EMPLOYMENT TRIBUNALS

Claimant: Ajit Pahal

First Respondent: Secur-it Group Ltd

Second Respondent: Secur- it Limited

Heard at: Nottingham **On:** 30 October 2019

Before: Employment Judge Rachel Broughton (Sitting alone)

Representatives

Claimant: In Person
Respondent: Mr John Wilkinson – Lay Representative

RESERVED JUDGMENT

The Judgement

i. The claim against The Second Respondent is dismissed on withdrawal by the Claimant.

ii. The claim against the First Respondent for unfair dismissal succeeds.

iii. The Claimant's claim that the First Respondent made an unlawful deduction from the Claimant's wages is well-founded and succeeds. The Respondent is ordered to pay to the Claimant the gross sum of £125.28 less deductions for tax for which the Respondent will account to Her Majesty's Revenue and Customs.

iv. The case will be listed for a hearing to determine remedy in respect of the unfair dismissal claim.

RESERVED REASONS

Background

1. The Claimant was employed by the First Respondent from 31 May 2010 as a security officer until his employment was terminated on 7 March 2019 on the grounds of conduct.

2. The Claimant presented a claim to the tribunal on 8 April 2019 following a period of early conciliation with Acas from 7 April 2019 to 8 April 2019.

3. The Respondent named in the first claim form was John Wilkinson. The Acas certificate provided that the prospective respondent was Secur-It Ltd. Following further information provided by the Claimant to the tribunal on 6 June 2019, the claim was accepted as a claim of unfair dismissal against Secur- it Ltd. The Claimant then issued a second claim on 10 June 2019 against Secur -It Group Ltd. The Claimant explained in correspondence to the tribunal, that he understood that Secur-It Limited had changed its name to Secur-It Group Limited. By order of Employment Judge Britton on 8 July 2019, the claims were consolidated.

4. A response to the claims was filed by Secur-It Group Limited on 5 August 2019.

5. Case management orders were made by the tribunal on 8 July 2019 which provided for exchange of documents by list by 19 August 2019 and exchange of witness statements by 16 September 2019.

The Hearing

6. The Claimant attended the hearing bringing with him a paginated bundle of documents, this was not an agreed bundle. The Claimant advised the tribunal that he had attempted to engage with the First Respondent with respect to the case management orders but without success. The Claimant had prepared a witness statement which he had sent to the First Respondent along with his documents in advance of today's hearing.

7. The Respondents had failed to attend the tribunal for the start of the hearing at 10am. The tribunal contacted the First Respondent and spoke with Mr John Wilkinson, the named contact in the response form. Mr Wilkinson informed the tribunal that he had been informed by Acas that the hearing was due to take place on 31 October however he was able to attend the hearing today and made immediate arrangements to do so, arriving by early afternoon.

8. Mr Wilkinson attended as the only witness for the First Respondent. Mr Wilkinson is employed by the First Respondent as Intelligence and Operations Manager. Mr Wilkinson had not prepared a witness statement and initially could not recall having received a copy of the notice of claim from the tribunal dated 8 July 2019 informing the parties of the hearing date and case management orders. Mr Wilkinson confirmed that the address on the notice of claim was the correct address and Mr Wilkinson also confirmed that he had been contacted by the Birmingham People's Centre who he understood were providing the Claimant with support in this claim and that they had attempted to speak with him about the case. Mr Wilkinson had received the Claimant's documents and a copy of the Claimant's witness statement on Friday 25 October. Mr Wilkinson had not engaged further with the Birmingham People's Centre and had no explanation for not having

done so, other than that it had been his intention to discuss the case with his manager today.

9. Mr Wilkinson confirmed that he had reviewed the documents in the bundle provided by the Claimant and accepted that a copy of the notice of claim which confirmed was contained within it at page 16. Mr Wilkinson then accepted that he had seen the notice of claim previously when he had filed the response.

10. I considered carefully given the absence of a witness statement and the absence of any adequate explanation for the default, whether to permit Mr Wilkinson to give oral evidence to the tribunal. The case management orders provided that no additional witness evidence may be allowed at the hearing without the permission of the tribunal. In considering the Overriding Objective, I allowed the content of the response form to stand as Mr Wilkinson's evidence in chief. Both parties confirmed that they were content with that approach.

11. Mr Wilkinson had brought with him a number of documents he wanted to submit into evidence. The documents included what he asserted was a map of the construction site where the Claimant had been working during the shift in question, what appeared to be a short unsigned statement or incident report which Mr Wilkinson said had been prepared by an employee of the First Respondent, a supervisor named Mr Paul Hately dated 5th March 2019, photographs of damaged vehicles which he alleged were the vehicles damaged on site during the relevant shift and a short investigation document. Mr Wilkinson accepted that he had not made any attempt to provide copies of these documents to the Claimant in advance of the hearing today and nor had the Claimant had sight of any of these documents at any stage during the period leading up to his dismissal The Claimant objected to the late production of these documents and did not accept their authenticity. He had not been allowed back on site to see the vehicles and therefore was not prepared to accept that they were photographs of the vehicles on site during the period in question. He did not accept the accuracy of the alleged site map. The short incident report was not signed by Mr Hately and no explanation was given for Mr Hately not attending as a witness today. No witness statement was produced for Mr Hately. Given the objections and concerns raised by the Claimant as a litigant in person, the failure by the First Respondent to provide any explanation for not having made prior disclosure of the documents and the dispute over the authenticity or accuracy of the documents, I did not consider that it was in the interests of the Overriding Objective to allow the documents to be submitted into evidence. The reason for the decision was explained to Mr Wilkinson, he confirmed that he understood the reasoning and raised no objection to it.

Correct Identity of the Employer

12. Before hearing the evidence, I sought to clarify with the parties the correct identity of the employing entity. It became clear that the correct respondent was Securit-Group Limited and the Claimant agreed to withdraw his claim against Secur-It Ltd.

13. Mr Wilkinson explained that Secur-It Midlands Limited had been acquired by Mr Richard Cooke, the Managing Director of the First Respondent, in 2013, he formed a new company called Secur-It Group Limited and the staff formerly employed by Secur-It Midlands Limited had transferred to the new company. Within the bundle was a contract of employment issued to the Claimant by Secur- It Midlands Limited stating that the Claimant's period of continuous employment began on 14 October 2013 (page 20-26 of the Claimant's bundle). The Claimant explained that he had been employed since 31 May 2010, had received several contracts of employment but could not locate the original contract which he had been issued with when he first joined Secur-It Midlands Limited. Mr Wilkinson explained that he had understood that the Claimant had been employed by the First Respondent only from 28 August 2016. The contract of employment in the Claimant's bundle issued to him by Secur- It Group Limited is dated 28 August 2016 (page 27 – 36) hereafter referred to as the Contract. The Contract does not state that the Claimant's period of continuous employment predates 28 August 2016, however Mr Wilkinson stated that he was not in a position to confirm or deny that the Claimant's employment had transferred under The Transfer of Undertakings (Protection of Employment) Regulations 2006 and that his period of continuous employment dated back to 31 May 2010. Mr Wilkinson had personally only been involved in managing the security guards for the past two years, prior to this he had been involved with the CCTV side of the First Respondent's business. Mr Wilkinson informed the tribunal that it would be "*fair to say that there would have been no gap in his employment*" and he was not in a position to dispute the dates given by the Claimant as his dates of continuous employment.

Issues for the tribunal

14. The issues for the tribunal are as follows;

Unlawful deduction of wages

(1) Did the Respondent make an unauthorised deduction from the Claimant's wages pursuant to section 13 Employment Rights Act 1996 by not paying him for the 16 hour shift he was rostered to work on the 4th to the 5th March 2019?

Unfair dismissal

(2) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("**ERA**")? The Respondent asserts that it was a reason relating to the Claimant's conduct.

(3) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy – unfair dismissal

(4) If the Claimant was unfairly dismissed and the remedy is compensation:

a. Did the First Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

b. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway**: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825**.

15 The Respondent has not pleaded contributory fault as a ground for reducing any compensation that may be awarded should the unfair dismissal claim succeed and made no application to amend its response.

The Legal Principles

16 Before reaching my conclusions in relation to the issues before me, I have had regard to the law which I am required to apply when considering the matters for consideration.

Unfair Dismissal – section 98 Employment Rights Act 1996

17 Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98 ERA, the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98 (4) which provides that "*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 rescores 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.

18 What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; **Grundy(Teddington) Ltd v Willis HSBC Bank**

Plc (formerly Midland Bank plc) v Madden 2000 ICR 1283 CA .

19 Mr Justice Browne- Wilkinson in his judgement in **Iceland Frozen Foods Ltd V Jones ICR 17 EAT** set out the law in terms of the approach the tribunal must adopt as follows;

a. *The starting point should always be the words of section 98 (4) themselves*

b. *In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the member of the Tribunal) consider the dismissal to be fair*

c. *In judging the reasonableness of the employers conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employers*

d. *In many (though not all) cases there is a band of reasonable responses to the employees conduct in which the employer acting reasonably may take one view, another quite reasonably take another;*

e. *The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair*

20 In terms of procedural fairness, the House of Lords in **Polkey v AE Dayton Services Ltd 1988 ICR 142 HL**; where an employer fails to take appropriate procedural steps, the tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced.

Conduct

21 Where the employer relies on conduct under section 98 (2) (b) ERA as the fair reason for dismissal, 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** the employer must show;

21.1 It believed the employee guilty of misconduct
21.2 It had in mind reasonable grounds upon which to sustain that belief
21.3 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 the circumstances.

22 The employer need not have conclusive evidence of misconduct but a *genuine and reasonable belief, reasonably tested*. The onus is no longer on the employer to show reasonableness, it is only the first of the three aspects of the Burchell test that the employer must prove. The burden of proof in respect

of the other two parts of the Burchell test are neutral.

Unlawful deduction of wages

23 Pursuant to section 13 ERA, an employer shall not make a deduction from wages of a worker employed by him unless— (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

24 The meaning of "relevant provision", in relation to a worker's contract, means a provision of the contract comprised— (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

25 Section 27 of the ERA defines "wages" to mean any sums payable to the worker in connection with his employment, including—

26 , Mr Hately had called the Claimant the morning of the 5 March to ask him about the damage. The Claimant does not accept he spoke with Mr Hately that morning. Mr Wilkinson was not sure what time Mr Hately had called the Claimant, he thought it may have been 9 am or 10am but was not sure. Mr Hately was not present to

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.

27 The question of what wages are 'properly payable' to the worker under section 13 (3) is critical to determining whether an unlawful deduction has been made.

28 In **Asif v Key People Ltd 0264/07**, the tribunal had dismissed the claim for two days' pay on the basis that it was 'inequitable' of the worker to bring the claim, having failed to perform his part of the bargain. The EAT overturned this decision. A tribunal is not entitled to refuse the claimant relief under the wages provisions simply because it would be unjust for him to recover. Even if the tribunal's reasoning were that the employer had a cross-claim against the claimant for breach which extinguished his claim for the two days that he had worked, that would not be a defence to the original claim. In the EAT's view, the wages provisions simply do not allow an employer to set off cross-claims for damages against wages otherwise due.

The Evidence

29 Mr Wilkinson relied upon the content of the grounds of resistance as his

evidence in chief and was cross examined by the Claimant. The Claimant relied upon his witness statement and was cross examined by Mr Wilkinson. Reference was made to the bundle of documents which the Claimant had prepared which numbered 44 pages.

Relevant Findings of Fact

30 The Respondent is a security company providing security services both manned guarding, which involves individual security officers physically on the client site and also the provision of CCTV. Mr Wilkinson's undisputed evidence was that at the date the Claimant was dismissed, the First Respondent employed 70 employees and now employs 350 employees and contracts with significant sized construction companies. The First Respondent has no HR function with disciplinary matters dealt with by the Managing Director Mr Lock and Mr Arfaan Ali, the Head of Operations.

31 The Claimant worked for the First Respondent as a security officer. The Contract provides for a notice period of one week for each full year of service. The Contract refers to disciplinary matters being dealt with under the First Respondent's disciplinary and grievance procedure including appeals. A copy of the disciplinary and grievance procedure was not contained within the tribunal bundle.

32 It is common ground between the parties that the Claimant was rostered to carry out security work at the site of one of the First Respondent's clients, Taylor Wimpey Fairfield on the evening of the 4 March 2019 completing his shift the following morning on 5 March when the contractors arrive on site between 6.30 and 7am. The First Respondent case is that there was significant damage caused to the site and a number of construction vehicles, that this was reported to them by the client at about 8am on the 5 March 2019 and that the First Respondent believed that this must have happened during the Claimant's shift, that the Claimant would have heard the vandalism being carried out if he was present on site. The Claimant denied hearing or seeing any vandalism and denied having left the site at any time during his shift. The First Respondent believed that the Claimant was not telling the truth and if he had not heard or seen anything this could only have been because he abandoned his post and left the site. The First Respondent considered that leaving the site constituted gross misconduct justifying his dismissal.

33 The Claimant accepts that he would have heard the damage had it happened during this shift. He denies leaving the site. He expressed doubt that the vehicles had been damaged or argues that the damage must have occurred after he left site.

34 Mr Wilkinson alleges that the site supervisor, Mr Hately had called the Claimant on the morning of the 5 March to ask him about the damage. The Claimant robustly denies that he had received a call from Mr Hately and Mr Wilkinson was unsure of what time Mr Hately had called, his evidence was that; "*perhaps it was 9 or 10am*". Mr Wilkinson was asked whether Mr Hately had invited the Claimant during that call to visit the site to see the damage, to which he replied; "*I doubt it".* In the absence of any direct evidence from Mr Hately, I find that on the balance of probabilities, Mr Hately did not contact the

Claimant on the morning of the 5 March 2019, I prefer the evidence of the Claimant on this point. However, the Claimant accepts that Mr Wilkinson called him on 5 March 2019 about 3 hours after his shift had ended which is consistent with Mr Wilkinson's evidence. The Claimant accepted that when Mr Wilkinson spoke with him he simply told Mr Wilkinson that he had not heard anything or seen any damage. The Claimant's evidence is that during this first call with Mr Wilkinson on 5 March, he was told that he had been dismissed.

35 Mr Wilkinson's evidence is that he called the Claimant again on the 6 March and received the same response from him, namely that he had not seen any damage and had not left site. Further, Mr Wilkinson's evidence was that there were further calls made by him to the Claimant after the 6 March but he could not recall the timings of those further calls. The Claimant does not accept that Mr Wilkinson spoke with him again after the 5 March. Mr Wilkinson's evidence was that the calls he made to the Claimant were short calls, Mr Wilkinson estimated about ten minutes although from his description of what was discussed, it was little more than a request for an explanation and a repeated denial by the Claimant that he had seen anything.

36 It is common ground between the parties that there was no meeting with the Claimant, no investigatory meeting and no disciplinary meeting. There was no discussion outside of any telephone discussion.

37 The Claimant alleges in his witness statement that his employment ended on 5 March 2019. The Claimant (page 41) produced copies of text messages.

On the 5 March 2019 he sent a text to Mr Wilkinson which states;

"*Hi John shifts for this week has been declined screen wiped off. Please reply in return thanks*"

And on the 7 March timed at 16:57;

"*Hi John, I look for work but nothing been confirmed whether I got any shift for this weekend. I look forward to hearing from you very soon."*

There is then a response from Wilkinson on **7 March** timed at 17:31;

"**I *told you, you have been let go, we have had to sack you, there will be no more work."***

38 The Claimant has also produced his last payslip (page 44) which has a process date of the 7 March 2019.

39 Mr Wilkinson's evidence is that he called the Claimant on the 7 March to inform him verbally that he was dismissed. The Claimant denies that there was a call on 7 March however on the evidence including copies of the text messages and process date of the last payslip, which the Claimant has himself produced and the oral evidence of Mr Wilkinson, I find that the decision to terminate his employment was communicated to him not on the 5th March but on the 7

March 2019 during a telephone call and that this was confirmed in the follow up text message of that same date. I find therefore that the 7 March is the effective date of termination and not the 5 March 2019. I also find on the evidence that Mr Wilkinson only called the Claimant on the 5th and 7th March, this is consistent with the Claimant's evidence and I find that the text messages appear to support his evidence that there was no contact on 6th March, there is certainly no reference to any conversation on the 6th March in those messages only a repeated request for Mr Wilkinson to respond to the Claimant's enquiries.

40 The Claimant complains that he was not sent a formal letter of termination in the post and that written confirmation was only sent to him subsequently by email although there is a dispute over when the email confirmation was sent.

41 Within the bundle at (page 39) is an email sent from the First Respondent to the Claimant on 26 March stating;" ***further to our conversation****, I am writing to you to confirm that you have been terminated from our employment on the grounds of gross misconduct. You have the right to appeal this decision, however, this must be done within seven days in writing."* At the top of the email it states; "*Further letter of termination*" and there appears to be an attachment to the email.

42 At page 38 of the bundle is another letter to the Claimant which is undated and states; "*I regretfully have to inform you that your employment with us is terminated with immediate effect as a result of Gross Misconduct on your part.*

The grounds of the charge of Gross Misconduct is by the supported by the following facts;

1) large-scale damage and intrusion on Taylor Wimpey Fairfield on the 4th or 5th of March 2019

Following our investigation, we found a large number of heavy and light plant equipment had suffered major damage to its external glass and internal computer systems, new laid concrete had been vandalised and major damage had also been inflicted on 2 tele- handler vehicles

The losses incurred has been estimated by the client to be in excess of a £100,000.

The plant equipment that was damaged was within 10 foot of your office on site, with a window facing the machines, yet you inform you saw no damage whilst patrolling the site, evidence from the site shows broken glass on the path you would have had to take to check on the machines.

You are unable to offer any explanation as to how the damage happened, and you are unable to provide any proofs of patrols.

We found you [r] actions to be wholly unacceptable and we find your position with Secur- IT to be untenable."

43 The evidence of Mr Wilkinson is that the above undated letter was sent by email on 26 March but an earlier copy of it would also have been sent earlier along with the Claimant's P45. Mr Wilkinson explained that the letter would have been sent by another member of staff, Ms Heidi Devitt, however his oral evidence was that although he would have expected the letter to have been sent earlier to confirm the decision to dismiss, he did not personally send the letter and was not actually in a position to confirm that it was sent or when. The Contract in the clause headed Notice to Terminate on page 6, does not require notice by the Respondent to be given in writing (page 31) and therefore I do not consider it is relevant to the issues to be determined, in this case, what date the written confirmation of dismissal was sent out. The decision to terminate had been communicated to the Claimant on the 7 March verbally and then by text. The Claimant's own case is that termination was communicated earlier than the 7 March.

44 The Claimant does not accept the damage on site was as described by Mr Wilkinson and it is accepted that the Claimant was not permitted to return to the site to view the damaged vehicles. However, the Claimant does not provide any reason why the First Respondent would be untruthful about the damage or the extent of it. I find on the evidence available and on a balance of probabilities, that it is more likely than not that the damage to the vehicles was as described by Mr Wilkinson. The Claimant is not in a position to dispute the evidence of Mr Wilkinson and nor did he allege that Mr Wilkinson was being dishonest, suggesting in the alternative that the damage may have been caused after he left the site.

45 The oral evidence of Mr Wilkinson is that he believes the Claimant finished his shift sometime between 6.30 and 7am, when questioned further he believes that the Claimant had handed over the keys to the site to the groundworkers between 6am to 6.45am. Mr Wilkinson's evidence was that the Claimant's timesheets showed that his shift finished at 6.30 although he did not produce copies of the time sheets and he accepted that the Claimant could have left the site later depending on when the contractors arrived and he was able to hand over the site keys .The Claimant's oral evidence is that he finished his last patrol at 6.,15am and he handed over the keys to the groundworkers at about 6.30. His witness statement however states that his shift finished at 7am. It is common ground that the Claimant would have stayed to hand over the site keys to the contractors. Neither party was in a position to confirm the exact time the Claimant left site but there was no dispute that it would have been no later than 7am and more likely to have been sometime between 6.30 and 7am. Mr Wilkinson's evidence is that the site manager arrived at the site at 7.30 am, saw the damage and called him at 8am. There were no witness statements from the site manager or contractors to confirm these timings. I accept the undisputed evidence of Mr Wilkinson that he was contacted at 8am and told about the damage and that the Claimant left the site sometime between 6.30 and 7am after handing the keys to the contractors. This left a period of between 30 minutes and one hour before Mr Wilkinson was contacted. Mr Wilkinson believes the delay in being contacted by the site manager about the damage on site would he believes, have been due to the client checking the damage before contacting him

however the evidence of Mr Wilkinson is not supported by any witness statements or interviews with the site manager or contractors.

46 Mr Wilkinson during cross examination put it to the Claimant that*; "you had to be lying or didn't know what was going on, the amount of damage could not have happened in between you leaving site and the contractors coming on site, if you left site one of the vehicles damaged was in the car park and you would have had to walk past it to get to your car. One of the JCBs was based 10 feet from where you were, if you looked out of the office you would have seen it".*

47 There was some discussion around where exactly the office was placed in relation to the damaged vehicles however it was not in dispute between the parties that one of the damaged vehicles was situated close to the site office and the Claimant accepted that he would have seen it from the site window and that he would have noticed it if it had been damaged.

48 Mr Wilkinson accepted that there was no attempt to hold a meeting with the Claimant before dismissing him because the decision had been made that there was no point, the Claimant had denied being aware of the damage and he had denied leaving the site. Mr Wilkinson refers to there having been some investigation by Mr Hately the site supervisor, his evidence was that this involved Mr Hately attending the site to view the damage. Mr Wilkinson did not allege that there had been any interviews carried out by Mr Hately with the site workers. Mr Wilkinson accepted that the contractors would have gone to the site office on arriving on site, that one of the damaged vehicles was in the car park at the entrance but also one was only 10 feet from the site office and would have been clearly visible. It was put to Mr Wilkinson, by the Claimant that if the damage had taken place during his shift and the vandalised vehicles were clearly visible, how could he explain the failure by the site workers to also notice the damage as soon as they arrived on site. Mr Wilkinson was unable to answer that question other than to respond, with respect to the visibility of the vehicle from the site office window, by suggesting that perhaps the window blind in the site office was closed, this was clearly conjecture on his part.

49 Mr Wilkinson cross examined the Claimant about his alleged failure to complete patrol logs and put it to the Claimant that the absence of patrol logs was evidence that he did not carry out his patrols because he had left site. The Claimant's evidence is that he had carried out the patrols as required, that he had made every check that he was required to make.

50 Mr Wilkinson put it to the Claimant that prior to the shift in question, the Claimant had told him that he had run out of patrol logs/forms and that Mr Wilkinson had not found any completed patrol logs for that shift in the site office. Mr Wilkinson also alleged that another security officer who worked on the site, had also reported that they needed more patrol log sheets, that they also had no blank forms left. The Claimant's evidence was that the patrol logs were completed and that he had put them in a folder near the photocopier in the site office. Mr Wilkinson did not assert that he had looked where indicated by the Claimant when searching for the logs and he did not assert that he had

at any point before dismissing, asked the Claimant where the completed patrol logs could be found. However, even if the logs had not been completed, based on Mr Wilkinson's own evidence, there may have been an innocent explanation, namely that there were no forms left.

51 I find on a balance of probabilities based on the evidence available to this tribunal, that the patrol logs had been completed by the Claimant. Mr Wilkinson was not in a position to say that he had looked for the logs where the Claimant stated in his evidence he had stored them. Mr Wilkinson did not allege that there had been any previous occasions when the Claimant had not carried out his patrols or kept patrol logs.

52 It is not in dispute that there were no cameras on the site. It is not in dispute that during the Claimant's shift he received automated check calls which he was required to answer, the purpose of those calls is to ensure that the security officers are safe on site, it is not to monitor their location. Mr Wilkinson alleges that the Claimant did not answer all the check calls on time but that the delay was only a few minutes and he did not consider that short delay to be unusual although he pointed out that responding to check calls is not evidence that the Claimant was on site because those calls can be made from any location. The Respondent did not produce any evidence regarding the time the calls were made and accepted that the delay in responding to a couple of the check calls was not material. The Claimant is adamant that he remained on site throughout his shift, that he had never left a site before during a shift before and that there is no evidence he had done so on this occasion. Mr Wilkinson then alleged and put it to the Claimant in cross examination that there had been one previous incident when the Claimant had left site during a shift. This he alleged was about four years previous however he then confirmed that he was not involved in that incident, that he was simply part of a team that had been asked to install CCTV on the site and that in terms of the investigation into wrongdoing by the Claimant, his understanding was that the investigation had proved; "nothing conclusive" and that as far as he was aware no action was taken against the Claimant. The Claimant denied that he had left site on any previous occasion.

53 Mr Wilkinson explained that there are random checks made on site, when someone physically attends to check the guards are present. It is agreed that no on-site checks were carried out on the Claimant during this shift however Mr Wilkinson accepted that the Claimant would not have known whether or not he was going to be subject to a check that evening/morning.

54 The Claimant did not have a GPS check system on his phone. The First Respondent is asking its security officers to add a GPS check system to their mobile phones which can track their location however the Claimant in his evidence appeared confused about what this was and how he would put it on his phone. Mr Wilkinson confirmed that this not a mandatory requirement, the First Respondent is in the process of 'rolling it out'.

55 I find on a balance of probabilities, on the evidence available to the tribunal that the Claimant was on site throughout the shift and responded to the check calls from the site and that he completed his full shift and carried out his patrols.

Decision to dismiss

56 Mr Wilkinson was asked who made the decision to dismiss the Claimant, to which he answered that the; "*direction came from the Managing Director, Richard Cook"*. Mr Wilkinson was then asked when Mr Cook gave that direction and he stated; *"couple of days after the incident, we were trying to speak to Mr Pahal, he could offer no explanation, felt he had been negligent to the point of gross misconduct."*

57 I asked Mr Wilkinson to confirm again that the decision to terminate was made by Mr Cook the Managing Director to which he said; "*yes in discussion with me and the Operations Director."*

58 Mr Wilkinson stated in oral evidence that the Managing Director had believed that the Claimant had left site because that seem more credible however when it he was asked whether Mr Cook had met with the Claimant before making the decision to dismiss, he confirmed that Mr Cook had not met with the Claimant and he could offer no reason why he had not done so. At this point Mr Wilkinson changed his evidence and alleged that he had personally made the decision to dismiss but it was on the direction of the Managing Director. On a balance of probabilities, based on the evidence from Mr Wilkinson, I find that that it is more likely that Mr Wilkinson reported back to Mr Cook about what had happened and Mr Cook instructed Mr Wilkinson to dismiss the Claimant, that it was Mr Cook who made the decision based on the account of events presented by Mr Wilkinson, that is consistent with how Mr Wilkinson initially answered the questions on this issue.

Disciplinary Policy

59 With regards to the process that was followed, Mr Wilkinson's evidence is that the First Respondent has a disciplinary policy and when asked what the policy provides for in terms of how to deal with cases of alleged gross misconduct his evidence was; "*I don't know off the top of my head*". He was asked whether the policy provided for an investigation meeting to which he stated; "*I would expect so*" but accepted no investigation meeting with the Claimant took place. Mr Wilkinson was asked about the Acas code of practice and confirmed that he was aware of it but could not "*quote from it*" and was unaware of what it says about conducting a fair disciplinary process.

Appeal

60 The Claimant complains that he was not allowed a right to appeal. Mr Wilkinson's evidence was that the Claimant had never raised an appeal.

61 The Claimant alleges that he wrote a letter of appeal which he sent to Mr Cook and a copy to Mr Wilkinson by recorded delivery. He did not have proof of the recorded delivery however there is within a bundle at page 40 a copy of a letter dated 25 March 2019 addressed to Secur-It Group Limited with a header;" Appealing against dismissal". The Claimant denies the alleged misconduct within this letter and is clearly asking for an appeal.

62 Mr Wilkinson denies having received a copy of the letter of appeal at page 40 however in evidence he confirmed that a handwritten letter was received by Mr Cook from the Claimant, the letter had been sent to Mr Cook's home address. Mr Wilkinson alleges that the letter received by the Managing Director at his home was a letter from the Claimant stating that he had not done anything wrong but that it did not ask for an appeal. Mr Wilkinson's evidence is that the First Respondent did not keep a copy of the letter which the Claimant sent. Mr Wilkinson had seen the letter which read like an apology and was;" *similar to the wording of the appeal letter at page 40".* The Claimant within the letter at page 40, states;

"*So I appealed against this decision and appealing that I want my job back. I look forward to hearing from you."*

63 It is common ground that no appeal hearing was arranged and Mr Cook did not check after receiving the letter, that the Clamant was asking for an appeal if as alleged, this was not apparent from the letter.

64 It is not in dispute that the Claimant continued after the 7 March to attempt to speak with Mr Wilkinson and that on 11 March Mr Wilkinson told him not to contact him again and from that point, ceased all communication with him. Mr Wilkinson alleges that the Claimant was being rude but did not explain in what way he was being rude but it is clear from the text message from Mr Wilkinson to the Claimant on 11 March 2019 that he was not prepared to engage in further communication;

"YOU HAVE BEEN FIRED, I WILL NOT BE RESPONDING TO ANY FUTHER MESSAGES AND CALLS"

65 I therefore find that what is more likely to have happened, is that the Claimant wrote a letter asking for an appeal and that by this stage Mr Wilkinson and Mr Cook were frustrated by the Claimant's continued efforts to contact them and challenge the decision and they were not prepared to spend the time dealing with an appeal. The view had clearly been formed that a disciplinary hearing was pointless and I therefore find that they in all likelihood Mr Cook and Mr Wilkinson held the same view about an appeal. The letter was not responded to.

Unlawful deduction of wages

66 Mr Wilkinson confirmed that the Claimant had been rostered to work a 16-hour shift on the 4/5 March 2019 but that he had been not been paid for that shift because he; *"didn't do the job*". Mr Wilkinson's evidence is that he did not know if the Claimant had been present on the site all night and thus did not pay him for the shift. Mr Wilkinson does not allege that the Claimant did not work some of the shift however because he believed he had left site at some stage, the whole amount was unpaid.

67 Mr Wilkinson stated that the First Respondent was not relying on any express contractual provision within the Contract or elsewhere, which authorised the

deduction.

68 It is agreed that the Claimant's hourly rate was £7.83 per hour which equates to £125.28 gross for a 16-hour shift.

69 I find on the evidence available to the tribunal, that the Claimant remained present throughout the whole of his shift.

Conclusions

70 The First Respondent terminated the employment of the Claimant because of damage caused to vehicles on the site the Claimant was tasked with guarding. On the facts I find that vehicles were damaged and that had the damage occurred during the Claimant's shift he would have heard and seen the vandalism, that is not in dispute.

71 The decision to terminate the Claimant's employment was taken by the Managing Director. The offence of leaving site is a serious one absent any adequate explanation or mitigation however, there was no reasonable investigation. Even in these circumstances where Mr Wilkinson could conceive of no explanation other than the Claimant not remaining on site, the only investigation was one brief call on 5 March with the Claimant when it was not put to him that the First Respondent believed he was being dishonest rather he was simply asked for an explanation.

72 The First Respondent's evidence as put before the tribunal, is that it did not conduct interviews with the contractors on site to understand exactly when the contractors became aware of the damage and why they had not seen the damaged vehicles as soon as they arrived at the time of the handover with the Claimant and whether indeed they had remained on site.

73 The belief regarding the Claimant's misconduct and indeed his lack of probity, was arrived at by Mr Cook who had not even spoken with the Claimant.

74 I do not find that the First Respondent had carried out as much investigation into the matter as was reasonable in the circumstances and therefore it did not have in mind reasonable grounds upon which to sustain its belief in the misconduct of the Claimant.

75 The Claimant requested an appeal however this was denied him which compounds the absence of a fair process.

76 The unfair dismissal claim is well-founded and succeeds.

77 The tribunal when calculating the amount that it is just and equitable to award employees who have been unfairly dismissed after considering their actual losses, may reduce the compensatory award whenever there is evidence that the employer could have dismissed fairly had a fair disciplinary process been carried out. This is commonly known as a 'Polkey reduction' after the House

of Lords case of Polkey v AE Dayton Services Ltd 1988 ICR 142 HL. The First Respondent made no representations regarding Polkey and in any event I do not consider that there is material sufficient to make a Polkey judgement in this case. I am mindful that the First Respondent considered that there was no feasible explanation other than that the Claimant had either ignored the vandalism or had left site however, it is not possible to speculate on what the evidence may have been had there been an investigation which involved the First Respondent obtaining more information from the actual contractors on site and giving the Claimant a reasonable opportunity to consider and respond to it and produce his own evidence, for example his patrol logs which were cleary a factor taken into account by the First Respondent when deciding that he had failed to carry out patrols because he had left the site.

78 With regards to the Acas uplift; there has been a failure to follow the Acas code of practice on conducting disciplinary proceedings. Mr Wilkinson's evidence is that the First Respondent do have a disciplinary and appeal policy and he could not explain why it had not been applied in this case. It is clear from the text messages that the Claimant struggled to accept the decision dismissing him hence the ongoing attempts to speak with Mr Wilkinson and that he was upset at the way the decision was communicated to him. The First Respondent deal with the Claimant in a high-handed manner in respect of the appeal, refusing even the courtesy of responding to his request. The issue of what uplift to award will be dealt with at the remedy hearing when both parties will have the opportunity to make representations in light of the findings.

79 The Claimant confirmed that he received jobseekers allowance from 28 March to 14 May 2019 but was unable to provide details at the hearing of what payments he received.

80 The case will be listed for a hearing to determine the sums to be awarded by way of remedy in respect of the unfair dismissal claim only and separate case management orders will be made for that hearing.

Unlawful Deduction from Wages

81 The First Respondent accepts that the Claimant had been rostered to work a 16-hour shift on the 4/5 March and that the payment he would have received for working that shift would have been £125.28 gross. The Respondent's case is that it does not accept that the Claimant worked the shift or at least all of the 16 hours but does not seek to maintain that it is able to identify what hours the Claimant did work, nonetheless it failed to pay the entire payment.

82 I find that the wages were properly payable, that the First Respondent has not proven on a balance of probabilities that the Claimant was not present on site during his shift.

83 The Claimant is therefore entitled to the payment of his wages in the sum of £125.28 as an unlawful deduction from wages under section 13 ERA.

Employment Judge Rachel Broughton

Date: 30 December 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE