailed notes were made and presented to the Tribunal at pages 362-364 inclusive. The Tribunal read and carefully considered those notes, in particular the comments made by the claimant at pages 362 and 363.

(17) During that meeting the claimant indicated that he had previously borrowed a projector which belonged to the university and that he had taken that off university premises. He had however asked for permission to do so from his line manager, Gordon Fletcher, and that permission had been granted to him. It was also discovered, however, that the projector had not been returned and arrangements were then made for it to be returned during the period of suspension.

(18) In the letter dated 23 March (page 367) Mr Fletcher says in his letter that he is enclosing a copy of the university's disciplinary procedure. The claimant told the Tribunal that that policy was not enclosed and that he was therefore put at a disadvantage and that this was a significant flaw in the procedures followed by the university. The claimant conceded, however, before the Tribunal that at the disciplinary hearing he specifically confirmed that he had read and had access to the university's disciplinary procedures, and furthermore the claimant had actually quoted from that same procedure when writing to the respondent in an email on 19 March at page 353. That was one month before the disciplinary hearing. The claimant had access via the internet to the disciplinary procedure of the respondent even though he was suspended, and had had access to that policy throughout his time as an employee with the respondent since autumn 2015.

(19) Darren Kibble was appointed to carry out an investigation and he prepared an investigation report dated 26 March 2018 (pages 357-378). The claimant alleged that Mr Kibble was not independent because security, as a department, fell under his remit and that as, in his opinion, the security department was part and parcel of what was being

investigated Mr Kibble was not independent. The respondent disputed that security was part of Mr Kibble's remit. In any event the conclusion of the Tribunal was that there was little if any disagreement between the facts as presented by the claimant and the facts as presented by the respondent. The claimant in his first meeting with his line manager at the time that he was suspended on 9 March had offered a description of the person that he said that he had spoken to, albeit without knowing whether that person was a member of security or a porter or indeed a member of any other department of the university. At page 351 the claimant identified the individual in question as having worn a black uniform, being about the same age as the claimant, being clean shaven and white. No attempt was made by the university to seek to identify that individual. The reasoning put forward by the university was that the information given was far too vague and that in any event even if that person had been identified that would not have altered the misconduct of the claimant as the person in question was not in a position, in the opinion of the university, to give proper permission, and indeed even on the evidence of the claimant had not given permission bearing in mind the language which the claimant had so carefully described in his own words at the foot of page 362. The Tribunal accepted that reasoning on the part of the respondent and accepted that Mr Kibble was sufficiently independent in order to carry out an investigation in circumstances where the majority, indeed the vast majority, of the facts giving rise to the allegation of misconduct were agreed between the claimant and the respondent.

(20) The investigation report concluded that what the claimant had done may constitute an example of gross misconduct and that a disciplinary hearing should be held. The claimant was therefore sent an invitation to a disciplinary hearing to be held on 20 April at 10.00am. That letter of invitation appeared in the bundle at pages 379/380. The claimant was told that Mr Withnell, who had no prior knowledge whatsoever of the claimant, would conduct the disciplinary hearing. The claimant was told, as he had been previously, that the allegation he would have to answer was "that you removed university property from university premises without permission". The claimant was told that Kelly Morton would attend only to advise in relation to HR policy and process.

(21) At both the investigation meeting and the disciplinary hearing the claimant wanted to be represented by his brother as the claimant was not a member of a trade and neither did he feel able to ask a colleague for assistance and support. The claimant submitted a letter from his GP dated 17 April (page 407) which in his opinion amounted to exceptional circumstances and which he submitted in support of his request that his brother should be allowed to be his representative at these meetings. The respondent considered that letter but did not accept it as exceptional circumstances, noting that the GP only went so far as to say that such meetings "might" prove to be overly stressful, and indicated that such meetings "could" exaggerate his condition. The claimant's medical condition was an irregular heartbeat. The claimant confirmed however to

the Tribunal in evidence that he experienced no medical difficulties whatsoever during either the investigation meeting on 23 March or the disciplinary hearing or the appeal hearing. The claimant was however afforded access to his brother on each occasion and special arrangements were made for his brother to come onto the premises of the university and he was allocated a special room in which he could sit and in which the claimant could consult with his brother at times of the claimant's choosing. The claimant confirmed that no difficulties in asking for adjournments and consulting with his brother had been placed in his way by the respondent at any time.

(22) The claimant attended the disciplinary hearing. However, as he had done prior to the investigation meeting which took place on 23 March, the claimant had asked if he could be accompanied/represented by his brother, both at the investigation meeting and at the disciplinary meeting. The respondent declined that request. Arrangements were made, however, to allow the claimant's brother onto the university premises and a room was set aside for his brother in order to enable the claimant to adjourn the meetings and to consult with his brother at any time. The claimant acknowledged that such facilities were made available and acknowledged that when he had asked for adjournments that they were granted promptly and without any difficulty and that he therefore had the opportunity to consult with his brother whenever he had wanted to do so.

(23) During the hearing the claimant presented a substantial written statement which was received by Mr Withnell and considered by him. A copy of that document appeared in the bundle at pages 425-439 inclusive and comprised detailed and comprehensive representations on behalf of the claimant. Mr Withnell read and considered this document.

(24) A copy of the respondent's notes of the disciplinary hearing were sent to the claimant. The claimant responded by email dated 26 April (page 462). He made certain comments but indicated that overall he believed them to "be a good account of the meeting". The comments which the claimant made were acknowledged and he was told that they would be attached as an addendum to the notes which had been made by the respondent.

(25) At pages 471/471,1 and 472 the claimant included in the bundle a series of questions which he had said related to significant areas of unfairness and failure to follow procedures and the ACAS principles. The claimant had attempted to ask the investigating officer, Darren Kibble, who was present at the disciplinary hearing, each of these questions one by one. The claimant, following advice from Kelly Morton, had been advised that he would not be allowed to ask those questions as a numbered list of questions of Mr Kibble but that issues he wanted to raise about the process would be considered by Mr Whitnell. The claimant raised and made these points in considerable detail in the written statement which he submitted to the disciplinary hearing in any event, and the Tribunal

finds that that statement was read and given appropriate consideration by Mr Withnell.

(26) Mr Withnell recognised that dismissal of the claimant was a real possibility depending on his conclusions about the alleged misconduct of the claimant, particularly bearing in mind that there was at the time of that alleged misconduct a live final written warning. Mr Withnell therefore took an appropriate of time in which to reflect on everything that he had heard and read and to carefully consider his conclusions. Mr Withnell reached a conclusion that the claimant should be dismissed and he wrote to the claimant in detail in a letter dated 3 May 2018. That letter is three pages long. The letter explains that Mr Withnell has not found the claimant to be guilty of gross misconduct but has nevertheless found him to be guilty of misconduct. It confirms that he has taken into account the existence of the live final written warning and that the decision has been taken to dismiss him with notice. The claimant was told that he could appeal.

(27) The claimant wrote a letter of appeal dated 12 May 2018. It was included in the bundle at pages 485-493 inclusive. Arrangements were then made for the claimant's appeal to be considered. A summary of the main points of appeal which had been raised by the claimant was sent to the claimant on 18 May 2018 advising him that the appeal hearing would take place on 5 June 2018. The appeal was chaired by Jackie Njoroge, a Director of Strategy. Notes of the appeal meeting were submitted to the Tribunal at pages 498-508. The notes show that the meeting lasted some two hours and 20 minutes from 9.00am until 11.20am. A letter rejecting the appeal of the claimant was sent to him on 14 June 2018. A copy of that letter was included at pages 509-511 in the bundle. The issues raised by the claimant were addressed and the reasons for rejecting the appeal were explained in particular on pages 510 and 511, including a number of the issues raised by the claimant as allegations of unfairness in his claim form and in his evidence to the Employment Tribunal.

Relevant Law

9. Section 98 of the Employment Rights Act 1996 requires a Tribunal, when determining whether a dismissal of an employee is fair or unfair, to be satisfied that the employer has shown the reason, or if more than one the principal reason for the dismissal and 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. The employer relied upon the conduct of the employee, which is included at subsection (2)(b).

10. Where the employer has shown that the reason for dismissal, in this case conduct, falls within subsection (2) of section 98, then section 98(4) of the Employment Rights Act 1996 requires that:

> "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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. Furthermore, the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case."

11. It is for the employer to show that misconduct was the reason for dismissal. According to the EAT in **British Home Stores v Burchell [1980] ICR 303**, a threefold test applies. The employer must show:

(a) It believed the employee guilty of misconduct;

(b) It had in mind reasonable grounds upon which to sustain that belief; and

(c) At the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

12. This means that the employer need not have conclusive direct proof of the employee's misconduct – only a genuine and reasonable belief, reasonably tested.

13. The Tribunal reminded itself that the onus on the employer to show reasonableness was removed by section 6 of the Employment Act 1980. The Tribunal reminded itself, therefore, that only the first of the three above aspects of the Burchell test must be proved by the employer. The burden of proof in respect of the other two elements of the test is neutral.

14. The Tribunal has already referred to the case of **Ivey v Genting Casinos** (see paragraph 3 above). Provided that the employer had a reasonable belief that the employee was guilty of misconduct, it is generally irrelevant that the employee did not consider the behaviour inappropriate himself.

15. Establishing the reason for dismissal (in this case conduct) is simply the first stage in the process of deciding whether the decision to dismiss the employee was fair or unfair. The exact statutory language of section 98(4) of the Employment Rights Act 1996 is often interpreted to require the Tribunal to ask itself whether or not the dismissal fell within the "range of reasonable responses" of a reasonable employer. The Tribunal must of course avoid substituting its own decision for that of the reasonable employer. The relevant question is whether or not the decision to dismiss was the decision of a reasonable employer.

16. The Tribunal also reminded itself that a conduct dismissal will not normally be treated as fair unless certain procedural steps have been followed. Those procedural steps include a full investigation of the relevant conduct and ensuring that the employee has been given a fair hearing and a proper and reasonable opportunity for the employee to say what they want to say in explanation or mitigation. The range of reasonable responses test applies as much to the question of whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.

This was the reasoning adopted by Lord Justice Mummery in **J Sainsbury PLC v Hitt [2003] ICR 111**.

17. The Tribunal also reminded itself that it was required to take into account the provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures where they are relevant to the case in question. The Tribunal reminded itself that a failure to follow the Code can (not must) result in a conclusion that the procedure followed by the employer was not the reasonable procedure of a reasonable employer. A failure to comply with procedural safeguards does not automatically render a dismissal unfair. The overall test to be applied by the Tribunal is whether or not the investigation and the process and procedures which led to the decision to dismiss the employer were the reasonable procedures of a reasonable employer.

Judgment

18. The employer made it clear to the claimant at all relevant material times that the conduct which was the subject of the disciplinary investigation and disciplinary hearing which led to the dismissal of the employee was "removing university property without permission" (see paragraph 14 above). The claimant admitted at all times that he had "removed university property from university premises". That was never in dispute. The university alleged that the claimant had removed the printer "without permission" and concluded after the disciplinary process and at the time of dismissal that the claimant did not have permission to remove the printer, and on that basis concluded that the claimant was guilty of misconduct. Applying the relevant legal principles there is no doubt from the conclusions of the investigation report and the conclusions of Mr Withnell at the end of the disciplinary hearing that the employer believed that the claimant was guilty of misconduct, namely removing university property from university premises without permission. The Tribunal was satisfied that the employer had reasonable grounds for that belief and that it had carried out a reasonable investigation of a reasonable employer in order to reach that conclusion.

19. The claimant indicated at all relevant times that he was satisfied that he did have permission but in the opinion of the Tribunal that was a belief which was both unreasonable and unsustainable. The claimant was unable to identify the person from whom he allegedly obtained permission. He was unable to say whether the person was a porter or a member of security or indeed a member of any other department of the university. The only discussion which the claimant alleged that he had had with anyone about removing the printer to take it home was with this unidentified person. Furthermore, even on the version of events put forward by the claimant he had not been given permission. He had not held a direct or detailed discussion with anyone about his proposal that he should remove a printer. It had been the briefest of discussions held only "in passing". Furthermore, the unidentified person whom the claimant indicated had given him permission to remove the printer did not actually give permission at all. Even in the words of the claimant, all that the unidentified person said was "can't see why not". The claimant placed great weight on the fact that he was allowed into a secure area through a security barrier by a member of security not only when he removed the printer but also when he returned it after trying, unsuccessfully, to use it at home. However, whilst the procedures at the security office may have been somewhat lax, and whilst it appears that on each of the two occasions the security officer relied upon the information which was given to them by the claimant, namely

that he was coming to collect a printer and on the second occasion coming to return a printer, neither of those occasions in the opinion of the Tribunal amounted to permission, most importantly, to remove the printer from university premises on the first occasion. The claimant did not ask the security guard whether or not he could have permission to enter the secure area, and neither did he ask for permission to leave with it when he then had the printer in the back of his car. He sought, in effect, to persuade the security guard on each occasion that he was coming to collect the printer in circumstances which would give rise to the impression that he already had permission to do so.

20. The Tribunal also found it significant that on another occasion when the claimant had asked to borrow a projector and remove it from the university premises the claimant had directly consulted his line manager and discussed the proposal and had been given direct and clear permission. The claimant provided no satisfactory explanation as to why he had not followed the same process when removing the printer. He sought to persuade the Tribunal that the printer was in some way abandoned so that in those circumstances permission from his line manager was not appropriate. He also sought to persuade the Tribunal and the employer that the printer was not part of his own department and that in those circumstances the permission of his line manager was neither appropriate nor necessary. The employer rejected these explanations as being reasonable explanations for failing to ask permission from the claimant's line manager as he had on a previous occasion. The conclusion of the Tribunal was that the employer had reasonable grounds on which to sustain the belief that the claimant had removed the printer without permission. There had been no discussion with the claimant's line manager about the proposal whatsoever. The claimant had taken no steps whatsoever to identify who was the appropriate person or persons who was able to give him permission to remove the printer. All that the claimant did was “in passing” to have the briefest of inconclusive discussions with an unidentified person about the suggestion that the claimant remove the printer and take it home. As the Tribunal has already commented above, the response of that individual did not on any reasonable interpretation amount to permission in any event.

21. The conclusion of the Tribunal, therefore, was that irrespective of the beliefs of the claimant, an ordinary reasonable and honest individual having the same information available to them as was available to the claimant would not have concluded that they had permission to remove the printer from university premises. An honest reasonable and sensible individual would have recognised that a great deal more was required in order to enable the claimant to conclude that he had permission. Permission should have been sought from an identified person. The circumstances against which the claimant was making the proposal that he remove the printer should have been explained to that reasonable person. It would have been reasonable for the claimant to have approached his line manager as he had on a previous occasion. If the claimant, as he asserted, did not believe that the printer had anything to do with his line manager then it was incumbent on the claimant to identify someone of similar authority who was sufficiently and properly connected to the ownership of the printer and then discuss the matter with them in sufficient detail in order to obtain proper, clear and informed permission before removing university property from the university premises. The conclusion of the Tribunal, therefore, was that the employer believed the claimant to be guilty of misconduct and that at the time of dismissal the respondent had in mind reasonable grounds on which to sustain that belief.

22. The Tribunal then considered whether or not at the time of his dismissal the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances. The Tribunal was firmly of the belief that the employer had at the moment of dismissal carried out the reasonable investigation of a reasonable employer. There was an initial failure to follow the disciplinary procedure of the respondent in failing to supply the claimant with a letter of suspension and in failing initially to obtain approval for the suspension of the claimant at the relevant level of authority within the university. However, within a relatively short period of time that error was corrected. Permission at an appropriate level was obtained and this was confirmed to the claimant in writing. Furthermore, following the letter on 23 March (see paragraph 14 of the findings of fact above), the claimant was well aware throughout the disciplinary process that the allegation of misconduct was that he had "removed university property from university premises without permission".

23. The respondent did not carry out any search to identify the person whom the claimant alleged that he had spoken to "in passing". The conclusion of the Tribunal is that that was the reasonable decision of a reasonable employer. The information given to describe that individual by the claimant was so vague as to make such an investigation unreasonable. The obligation was on the claimant at the point of removing the printer to ensure that he had a proper and reasonable level of permission to do so. The claimant was unable to identify the individual other than by reference to a vague description. He had no idea which department of the university the individual worked in. The conclusion of the Tribunal, therefore, is that the failure to search the university for this individual on the basis of the vague information supplied by the claimant was the reasonable decision of a reasonable employer.

24. The claimant was not allowed to be accompanied in the room where the disciplinary hearing was held by his brother, but the Tribunal finds that the employer went out of its way to accommodate the claimant's brother within the premises of the university and as the claimant told the Tribunal, he had no difficulty whatsoever in asking for breaks and he was at all times given every opportunity to consult with his brother during the disciplinary process. The Tribunal took into account that the statutory right to be accompanied at a disciplinary hearing in any event would have excluded the claimant's brother from the list of those who are, by statute, permitted to accompany an individual at a disciplinary hearing.

25. The claimant attended the disciplinary hearing with a set of questions which he wished to ask by reference to that numbered list. It was admitted by the respondent that the claimant was not permitted to go through that list question by question, but after careful examination of the list of questions and the issues which the claimant wished to raise, the Tribunal is satisfied that during the disciplinary process the relevant issues were carefully and patiently addressed by Mr Withnell before he concluded that the claimant should be dismissed. In particular the Tribunal noted that Mr Withnell had taken a proper period of time in which to reflect on his conclusions. He carefully appreciated the impact of the claimant being dismissed. After taking all matters into account Mr Withnell did not conclude that the claimant was guilty of gross misconduct but nevertheless was guilty of misconduct. In the opinion of the Tribunal this demonstrated that Mr Withnell took proper and reasonable care and attention to reflect on all the circumstances before reaching his conclusion that the claimant should be dismissed.

26. The Tribunal finds that it was fair and reasonable for Mr Withnell to take into account that at the time of the claimant removing the printer from the university premises without permission he was still the subject of a “live” final written warning which had also been issued to him for misconduct. Whilst the Tribunal accepted that at the conclusion of that particular disciplinary process the claimant had not been specifically reminded of the consequences of further misconduct, the disciplinary procedure of the respondent, to which the Tribunal has referred above, did make those consequences clear. The claimant had been referred to the disciplinary procedure of the respondent at the time that he began his employment. In any event, in the opinion of the Tribunal, it would be recognised by any ordinary and reasonable person that committing further misconduct during the live period of a final written warning which had also been issued for misconduct would, to use a colloquialism, “put the claimant in hot water”. What otherwise could be the reasonable conclusion of an honest and reasonable person who was told that a final written warning would remain live for a period of 12 months? Furthermore, 12 months means 12 months. IT does not mean 12 months less a few days. In the opinion of the Tribunal it was incumbent upon the employee to be aware of the live period of the final written warning and if he was proposing to do something which was obviously unusual, such as removing the printer to use at home, then on the basis that he was aware that he had against his name a live final written warning for misconduct it was his responsibility to ensure that he obtained proper, reasonable and informed permission to behave in the way that he did.

27. The conclusion of the Tribunal, therefore, was that it was the reasonable decision of a reasonable employer for Mr Withnell to take into account the final written warning, to take into account the fact that it had been issued for misconduct and to take into account the fact that at the time that the claimant removed the printer, without permission from university premises that the final written warning was live.

28. The judgment of the Tribunal is that the decision of Mr Withnell to dismiss the claimant fell within the range of reasonable responses to all those circumstances and that the decision to dismiss the claimant was the reasonable decision of a reasonable employer. There was no doubt or dispute that the claimant had removed university property from university premises. The employer had perfectly reasonable grounds to conclude that the claimant had done so without permission and that he was therefore guilty of misconduct. He did so at the time of a live final written warning. Taking all those circumstances into account the judgment of the Tribunal is that the decision to dismiss the claimant, with notice, fell within the range of reasonable decisions of a reasonable employer.

29. The claim of unfair dismissal is therefore dismissed.

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Employment Judge Whittaker

Date 24th September 2019

REASONS SENT TO THE PARTIES ON

4 October 2019

FOR THE TRIBUNAL OFFICE

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