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EMPLOYMENT TRIBUNALS

Claimant: **Mr J Frankis**

Respondent: **Mears Ltd**

Heard at: **East London Hearing Centre**

On: **Wednesday 4 September 2019 & Wednesday 16 October 2019**

Before: **Employment Judge Ross (sitting alone)**

Representation

Claimant: In person

Respondent: Ms E Banton (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The complaint of unfair dismissal is not upheld.

(2) The claim is dismissed.

REASONS

1 The Claimant was continuously employed by the Respondent and its predecessors (prior to TUPE transfers) from 1 March 2010 until dismissal on 31 October 2018. The stated reason for dismissal was gross misconduct.

2 By a claim presented on 18 February 2019, after a period of early conciliation between 19 December 2018 and 19 January 2019, the Claimant brought a complaint of unfair dismissal.

The issues

3 A list of issues drafted by the Tribunal was agreed between the parties at the outset of this hearing. This is attached at Appendix A.

4 As well as contesting the fairness of the decision to dismiss, the Claimant also disputed the reason for dismissal, contending that it was not for a reason relating to conduct.

The evidence

5 I read witness statements for and heard oral evidence from the following witnesses:

5.1 Mr Simon Shephard, Repairs Manager;
5.2 Mr Gary Luscombe, General Manager;
5.3 The Claimant.

6 There was a quite comprehensive bundle of documents produced by the Respondent on the first day of the hearing. The Claimant also produced a smaller bundle. There was, by the second day of the hearing, an agreed bundle of documents incorporating any relevant documents in the Claimant's bundle into the Respondent's bundle. Page references in this set of Reasons refer to pages in that agreed bundle.

7 I read the documents attached to the Claimant's witness statement (A to J).

The facts

8 The Respondent is a provider of repairs and maintenance services for social housing.

9 The Claimant was employed as a Plumber/Multi-Trade Operative working on the Respondent's contract with the Thurrock Borough Council. His duties involved reactive repairs, much of which involved lone working in the homes of tenants and occupiers.

10 The Claimant had worked for Thurrock Council and his continuity of employment was preserved by the TUPE regulations when the contract for reactive repairs passed to Morrisons, and then after the contract with Morrisons expired, to the Respondent.

11 It was a term of the Claimant's contract of employment with Thurrock Council that generally the employer's telephones should only be used for business purposes (see page 147B). The Claimant's case (before this hearing) was that his contractual terms with Thurrock Council had never been varied. I found that at, or shortly after, the point of transfer of the contract to the Respondent, the Claimant received a copy of the Respondent's Employee Handbook, which included its mobile phone policy. This policy states:

> "*If you have a company mobile the company will pay for the cost of all business calls. You must cover the cost of any personal calls you make using those phones. Excessive use may invoke the disciplinary procedure*."

12 The Respondent's policy in respect of when the company mobile phone could be used to make personal calls was as follows: "*in an emergency; and when staying away from home for business reasons, calls of a reasonable duration could be made to home or a partner*".

The investigation

13 On 7 August 2018, James Mullan, Commercial Manager, raised by email to the Claimant's supervisor Mr Ryder, that the Claimant's telephone bill was the highest in the branch in July 2018. This led to the Respondent investigating this complaint.

14 In submissions, the Claimant stated that the email dated 15 August 2018, 11:18am, at page 192, showed that the allegation about excessive phone calls was devised on 15 August 2018, after the incident referred to in that email, and after the Claimant filed a grievance against Mr McCarthy. This email at page 192 was not put to Mr Shephard in cross-examination as founding the basis of such a claim. The email was put to Mr Luscombe in cross-examination when the Claimant alleged that this document showed that the whole disciplinary process against the Claimant was orchestrated and, as a result of this, an email was sent to Mr Ryder to investigate the Claimant's phone use.

15 I found that such an allegation based on the document at page 192 was pure speculation. I preferred Mr Luscombe's evidence on this issue as to when Mr Mullan first raised the issue of the Claimant's phone use. I found Mr Luscombe was an honest witness. Moreover, Mr Luscombe's evidence was corroborated by the following:-

15.1 The investigation report at page 61 which states the issue over phones was raised by Mr Mullan on 7 August 2018 with Mr Ryder. This report's accuracy was never challenged by the Claimant until this hearing.

15.2 On what I heard and saw, there is no reason why Mr Mullan would make up a complaint about the Claimant's use of his company mobile phone for personal use on either 7 or 15 August, because Mr Mullan is in a separate part of management as Commercial Manager.

15.3 The Claimant has never disputed the 02 bill records used by Mr Mullan (and in particular the Claimant did not dispute the figures for telephone use put to him at either the disciplinary hearing or the appeal hearing).

16 An investigation was conducted by Barry Euesden, Senior Supervisor. At no time did the Claimant object to Mr Euesden as investigator until this Claim. As part of the investigation, Mr Euesden collected the following data:

16.1 Evidence that the Claimant had received Personal Digital Assistant ("PDA") training including the company's mobile phone policy on 13 July 2016.

16.2 Analysis of mobile phone bill history identifying the top 10 numbers called from the Claimant's mobile phone. This revealed 229 calls to one number

over five months and a potential average of 50.6 personal calls per month. The Claimant's calls to the number called most lasted an average of 273.96 minutes per month and all the personal calls lasted in the region of 300 minutes per month.

16.3 Mr Euesden calculate the potential cost of the lost time, most of which was during core working hours (76%).

16.4 He considered individual instances where the evidence indicated that the Claimant had kept jobs open whilst on the phone to make personal contact such as the job summary for 33 Camden Close of 24 May 2018.

16.5 The evidence from the Claimant in his investigatory interview on 13 September 2018, in which he confirmed his wife's telephone number, did not dispute making calls of 22 hours 49 minutes to her between February and June 2018, and did not dispute making such personal calls was against the company policy.

17 During the investigatory interview, at first the Claimant stated he did not recognise his wife's mobile telephone number, which was the number that most of his calls had gone to. Shortly after that, he accepted in interview that he phoned his wife occasionally and was asked to check if this could be his wife's number. He checked his PDA to see if the number on the phone bill was the same as his wife's and confirmed that it was.

18 The findings of the investigation report were as follows:-

18.1 The Claimant had used the company PDA to make excessive personal phone calls.

18.2 Due to the time of the calls and the length of the calls, the Claimant was abusing company time making personal calls when he should be working.

18.3 The investigation demonstrated that jobs had been intentionally left open to incorporate the personal calls and to conceal unproductive time, which was conduct which undermined the trust and working relationship between the employee and employer.

19 Mr Euesden recommended that the Claimant's case be forwarded for disciplinary action.

20 After the interview on 13 September 2018, the Claimant was suspended. The letter of suspension explains the suspension was a precautionary one, which was a neutral act. The letter also stated that if he needed to contact any work-related person in defence of his case, he must first seek permission and notify his request to HR. I heard no evidence that he sought to call any witness in his defence. The suspension letter warned that the allegations were serious and could lead to his dismissal.

21 There was no evidence in the investigation report to suggest, nor did the Claimant or his representative suggest, at the time of the disciplinary hearing that

Mr Euesden had a grudge against the Claimant. I found that the language and documents compiled in the investigation were unremarkable in content and understandable and appropriate in scope. I found, on a balance of probability, that Mr Euesden was an independent investigating officer.

The disciplinary hearing

22 Mr Shephard was appointed as Disciplinary Hearing Manager having been approached by Human Resources. The Claimant was invited to the disciplinary hearing on 15 October 2018 on the following charges:

> "1. *Using the company PDA/phone to make excessive personal calls*
> *2. Abuse of Company time*
> *3. Conduct which undermines the trust and working relationship between the employee and employer*".

23 A copy of the disciplinary policy and procedure was included with the letter along with the documentary evidence to be used at the disciplinary hearing. This was a reasonable and fair way to proceed.

24 The hearing was re-scheduled twice to accommodate the Claimant or his trade union representative. The hearing took place on 25 October 2019. The Claimant was represented by a Unite Regional Officer. Although the Claimant was critical of his representative and the advice received, his choice of representative had nothing to do with the Respondent. Moreover, he made no complaint about the representative at the disciplinary hearing; indeed, the Claimant chose to be represented by the same representative at the appeal hearing.

25 From Mr Shephard's oral evidence, I found that there was a degree of antagonism between Mr Shephard and the Claimant and I note that the disciplinary hearing at one point at least became heated. I found that this probably stemmed from Mr. Shephard's view that what he had done at the disciplinary hearing had been reasonable. I found that Mr Shephard was a reliable as a witness on all key facts.

26 Over the course of the disciplinary hearing, Mr Shephard formed the honest belief that the Claimant had made a significant number of personal calls on the company PDA/phone, during the working day over February to June 2018. Over a period of five months Mr Shephard found calls to Mrs. Frankis had totalled 1,169.82 minutes. Mr Shephard also believed that the Claimant had made other personal calls which he identified; he decided the total amount of personal calls to the Claimant's wife and others averaged over five hours each month.

27 The witness statement of Mr Shephard is incorrect to suggest at paragraph 7e that more than nine hours per month were spent on personal calls. This was a mistake in the witness statement and clarified in oral evidence, and the basis on which Mr Shephard dealt with the Claimant was that he was making an average of five hours and nine minutes of personal calls per month. Mr Shephard also believed that the Claimant had had training on the content of the Respondent's mobile phone policy and considered the Claimant's work diary and record of training when deciding the Claimant had attended this training on 13 July 2016 (relying on pages 65 to 67).

Mr Shephard explained to me the likely reason why there was no signed attendance sheet for that training; this was because the Claimant often refused to sign documents.

28 At the disciplinary hearing, the Claimant did not question the figures for phone calls produced by the Respondent, nor dispute the specific examples selected by Mr Shephard. After two examples (concerning 33 Camden Close and 29 Seabrook) the trade union representative did not wish to hear more examples. These two calls lasted 43 minutes and 48 minutes respectively, during which the job was open on the Respondent's system.

29 At the disciplinary hearing, the Claimant stated that he was "*shocked*" at the figures (see page 103) and that he did not realise the duration of the calls. He did not expressly deny doing the training of 13 July 2016, but stated that he could not recall doing it. The Claimant stated that he must have been having a mental breakdown and that his father died in June 2017 and the Will was only just received, and that his wife had personal problems at that time. Mr Shephard noted that the Claimant had not approached his supervisor with any personal issues.

30 The Claimant did make an apology for using the company mobile phone and offered to pay any bills arising from it. The Claimant then proceeded to try to deflect blame from himself to others and denied that he was actually doing jobs when making the calls (which seemed to me to miss the point of the charges). At this point the meeting got slightly heated. The Claimant admitted excessive use of the phone and apologised but not in a fulsome or remorseful way:

> "*I'm not going to deny the phone calls, I have offered to pay for the phone calls and my lost time. There is an excessive amount but I still feel that although I'm on the phone an hour a week then the other 36 I must have been working.*" (see p.105).

31 The Claimant claimed in evidence that in effect these were Mr Shephard's words but I find that the Claimant is an intelligent man, well able to choose and use his own words. He never contested the accuracy of the disciplinary hearing notes at any point in his appeal or at this hearing.

32 It is important to record that at the disciplinary hearing the Claimant's case was to admit that he had done wrong, and not to claim (as he did before me) that he had done nothing wrong and did not know the Respondent's phone policy.

33 At the conclusion of the disciplinary hearing, the Claimant's trade union representative summarised the Claimant's case, acknowledging that the Claimant had apologised and advised Mr Shephard to take advice from HR and not to reach a decision that day. The trade union representative did not mention any of the allegations of unfairness made at the start of this Tribunal hearing, nor did he claim that the Claimant did not know the Respondent's phone policy nor that the Claimant had not been trained in respect of it. Mr Shephard adjourned the hearing for about one hour and then adjourned it to 31 October 2018 to consider his decision and take advice from HR.

34 Having seen the Claimant over the course of the two days of this hearing, I concluded that he would not have apologised and offered to pay unless he accepted that he had done wrong at the time.

35 Mr Shephard decided to dismiss the Claimant for gross misconduct. In summary, Mr Shephard formed an honest belief in the following:-

35.1 The Claimant was a lone worker and the Respondent had to be able to trust him to get on with his jobs without supervision or with minimal supervision. The company phone was a necessity for his role but the Claimant had misused it and therefore could misuse other things.

35.2 The Claimant and such operatives worked with vulnerable members of the public. Mr Shephard concluded that the Respondent lacked sufficient trust in the Claimant for him to continue in employment.

35.3 This lack of trust was in part because Mr. Shephard believed the Claimant had not been truthful when interviewed on 13 September 2018, when the Claimant had claimed that he did not know his wife's mobile number.

35.4 The two job examples discussed in the disciplinary hearing (33 Camden Close and 29 Seabrook) show the Claimant making personal calls despite being logged on to jobs that he should have been working on, where the Council was paying for the job. He found that the Claimant was deliberately keeping the job open to account for his time making personal calls. For example, Mr Shephard believe that the photo taken at 10:12am was taken from the van parked outside 33 Camden Close.

35.5 Mr Shephard decided the Claimant knew that he was abusing the mobile phone and was fully aware of his actions. He concluded that the Respondent could no longer trust the Claimant.

36 I found that Mr Shephard reached that belief based on the evidence collected in the investigation, and put before him. After the two examples (33 Camden Close and 29 Seabrook) were put up on the big screen in the hearing room, the Claimant's trade union representative stated that he had seen enough, so no further examples were gone through. I explained to the Claimant that I was not rehearing the disciplinary hearing; he could not now challenge evidence not challenged at the time of the disciplinary hearing. Further, in the disciplinary hearing the Claimant accepted that some calls were made to his brother and to his son.

37 Mr Shephard considered that the severity of the misconduct, the trust lost with the Claimant, meant that a sanction other than dismissal would not suffice. Understandably (given the extract at page 105, cited above at paragraph 30) Mr Shephard did not believe the Claimant's apology was sincere; I found that he had grounds for that belief given the nature of the apology. Mr Shephard took into account the Claimant's apology, his clean record and he offered to pay money back for the calls.

38 At the adjourned disciplinary hearing on 31 October 2018, Mr Shephard read out his decision and summarily dismissed the Claimant. I found that the reasons read out were the same as those in the dismissal letter at pages 110 to 113. The Claimant was sent the dismissal letter on 6 November 2018.

39 I found that Mr Shephard dismissed the Claimant for gross misconduct for the reasons that he gave and not for any of the reasons alleged by the Claimant at this hearing. I reached this conclusion for the following reasons:-

39.1 I accepted Mr Shephard's evidence of the reasons for dismissal. He believed the data and evidence collected showed that the Claimant was guilty of, in effect, stealing time from the Respondent and its client.

39.2 Mr Shephard was not influenced by anything said or done by Mr Euesden other than the matters set out in the investigation report. I accepted Mr Shephard's evidence that Mr Euesden was the correct person to carry out the investigation as senior supervisor. Mr Shephard did not know that the Claimant had brought a grievance against Mr Euesden in the past.

39.3 At the disciplinary hearing the Claimant did not suggest that he was being disciplined because of his grievance brought in August 2018 against Mr McCarthy, nor that he was being disciplined because he had seen employees working on the home of Mr Luscombe.

39.4 At the disciplinary hearing the Claimant made no reference to the fact his contract of employment had superior terms than that of other employees as a reason why he was being disciplined, nor that he was being disciplined because he insisted on his contractual rights.

39.5 In any event, about 24 to 25 staff at the Thurrock depot were still working on Thurrock Council terms and condition, but I only heard evidence of the Claimant being disciplined.

39.6 At the disciplinary hearing, despite being represented by a trade union representative, the Claimant did not ask for an adjournment or for the hearing officer to be changed.

39.7 At the disciplinary hearing, the Claimant did not dispute the basic thrust of the Respondent's case and in essence accepted that he had done wrong, evidenced by the apology that I have referred to, the raising of alleged mitigation, and the offer to pay for the cost of the calls.

The appeal

40 The Claimant appealed by letter dated 5 November 2018. The appeal consisted of three grounds, all of which involved a change of case from that put before the disciplinary hearing, and amounted to disputing the reason for dismissal altogether:-

40.1 The dismissal was because he had put a grievance in against Mr McCarthy on 15 August 2018.

40.2 The Claimant was never informed of the Respondent's phone policy nor given a copy of it.

40.3 The allegation of abuse of company time was disputed. The PDA/phone timeframes and locations were consistently wrong. Some calls were made en route and some calls were emergencies, such as the well-being of himself and his brother following his father's death.

41 Mr Luscombe was asked by HR to be the appeal hearing officer. Prior to the appeal he read the grounds of appeal, the decision to dismiss and the investigation evidence. I found Mr Luscombe to be a patently honest and reliable witness. I accepted all his evidence without difficulty. He came across as someone who understood the Claimant well, who had had numerous direct conversations with him about work and how resolutions could be found, and who thought highly of the Claimant and his work. In short, I found that Mr Luscombe had no axe to grind in respect of the Claimant. He knew that the Claimant had been offered support by the Respondent after his father's death because he had offered it himself. He knew that the Claimant had not taken up this offer of support.

42 I found that Mr Luscombe had been sympathetic to the Claimant after the death of his father and made accommodations for him.

43 At no time had the Claimant told him either during the appeal hearing or beforehand that the loss of his father was affecting his ability to work nor that he had to ring family members during the working day.

44 The appeal took place on 26 November 2018. The Claimant was represented by the Unite Regional Officer again.

45 I accepted Mr Luscombe's evidence as to why the appeal was rejected. In particular, Mr Luscombe concluded that the disciplinary and dismissal were not connected to the Claimant's grievance against Mr McCarthy. He found that it was totally irrelevant and, in any event, the investigation into the phone use had begun before the Claimant's grievance was made, and the grievance was dealt with by a totally different manager (Mr Mullan).

46 Mr Luscombe also concluded, considering the documentary evidence, that the Claimant had attended the training on 13 July 2016 which included training on the mobile phone policy. Moreover, Mr Luscombe believe the Claimant must know from various sources what the Respondent's company mobile policy was. These sources included:

46.1. Mr Luscombe knew that he had been given a copy of the phone policy when he joined the Respondent, within the Respondent's employee handbook, so he believed the Claimant would have been given such a handbook too.

46.2. Mr Luscombe believe the Claimant would know of the Respondent's phone policy after five years within the business.

46.3. Mr Luscombe believed that the Claimant would know from "tool box talks" what the Respondent's company mobile policy was.

47 Mr Luscombe noted that the Thurrock Council terms and conditions also included a general prohibition on the use of phones for personal use which the Claimant acknowledged he had a copy of.

48 Mr Luscombe did not uphold the appeal in order to stop the Claimant complaining about Respondent employees working on Mr Luscombe's house. This was never suggested at the appeal. I accepted Mr Luscombe's evidence about this allegation in any event; his evidence was that he did not know of this allegation until after the appeal and there never were any employees of the Respondent working on his house.

49 In his witness statement, the Claimant relied on the email at page 194 to support this theory as to why his appeal was rejected, but this document is no evidence at all. I consider that this allegation was pure assertion by the Claimant.

50 The Claimant did not raise in his appeal that Mr Euesden was not independent, nor did he complain that he should not have conducted the investigation.

51 Without hesitation, I found that Mr Luscombe held a fair appeal. He considered the appeal on the evidence, he found that the Claimant had breached the Respondent's trust and that dismissal was the appropriate sanction. He explained in answer to my question that the Claimant was using his phone in company time over long periods, and effectively breaching the phone policy, and being funded by public money in that the local authority would be paying for the time spent. He found that the Claimant gave no evidence to justify the serious breaches; he found the Claimant did not recognise how serious what he had done was.

52 The Claimant was informed of the appeal decision with detailed reasons in an outcome letter, pages 123 to 125.

53 At the appeal hearing the Claimant did not suggest that the Respondent's phone policy did not apply and that Morrison's policy should have applied. The Claimant did, however, suggest this during his cross-examination of Mr Luscombe. In any event, Mr Luscombe believed the Respondent's policy superseded that of the Morrison's policy, and that of Thurrock Council. On the documents that I saw, this belief was based on reasonable grounds, because he believed that the Claimant had attended the training on the Respondent's phone policy on 13 July 2016 (having looked at the documentary records), and that the Claimant had received a copy of the Respondent's Employee Handbook containing the telephone policy.

54 In his Claim, the Claimant changed his case further. In respect of the argument at ground 2 of his appeal, in his witness statement he stated at paragraph 9:

> "*I first received a PDA (Personal Digital Assistant) after negotiation, when I worked for Morrisons and it was explained to me that it would never be used in a disciplinary. The PDA was accepted by me under these circumstances in a meeting with Steve Galagher, Terry Wilkes (the union official) and myself*."

55 Before me, the Claimant's evidence on this matter was very different. The Claimant gave evidence on the second day of the hearing (which was never mentioned in either the disciplinary hearing, the appeal hearing, his ET1, or his witness statement, nor to any Respondent witness in cross-examination), that he had been given permission by a manager at Morrisons, Mr Gallagher, to use the company mobile phone during his work for personal reasons so long as he paid the charges for personal calls. I rejected that evidence as not credible because:-

55.1 The evidence was implausible in itself that a contractor carrying out this type of work would agree to such an individual variation of contract, which would give, on the face of it, an operative the ability to use his phone for personal reasons during work time, when either the Respondent or the client would be paying for the labour cost.

55.2 As I have indicated, there was no previous reference to this alleged variation of his contract whilst at Morrisons in any meeting with the Respondent nor in his witness statement.

55.3 The Claimant's explanation of why he had not mentioned these particulars in the disciplinary hearing, which was that he had been asked about the Respondent's policy not the Morrisons' policy, was absurd.

56 The Claimant's evidence on this matter was a recent invention. I realise that this is a strong finding but it is impossible to understand how the Claimant could be mistaken about this; and if Mr Gallagher at Morrisons had really agreed to such a variation, it would have been raised in the disciplinary process or at least in the ET1 and the witness statement for these proceedings. Moreover, I find it implausible that Mr Gallagher would have agreed to the Claimant using the company mobile at any time during the working day for personal calls, when this was clearly not the policy of either Thurrock Borough Council nor the Respondent, and where the cost of the wasted time would have to be borne either by Morrisons or their client.

57 Counsel for the Respondent spent some time arguing why the Claimant was not a credible witness. It was submitted that the Claimant had changed his case over time. I found that the points made at paragraph 5 of the written submissions were well made in that respect. In any event, I have explained above why I found the Claimant to be, in some instances, a witness who was not credible. Where there was any dispute of relevant fact, I preferred the evidence of the Respondent's witnesses whom I found to be reliable for the reasons I have explained. I recognise, however, that this case does not rest on the Claimant's credibility but on whether the Respondent can show the reason for dismissal was a fair reason, and whether the decision to dismiss was fair within section 98(4) Employment Rights Act 1996. I need to consider the terms of the *Burchell* test and ensure that I do not substitute my view for that of the employer.

The Law

Law in respect of Unfair Dismissal

58 In determining whether a dismissal was unfair, it is for the employer to show that the reason for the dismissal is a potentially fair reason within section 98 Employment Rights Act 1996 ("ERA").

59 A potentially fair reason is one which relates to conduct: section 98(2)(b) ERA.

60 Gross misconduct is conduct which is so serious that it goes to the root of the contract. By its very nature, it is conduct which would justify dismissal, even for a first offence.

61 I directed myself to section 98(4) Employment Rights Act 1996, which provides as follows:

> *"(4) 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."*

62 The burden of proof on the issue of fairness is neutral.

63 In conduct cases, in considering the fairness of a dismissal, the necessary questions for a Tribunal to consider are:

63.1 Did the employer have an honest belief that the employee was guilty of misconduct?

63.2 Was that belief based on reasonable grounds?

63.3 Was that belief formed on those grounds after such investigation as was reasonable in the circumstances?

(See *BHS v Burchell* [1980] ICR 303, a case provided by Ms. Banton)

64 I directed myself to the principles which it must apply when applying section 98(4):

64.1 The Employment Tribunal must not substitute its own view for that of the employer as to what was the right course to adopt for that employer.

64.2 On the issue of liability, the Tribunal must confine itself to the facts found by the employer at the time of the dismissal.

64.3 The employer should ask: did the employer's action fall within the band of reasonable responses open to an employer in those circumstances?

(*See* *Foley v Post Office and HSBC Bank plc v Madden* [2000] IRLR 3.)

65 The Tribunal reminded itself that the range of reasonable responses test applied not only to the decision to dismiss but also to the procedure by which that decision is reached including the investigation: see *Sainsbury plc v Hitt* [2003] ICR 111. I directed myself to the following passage in *Hitt*, with emphasis added by me, which I found to be relevant to this case:

> "*The investigation carried out by Sainsburys was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades.* ***The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him.*** *The uncontested facts were that the missing razor blades were found in Mr Hitt's locker and that he had had the opportunity to steal them in the periods of his absence from the bakery during the time they went missing. Investigations were then made, both prior to and during the period of an adjournment of the disciplinary proceedings, into the question whether, as Mr Hitt alleged, someone else had planted the missing razor blades in his locker. In my judgment, Sainsburys were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was improbable. The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment tribunal in their view considered ought to have been carried out*."

66 Reading *Hitt* and Foley together, it is clear that the Tribunal must not substitute its own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer.

67 Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances.

Submissions

68 I read written submissions from Counsel for the Respondent, which were served on the second day of the hearing. I put the case back for 40 minutes so that the Claimant could read those submissions; the Claimant did not seek any further time, and at the end of the first day of the hearing, I had directed that written submissions should be limited to four sides of A4. After that break, I heard oral submissions from the parties. I took into account all the submissions made even if I have not addressed them separately below. It is fair to say that several of the submissions from the Claimant were directed to me rehearing the disciplinary case and inviting me to substitute my own conclusion for that of the employer.

Conclusions

69 Applying my findings of fact to the issues agreed with the parties, and applying the law set out above, I have reached the following conclusions.

Issues (1) – (2): Reason for dismissal

70 The reason for dismissal was a reason relating to the conduct of the Claimant. In particular, the dismissing manager, Mr Shephard, had an honest belief that the Claimant was guilty of gross misconduct. I repeat the findings of fact at paragraphs 35 and 39 above.

71 Further, Mr Shephard had reasonable grounds for his belief that the Claimant was guilty of gross misconduct. I repeat the findings of fact particularly those at paragraphs 36-37 above. In particular, the Claimant did not dispute the Respondent's figures for the duration of the company phone use, nor did he contend that he did not know the terms of the Respondent's phone policy, nor did he defend the case on the basis that he had done nothing wrong. On the contrary, the Claimant apologised, admitted the phone use was excessive, and offered to pay for the personal use.

72 For the reasons set out in the findings of fact, I rejected the Claimant's case that the reason or principal reason for dismissal was for any of the matters raised by him, set out in the Agreed List of Issues.

73 As I have explained, the issue of the Claimant's excessive phone use had been raised before he filed his grievance against Mr McCarthy dated 15 August 2018 (which, incidentally, was not received by HR until 20 August 2018 – see p37).

74 The Claimant did not see employees of the Respondent working at the home of Mr Luscombe; this did not happen. The Claimant was not dismissed for what he perceived that he saw in any event. I repeat the findings of fact at paragraphs 39 and 45-52 (in respect of the appeal) above.

75 The Claimant was not dismissed because of his contract terms (being more generous than those of the Respondent's standard terms) nor because he was viewed as being difficult because he insisted on enforcing his contractual rights.

Issue 3: Procedural fairness

76 The decision to dismiss was procedurally fair. The investigation was well within the band of reasonable responses. I repeat the findings of fact at paragraphs 13-21 above. The investigation generated a lot of evidence of excessive personal use of the company mobile phone, which was never contested.

77 In the light of the Claimant's response to the data, and the way in which he sought to defend the case at the disciplinary hearing by way of mitigation only (rather than denial of any wrongdoing), the investigation was manifestly reasonable. In particular, it was never argued at the investigatory interview, nor at the disciplinary hearing, that the alleged number and length of the personal calls was inaccurate.

78 At the disciplinary hearing, the Claimant was represented by a trade union regional officer. The Claimant was able to adduce evidence, ask questions, or advance arguments. His representative made closing submissions.

79 Moreover, the appeal was a fair and reasonable process, as explained in the findings of fact. I found that Mr Luscombe was independent, honest, and had a professional relationship with the Claimant. The Claimant was permitted to change his case for the appeal, and advance new arguments.

Issue (4): Was the decision to dismiss within the band of reasonableness?

80 The fact that Mr Shephard did not accept the apology as genuine, and found the Claimant to be guilty of gross misconduct as charged, is not something that I can interfere with; I cannot substitute my view.

81 I consider that, on the face of the investigation evidence and the disciplinary hearing (in which the Claimant admitted excessive use of the phone and Mr Shephard found the mitigation insufficient), the findings reached by Mr Shephard and the decision to dismiss were well within the band of reasonableness open to the employer. I repeat the findings of fact set out at paragraphs 37-39 above. The Claimant was a lone worker, working in the homes of occupiers, some of whom were vulnerable; and the Respondent had to be able to trust him.

82 The Claimant had a fair appeal, amounting to a re-hearing. I concluded that this would have cured any procedural defects, had any existed.

Issue 7: Contributory Fault

83 If I am wrong about the above, and the dismissal was unfair, I would reduce the basic and compensatory awards by 100% for contributory fault for the following reasons.

84 By way of further fact finding:

84.1 I rejected the Claimant's account that he did not know the terms of Respondent's phone policy. There was evidence that he must know of it, after 5 years in the business. Moreover, on balance, it is likely he received a copy of the Employee Handbook of the Respondent, knew of it through training or some Toolbox Talk.

84.2 The Claimant's contract prohibited personal phone use, whether it was in the terms set out in the Respondent handbook, or the Thurrock Council terms and conditions. On balance, I find that the Claimant's contract was varied over time, so that he worked in accordance with the Respondent's term on this issue (given that he worked on after training in it and after being warned at time of transfer what the Respondent's policy was). But if I am wrong about this, it can make no difference, given the terms of the Thurrock terms and conditions.

84.3 The Claimant's frequent changes of case, and the not credible evidence that he gave on certain issues, led me to conclude that he had made the personal calls alleged, including long calls when jobs were open (as in the 33 Camden Close and 29 Seabrook examples). I was satisfied that he was guilty of gross misconduct.

84.4 I accepted that his apology, and his view of what he had done, lacked any remorse or insight. Given his approach in the disciplinary hearing (which was to state that if he worked for 36 hours rather than the contracted 37 hours that was complying with his contractual duty to work), and his change of case at the appeal, his conduct was particularly blameworthy.

Summary

85 For all the above reasons, the Claim is dismissed.

Employment Judge Ross

Date: 6 November 2019

Agreed List of Issues

(1) What was the reason or principal reason for dismissal?

(2) Was it a potentially fair reason within section 98(2) ERA 1996? The Respondent contends that the reason related to conduct.

(3) Was the decision to dismissal procedurally fair?

(4) If procedurally fair, did the Respondent act reasonably by treating that reason as sufficient reason for dismissal? In other words, was the decision to dismiss within the band of reasonable responses open to the employer? Sub-issues include:

4.1 Whether the dismissing manager had an honest belief that the Claimant was guilty of the alleged gross misconduct;

4.2 Whether such belief was based on reasonable grounds;

4.3 Whether the Respondent had carried out such investigation as was reasonable in the circumstances.

(5) If the dismissal was procedurally unfair, what was the percentage chance that the Claimant would have been dismissed in any event?

(6) Did the Respondent fail to comply with the ACAS code?

(7) Did the Claimant contribute to his dismissal? If so, what percentage deduction is just and equitable?

(8) If unfairly dismissed, what remedy is the Claimant entitled to?

<u>Particulars of unfairness (as confirmed by C):</u>

1. C had not been informed of, and did not know, the R's use of phone policy.

2. The investigation was not carried out fairly. The investigating officer B Euesden had a grudge against C because he had brought a grievance about him in the past, because he had brought disciplinaries against C. BE was not independent.

3. The decision to dismiss was outside the band of reasonableness. He should have been given a warning.

4. The decision to dismiss was because C was not liked at Mears, because of the following:

4.1. A grievance brought in August 2018 against Mr. McCarthy supervisor, evidenced by the fact that he was suspended on 13.9.18, the day after the grievance decision.

4.2. C had seen R's employees working on the home of G. Luscombe (which would have amounted to misconduct by GL) and he was sacked before he could report this.

4.3. C's contract had superior terms (due to the TUPE transfer) to those in a standard contract provided by Mears.

4.4. C was viewed as a pain because he insisted on enforcing his contractual rights. He insisted on continuing on his terms and conditions pre-transfer.