



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106968/2019

10

Held in Dundee on 28 & 29 October 2019

Employment Judge I McFatridge

15

Mr Shael Webster

**Claimant
In person**

20

25 **Interplex PMP Limited**

**Respondent
Represented by
Mr MacDougall
Advocate**

30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35

The judgment of the Tribunal is that the claimant was not unfairly dismissed by the respondent. The claim is dismissed.

40

REASONS

1. The claimant submitted a claim to the Tribunal claiming that he had been unfairly dismissed by the respondent. The respondent submitted a response in which they denied the claim. It was their position that the claimant had been summarily dismissed for gross misconduct and that the dismissal was procedurally and substantively fair. The hearing took place over two days and during the course of this evidence was led on behalf of the respondent from Mr David H S Mather, Plating Department Team Leader with the respondent who carried out an investigation into the matter which led to the claimant's dismissal; Ms M Scott an external Consultant to the respondent who carried out the disciplinary hearing and made the decision to dismiss the claimant; and Mr Stuart Howes, Engineering Manager of the respondent who held an appeal hearing at which the decision to dismiss the claimant was upheld. The claimant gave evidence on his own behalf. The parties lodged a joint bundle of productions. On the basis of the evidence and the productions I found the following essential matters to be proved or agreed.

5

10

15
2. The respondent are a manufacturing company based in Arbroath. They produce inset mouldings and connectors. They are part of a worldwide group of 50 or 60 different companies. They employ around 150 to 160 employees in Arbroath and throughout the world the group of which they form part has around 20,000 employees. The claimant was employed by them as a Plating Chargehand within the respondent's plating department. His employment commenced on or about 13 July 2010. At the time the claimant was dismissed his wages amounted to £481.94 per week gross, £373.70 net. Until the events which led to his dismissal which are narrated below the claimant had a clear disciplinary record with the respondent and had not received any disciplinary warnings, formal or informal. He was seen by the respondent as a good employee.

20

25
3. On 12 February 2019 Mr Mather was in the plating lab during the course of his duties. There were normally three individuals who worked together in the plating lab, RK, AN and DR. Others had access to the plating lab from time to time. Mr Mather noted that DR was in a state of distress. He asked her what was wrong and was presented with a piece of paper

30

containing two names and depicting three separate scenes of matchstick figures engaged in acts of sexual nature. The matchstick figures were engaged in sex acts. The name of D and R, two of the individuals who worked in the plating lab were on the piece of paper above the stick figures. Mr Mather took custody of the piece of paper. This was lodged (J7). He also spoke to AN. AN advised him that she had discovered the piece of paper when she arrived for her shift the previous Friday morning (8 February). AN had taken a photograph of the document in situ. She had then put it away in a drawer and decided to show it to RK and DR when they were both next on shift. She had just done that on the morning of 12 February shortly before Mr Mather arrived. Mr Mather took D into his office to have a coffee and compose herself. He asked her to have a think about what she wanted to do. Mr Mather was aware that Neil Patrick the respondent's HR person was on site. He suggested that D speak to Mr Patrick which she did. After this discussion Mr Mather met again with D and she advised that she wished the matter dealt with formally. Shortly thereafter Mr Patrick came up to see Mr Mather and discussed the matter with him. In the meantime, whilst D had been discussing matters with Mr Patrick, Mr Mather decided to check the writing on the piece of paper against examples of handwriting which he had in his office in relation to other employees who would have access to the plating lab.

4. One of the examples of handwriting which Mr Mather had was a short note relating to a course certificate which had been written by the claimant. A copy of this was lodged (J12/6). Mr Mather considered that the writing on the note was very similar to the writing on the piece of paper. Having discussed this with Mr Patrick, Mr Mather invited the claimant in to his office and put matters to him.
5. Subsequent to this meeting with the claimant Mr Patrick produced an investigation report, a copy of which was lodged (J13). I was satisfied that the investigation report accurately summarised the meeting between Mr Mather and the claimant on 12 February. It states

"I called Shael in to the office at 14.00 and asked him to take a seat. I advised him that there was an investigation being carried out in relation to an item of an offensive nature being discovered in the Lab

on Friday the 8th and that, from an initial investigation and comparisons of the handwriting, it had been considered that he was most likely the responsible party.

5 Shael was shown the item in question and was asked if he had any knowledge of it to, which he responded no

He was then advised that, based on assessment of the handwriting, and comparisons made, that there was reasonable grounds to believe that he was responsible.

10 Shael responded that it wasn't him and added that his handwriting is easy to copy and that this is a load of rubbish.

Shael was then advised, due to the seriousness of the matter and that, based on his response, that an official investigation would have to be conducted surrounding all available evidence and that, based on this, he would be suspended on full pay during this time.

15 He was also advised that during this time, the matter was not to be discussed with any other Interplex employee, either inside the factory or out with the factory at any time."

6. 20 The meeting between Mr Mather and the claimant had commenced at 2 o'clock and the claimant left immediately thereafter. At 14.52 the claimant sent a text message to Mr Mather stating

"That writing was mine I remember now last week I was away to write a note to (R) and (D) think it was to check flash solution, someone has drawn they stupid figures and left them out in the open for everyone to see to land me in the shit."

25 7. Subsequently Mr Mather spoke again to AN and to RK on 13 February. Once again I accepted that Mr Mather's investigation note contained an accurate record of his discussions with both of these individuals. AN stated

30 "When A arrived and switched on the lab light, she noticed this piece of paper situated as shown. On closer inspection, Anna took a photo of what she had found and where it was found, Anna then decided to remove the item from public view, but retain in order to show the 2 individuals named in the picture what had been left.

On Monday, when RK returned back to work and was shown the item, it was agreed between R and A that this needed to be shown to D when returning to work on Tuesday.”

The photograph which AN took was lodged at J13(1).

- 5 8. Subsequent to these meetings Mr Mather also decided to interview other individuals who he considered may have had the opportunity to enter the lab over the relevant period. These were RM, JR and RC. All indicated that they had not seen the item between Thursday and Friday and had no knowledge of the item.
- 10 9. Mr Mather was aware that AN had left the plating lab at 16.30 on Thursday 7 February and that she said the paper had not been there then. She said it had been there when she turned up for work on Friday 8 February around 8.30 am.
- 15 10. The layout of the relevant part of the respondent’s premises including the plating lab is shown on a plan which was produced for the hearing (J25). Mr Mather was aware that there was a video camera (CCTV) which covered both entrances to the plating lab. He decided to check the CCTV for the period between approximately 16.30 on Thursday 7 February and 8.30 on Friday 8 February. He checked this CCTV footage himself in private. His findings in relation to the CCTV are set out in his investigation report (J13/4). It stated
- 20

“RC entered the Lab on the CCTV footage, timestamp 20.33. In reality, the time was 19.33, as the clock is displaying one hour out from actual.

- 25 He then left the Lab at 20.42. Total time between initial entry and exit – 9 minutes. During this time he entered and exited the lab 4 times, going between lab and inspection room next door, or lab and workshop. Longest time spent in lab was one minute.

- 30 Shael (claimant) then entered the lab carrying a yellow box at 22.05 and went to the lab sink, then walked across to the kettle area, exited at 22.06 and re-entered at 22.07, walking back across to the kettle area.

RC entered the lab at 22.09 while Shael was in there and had a discussion, both then exiting at 22.10

KW then entered and exited the lab after collecting some documents in the lab at 22.16.

5 RC then entered the lab at 22.49, retrieved some blue tissue to dry his hands and left approx. 20 seconds later.

Shael (claimant) entered the lab at 22.51 to retrieve a bucket and walked out to the sink outside the lab to dispose of contents. Entered lab at 22.53, removed bucket and yellow box, then leaving department at 22.55.

10 FD entered the lab at 23.11 with a gift bag, exiting 1 minute later.

Timing above are based on camera timing, but are 1 hour out on actual time, i.e. 23.11 is 22.11

No other entries to lab were made until 08.30 actual time, when AN started shift.”

11. Mr Mather was aware that although the camera was set up to show both doors going in to the plating lab there was a possibility that if the intervening fire doors leading to the production area were themselves closed it would not be possible to see the second door leading into the plating lab. Mr Mather satisfied himself that the fire doors had remained open during the whole of this time and he was able to view both doors to the plating lab during the whole of the period in question. He did not consider that it was appropriate to look at CCTV for any other period of time. His understanding based on what AN had said was that the piece of paper had not been there at 16.30 on the Thursday but had been there at 8.30 the following morning. He did not see any point in looking at who had access to the lab prior to 16.30 on the Thursday.

12. The claimant was invited to an investigation meeting by letter dated 13 February 2019. This letter was lodged (J9). It noted that the allegation being investigated was

30 “Creating and leaving in the workplace a sketch/drawing of a highly offensive, explicit and sexual nature, relating to two colleagues.”

The claimant was sent a copy of the Staff Handbook which contained the disciplinary procedure and disciplinary rules. He was advised that if he knew of any documents, witnesses or information that he thought would be relevant to matters under investigation to let Mr Mather know as soon as possible. He was advised of his right to be accompanied. He was advised that the allegation had the potential to be gross misconduct.

5

10

15

20

25

30

13. The claimant duly attended the investigation meeting on 15 February 2019. He was accompanied by KG a work colleague. A minute of the meeting was lodged (J10). It was signed by the claimant and by Mr Mather on 19 February. I considered this to be an accurate, albeit not verbatim, record of what took place at the meeting. The claimant confirmed that he had sent the text to Mr Mather in which he accepted the writing was his and provided the explanation. He stated that the note was to check silver flash solutions on the J line and that whilst he couldn't confirm the date it was perhaps Tuesday or Wednesday. He was asked why he never completed the note. He said when I first started writing the note I decided there was actually no need and left the paper in the lab. He said he had written hundreds of notes in the past. He said that he would not have noticed the note lying there. He indicated that he had not recognised his handwriting initially because he was concentrating on the drawings. He said that he had already been stressed out prior to the discussion on 12 February.

14. Following this meeting Mr Mather decided it would be appropriate to investigate the matter further by having a handwriting expert look at the note. This was arranged through the respondent's solicitors. A copy of the report which was obtained from EA Gillies a forensic document examiner was lodged (J12). The report is dated 22 February 2019. A copy of the note and a copy of the note relating to course completion acknowledged to be in the claimant's handwriting was attached to this. Ms Gillies refers to the comparison in her report. Her conclusions are set out on page J12/5 (Page 3 of 6). She states

"In my opinion

1. A similar black rollerball type pen ink has been used to complete the names and the stick figures on the A4 Piece of Paper.
2. The position of the names relative to the drawings is suggestive of labelling and as such it is unlikely that the names were written before the drawings were completed.
3. It is probable that Mr A is responsible for the names "R" and "D".

Ms Gillies signs a Statement of Truth in relation to this. Within her report on page 4 of 6 she sets out her definition of the conclusions relating to probability. Probable is stated to be

- Limited correspondence between the questioned and sample material within the range of variability.
 - Smaller amount of comparable material/identifiable features than for HIGH PROBABILITY but sufficient to indicate that a chance match is unlikely.
- In my experience the evidence indicates that it is unlikely another person is the author."

15. In a letter dated 25 February 2019 the claimant was invited to a disciplinary hearing. The respondent asked Michelle Scott who at that time was a consultant providing services to the respondent to conduct a disciplinary hearing. She had not had any previous dealing with the claimant. She considered herself to be independent of the respondent. She had considerable experience in dealing with disciplinary matters in the past.

16. The letter of invitation to the hearing was lodged (J14). A copy of the investigation report together with the forensic report was provided to the claimant along with the letter of invitation to the disciplinary hearing.

17. On 27 February 2019 the claimant sent an e-mail to the respondent providing additional information.

18. In his e-mail the claimant stated

“My inspector KW was on backshift (2pm-10pm) the week we were running silver plated parts. He was also there at the start of the week when I started writing the shift changeover note and then decided against it as it was no longer needed. This will prove that I did partially write a changeover note. If I thought someone would go to the extent of adding drawings, intentionally or unintentionally I would’ve discarded the paper right away.

There is a strong possibility that another employee has added pictures to the unfinished note. Going by previous history with a fellow employee (who entered the laboratory that very night) I have reason to believe this act may have been carried out specifically to have me disciplined. It may also have been drawn by someone who thought it would be a good joke? (I myself don’t see the funny side)

8 Years plus in the company I have never made any sexual remarks to any other employees, never been disciplined for discrimination or bullying, it is not in my nature. I have the upmost respect for my co-workers and I am completely embarrassed by this accusation. I am a very hardworking person who works to maintain a life for my fiancé and two young kids and I would do nothing to jeopardise my job.”

19. Ms Scott met with the claimant on 1 March 2019. The claimant was once again accompanied by KG a work colleague. Lee-Ann Doyle of the respondent took minutes. These were lodged (J16). Mr KW was also invited to the meeting on behalf of the claimant and gave evidence in relation to the claimant’s suggestion that he had started a note. Ms Scott asked KW if he had seen the claimant start writing the note and KW said “Not physically there when he was writing it no.” Ms Scott asked him what he knew about what was going on. KW responded about rumours about some images. He was asked by Ms Scott about the culture in the department and if he left notes. KW said

“No. Sometimes drawings on board, yes. Not me personally.”

Claimant – Do you remember images on board taking the mikey out of people.

KW – It has been done. It has affected me. But, I'm not bothered with it, just thought the person an idiot. Agreed that there may be some 'tom foolery'."

20. During the course of the hearing the claimant also indicated that there was
5 a history between himself and another member of staff FD. He stated

“She was sacked 5/6 years ago as she threw a box of parts at him and split his nose. The result of this is that she lost her job. He was told she would never be employed by the company again. But, six months later she was re-employed but he was told that he wouldn't have to
10 work with her again. But, recently he has to work with her as she has been moved departments.”

Ms Scott asked if anything had happened since she had been back and the claimant said

“No. Again stated he wasn't happy with her being back and that it was
15 serious as it serious as it went to court but she wasn't charged as it was deemed losing her job was enough punishment. Or he feels someone else has done this.”

The claimant's position was that he admitted he wrote the names but it was his position that someone else had taken the paper away and
20 completed the drawings. He said it could have been FD. He referred to the fact that she was one of the people on the CCTV on Tuesday night.

21. Ms Scott continued to press the claimant and asked if he had perhaps completed the note as banter. She urged him to come clean. She mentioned that the evidence against him appeared to be strong. The
25 claimant maintained his position that he was not responsible for the drawing but that the names appeared to be in his handwriting.

22. After the hearing Ms Scott said she would consider matters then revert to the claimant.

23. Following the meeting Ms Scott decided she wished to investigate further
30 in relation to whether FD could have left the note since she was one of the people who was reported to be in the lab between Thursday and Friday.

24. Ms Scott spoke to Mr Mather about this. Mr Mather told her that whilst his investigation report indicated that FD had been in the lab for a minute in fact the actual time she had been there was shorter than this. He also said that she had confined herself to the area between the central table and the sink. She had not been in the area next to the kettle where the note was found. It was his view that she could not have left the note.
25. Ms Scott decided that on the balance of probabilities the claimant had produced the note. She considered that he had been responsible for the stick figure as well as for the writing above. She considered the respondent's disciplinary policy which was lodged (J5). She felt it was a serious matter. It had caused serious upset to D. She noted that at section 3.15 there is a non-exhaustive list of matters which would normally be regarded as gross misconduct. She felt that she should apply her training which was that disciplinary process should be based on trying to shape future behaviours. The problem she felt was that having discussed matters with the claimant there was no acknowledgment by the claimant that he was at fault or saying he would come back to work with a different attitude of behaviour. She also considered the upset that the incident had clearly caused amongst other employees and did not believe that it would be a viable working environment should the claimant return. She believed the claimant was responsible and that the appropriate outcome was summary dismissal.
26. She called the claimant to an outcome meeting to be held on 8 March. The claimant was advised of the outcome verbally at this meeting. He was also sent a letter which confirmed the decision and the reasoning (J19). The letter confirms that she took into account the claimant's length of service and good record however due to the gravity and nature of the events the decision was to dismiss. The claimant was advised of his right to appeal.
27. The claimant submitted a letter of appeal which was lodged (J20). He maintained his position that he was not responsible for the drawings. He referred to his good record and expressed the view that dismissal was an inappropriate sanction.

28. The appeal hearing took place on 13 March 2019. It was conducted by Mr Howes the respondent's Engineering Manager. A note of the hearing was produced by Marie Lewis of the respondent who took minutes. The claimant was accompanied by KG a colleague. The notes were lodged
5 (J23). I considered these to be an accurate record of what took place at the hearing.

29. Mr Howes produced what he termed "reading notes" which were lodged (J22). In these Mr Howes goes through the claimant's letter of appeal and sets out his views on these following the meeting. Mr Howes decided that
10 he would uphold the decision to dismiss. He wrote to the claimant on 15 March 2019 confirming this (J24). Following dismissal the claimant was unemployed for 18 weeks before obtaining other employment.

Matters arising from the evidence

30. I accepted the evidence of the respondent's witnesses as being credible
15 and reliable. The evidence which they gave was in relation to their involvement in the investigatory and appeal hearings. This was in keeping with the contemporary written documentation and, although the claimant disputed the conclusions they had come to I did not understand the claimant to seriously dispute that the meetings had gone in a way other
20 than is recorded. The claimant raised the issue of whether Mr Mather could have come to the conclusions he did from the CCTV evidence. I was happy on the basis of the way that Mr Mather answered questions and the fact that he was quite evidently trying to assist the Tribunal by being truthful whilst at the same time making appropriate concessions that
25 his evidence regarding his viewing of the CCTV was to be accepted.

31. The claimant himself did not have much to say about the sequence of events which led to his dismissal other than a blanket denial that he had been responsible for the drawing. As will be noted below this was
30 unfortunate as the issue of whether or not the claimant was guilty of carrying out the drawing was not one which this Tribunal was required to adjudicate upon. I accepted the evidence of the respondent's witnesses that they had approached matters with an open mind and honestly came to the view they did based on the evidence. I accepted the evidence of

Ms Scott that she had attempted to draw the claimant out as to whether he may have done the drawing but intended it as banter. It was clear to me that she had formed a genuine view that the evidence showed that the claimant was guilty and was hoping that if he admitted that she could then deal with the issue more leniently.

Issue

32. The sole issue to be determined by the Tribunal was whether or not the dismissal was fair or unfair. If I had found the dismissal to be unfair the claimant was seeking compensation.

Discussion and decision

33. Both parties made full submissions. Both made written submissions which were supplemented orally. Rather than refer to them individually and try to summarise them I shall deal with any issues raised in the discussion below.

34. The right not to be unfairly dismissed is a statutory right granted by Part X of the Employment Rights Act 1996. It is important to note that the Tribunal's jurisdiction in an unfair dismissal claim is confined to the terms of Part X and in particular section 98 of the said Act. I say this because at times during the hearing I formed the impression that the claimant considered that the Tribunal would in some way be addressing the issue of whether or not he was guilty of drawing the figures which his employers alleged he had and that if the Tribunal came to the conclusion that he had not been guilty of this conduct then he would be able to "clear his name". I feel it is important to say at the outset that that is not something that the Tribunal can do and the Tribunal's role is limited to applying the statutory rules set out in Part X. A finding that the dismissal is unfair does not mean that the employee is not guilty of the conduct alleged and conversely a finding that the dismissal was fair does not mean that the Tribunal agreed that the employee is guilty. The Tribunal's role is to apply employment law as contained in the Employment Rights Act and as it has been interpreted over the years by the higher courts. That having been said, it is probably as well that I set out the relevant statutory provisions.

35. Section 98 of the Employment Rights Act 1996 states

“(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 –

- 5
- (a) The reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

10 36. The case of ***Abernethy v Mott, Hay and Anderson [1974] IRLR 213 CA*** gives guidance as to what is meant by a ‘reason’ stating that a reason for dismissal is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee.

15 37. In this case it was the respondent’s position that the reason for dismissal was one relating to the conduct of the claimant which is a potentially fair reason falling within section 98(2)(b) of the said Act.

38. I was satisfied on the basis of the evidence that the respondent’s belief that the claimant had been responsible for the drawing was the reason for dismissal and that this is a reason relating to the claimant’s conduct.

20 39. Having established that the reason for dismissal was a potentially fair one I am then required to address section 98(4). This states

“(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) –

- 25
- (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
- 30
- substantial merits of the case.”

40. The approach which Employment Tribunals ought to take to the issue of fairness under section 98(4) was set out some considerable time ago in

the case of ***British Home Stores Limited v Burchell [1980] ICR 303***.

That case dealt with the legislation of unfair dismissal prior to the Employment Rights Act 1996 but subsequent case law has confirmed that this approach is appropriate in relation to cases under the 1996 Act. In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct in determining whether that dismissal is unfair an Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. Stopping there, I would state that this confirms that the Tribunal is not concerned with the conduct of the employee. The Tribunal is concerned with looking at what the employer has done and deciding whether or not the employer has complied with the relevant employment law provisions.

The ***Burchell*** case goes on to set out a three-fold test. First of all there must be established by the fact that he believed that the employee was guilty of the conduct in question. The question is did the employer truly believe it? As noted by the respondent's representative this means that the employer should not act on the basis of mere suspicion but must have a genuine belief that the employee is guilty. The second part of the test is that the employer must have had reasonable grounds on which to sustain that belief. The third element of the test is that employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

41. In this case I was satisfied on the basis of the evidence of all three of the respondent's witnesses that the respondent through the two decision makers did have a genuine belief that the claimant was the person who had produced the drawing and left it out for a work colleague to see. I accepted their evidence that both of them had concluded that the claimant was guilty of the misconduct with which he was charged.

42. With regard to the second question it was my view that they did have reasonable grounds upon which to sustain that belief. The information before them was that

1. The claimant himself had said that the writing on the drawing was his although he subsequently said that it was very like his.
 2. The handwriting expert had indicated that the positions of the writing in relation to the drawings was more suggestive of labelling the drawings rather than the start of a shift changeover note.
 3. The handwriting expert considered that the drawing and the handwriting had been carried out by the same type of pen albeit the claimant's position was that such pens were readily available within the respondent's premises.
 4. The handwriting expert had said that it was probable that the handwriting was that of the claimant.
 5. CCTV footage showed that the claimant was one of only five individuals who had entered the lab between 16.30 on Thursday when the witness AN said that the note was not there and 08.30 on the Friday when AN discovered the note.
 6. The CCTV showed the claimant leaving the lab at 22.55, having had ample opportunity to leave the note. Only one person is shown as going in to the lab after that, namely FD. The evidence of Mr Mather who viewed the CCTV was that she was in the lab for only a few seconds and did not go near the area where the note was found.
43. In my view the respondent's decision makers in the form of Ms Scott and Mr Howes did have reasonable grounds upon which to sustain the belief that the claimant was guilty of having produced the drawing. I also note that, as commented upon by the respondent's representative the claimant at various stages during the hearing confirmed that the evidence was strong against him "from the respondent's point of view". In my view the facts show that it is inescapable that the respondent had reasonable grounds upon which to sustain the belief which they did.
44. The final point is investigation. The respondent is required to have carried out as much investigation as was reasonable in the circumstances of the case. The case of **Sainsbury's Supermarkets v Hitt [2003] IRLR 23 CA** confirms that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and

substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The range of reasonable responses test is one which is well known in employment law. It specifically recognises that it is not for the Employment Tribunal to stipulate a “one size fits all” approach that employers must take in a particular circumstance. The well known case of ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT*** states that

“In many (though not all) cases there is a band of reasonable responses to the employer’s conduct within which one employer might reasonably take one view, another quite reasonably take another. ... The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if it falls outside the band it is unfair.”

45. Applying this test to the issue of investigation it follows that the Tribunal is required to consider whether the investigation carried out was within the band which a reasonable employer would have carried out. The Tribunal may recognise that it is not a question of whether the Tribunal believes that the investigation should have taken a different form but whether the form which the investigation did take was within the band of reasonableness.

46. In this case it is clear that Mr Mather interviewed other individuals who he felt might have had access to the plating lab. He spoke to the three individuals who worked mainly in the lab during the day. He obtained a copy of the photograph taken by AN. He arranged for the drawing itself to be subject to expert analysis. He also viewed the CCTV. The claimant suggested that Mr Mather ought to have viewed the CCTV over a longer period. I understood him to be suggesting that Mr Mather ought to have viewed the CCTV from the Tuesday or Wednesday when he says he first completed the shift changeover note. Mr Mather’s conclusion was that this would not be appropriate since he believed on the basis of the evidence of AN that the note had not been there on the Thursday at

finishing time but had been there on the Friday when she started. He could therefore see no point in looking at CCTV outwith these times. As noted above the question for me is not whether I believe he ought to have looked at the CCTV or even whether had I been charged with investigating the matter whether I would have viewed the CCTV. The question I have to consider is whether it was outwith the band of reasonable responses for him not to view the CCTV for the period from Tuesday to Thursday. I do not see any way that I could make such a finding on the basis of the evidence in this case. It appeared to me that Mr Mather was perfectly entitled to come to the view that the appropriate period to look at the CCTV was the period from Thursday at 16.30 until 08.30 on Friday. I did not understand the claimant to make any other specific suggestions but in any event, looking at matters in the round it appears to me that there is really no question but that the investigation carried out by the respondent was one which fell within the responses of a reasonable employer to the situation the respondent found themselves in.

47. It is therefore my view that looking at matters in the round the respondent was entitled to come to the view they did which was that the claimant was guilty of the conduct in question.

48. Before moving on to consider whether having reached that view they were entitled to dismiss it is as well to look at the issue of procedural fairness. The case of ***Polkey v A E Dayton Services Ltd*** makes it clear that in considering fairness under section 98(4) procedural fairness is an important part of overall fairness. In this case the claimant made various criticisms of the procedure mainly the fact that he felt it was drawn out. Once again I consider that the procedure adopted was well within the range of reasonable responses. The claimant was suspended. He was advised of the allegation against him. He had the opportunity of an investigation meeting, he then was required to attend a disciplinary. I note the disciplinary was carried out by someone who was outwith the permanent management of the company. He was allowed to bring a witness to the disciplinary hearing (KW) (although KW's evidence was much less helpful to the claimant than the claimant had indicated it might be). The claimant was then given a right of appeal. In my view there were

no procedural defects which would lead me to consider the dismissal unfair. Undoubtedly there were some matters which some employers might have dealt with differently but at the end of the day the procedure adopted was well within the band of reasonableness.

5 49. Finally, I require to consider whether having come to the conclusion they did as to the claimant's guilt the respondent was entitled to dismiss. Using the wording of section 98(4) did they act reasonably or unreasonably in treating the claimant's misconduct as a sufficient reason for dismissing him. Once again the test to be applied is that of the range of reasonable
10 responses.

15 50. The respondent's representative drew my attention to the terms of the respondent's policy which sets out various matters which are to be regarded as gross misconduct. Misconduct is essentially conduct which goes to the root of the contract of employment. An employee who commits gross misconduct can be considered to have repudiated the contract entitling the employer to terminate the contract without notice. As can be seen this is a contractual concept rather than something arising from the statutory unfair dismissal scheme. I accepted that in this case given what the employer's handbook says about gross misconduct it would appear
20 that the claimant's conduct did fall within this head. I also note the various authorities provided by the respondent which indicate that conduct which is considered to be gross misconduct will also be sufficient grounds on which to fairly dismiss in terms of the Employment Rights Act. That having been said I do not find that approach to be particularly helpful in this case.
25 My view is that I require to address the question posed by section 98(4) in the round. I have found that in applying the terms of section 98(4) the respondent was entitled in terms of employment law to find that the claimant had committed the misconduct alleged against him. He had produced a drawing showing stick figures performing sexual acts which
30 were labelled as representing two of his co-workers. He had left this in an area where it was likely to be seen by these co-workers. It was undoubtedly likely that these co-workers would be offended by this and in fact one of them was. In my view there is really no question but that having

found that the claimant was guilty of this conduct dismissal was within the band of reasonable responses.

51. I note the claimant argued that the sanction was unfair given the limited evidence against him. I do not accept the premise of this argument. There are really two questions. The first is whether the respondent was entitled in terms of employment law to come to the view that the claimant was guilty of the conduct alleged. This involves applying the **Burchell** test and the strictures of procedural fairness. For the reasons set out above I consider that the respondent was entitled to come to that view. I am then required to go on to consider the question of whether dismissal was a permissible response to this in terms of section 98(4). I do this on the basis of the information that the respondent had at the time which included their reasonable belief that the claimant was guilty. In my view there is no question but that dismissal was within the band of reasonable responses and the dismissal is therefore fair.

52. I appreciate that the claimant continues to maintain that he is entirely innocent from having anything to do with the production of the drawings. This result may come as a disappointment to him but I would draw his attention once again to what I have said above to the effect that the Tribunal has not made any finding as to his guilt or innocence. To do so would be beyond the jurisdiction of the Tribunal. What the Tribunal has said is that his dismissal by the employer was fair in terms of Part X of the Employment Rights Act 1996.

25

Employment Judge:

Ian McFatridge

Date of Judgment:

20 November 2019

30 **Date Sent to Parties:**

20 November 2019

