EMPLOYMENT TRIBUNALS

Claimant: **Mr A Wheatley**

Respondent: **Kings Security Systems Limited**

Heard at: **Birmingham**

On: **4 February 2020**

Before: **Employment Judge Flood**

Representation

Claimant: In person (assisted by Mr Aivihenyor)
Respondent: Mr Dunn (Counsel)

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and breach of contract are not well founded, and his claim is therefore dismissed.

REASONS

The Complaints and preliminary matters

1. The claimant brought a complaint of unfair dismissal contrary to **section 94 of the Employment Rights Act 1996 ("ERA")** and for breach of contract pursuant to **Regulation 3 the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994**.

2. The claimant attended in person and had the assistance of Mr Aivihenyor to present his case. The respondent attended and was represented by Mr Dunn of Counsel. A bundle of documents had been prepared and agreed by the parties ("the Bundle").

3. The claimant had on 3 February 2020 disclosed to the respondent an audio recording of part of his disciplinary hearing. The respondent informed the Tribunal of this yesterday and objected to its late disclosure. The matter was discussed again at the outset of the hearing. The claimant confirmed that he had audio recordings of his investigation, disciplinary and appeal meetings. He explained that he had made these recordings on his phone and was not

intending on using them. He said he had recently changed phones and within the last few weeks had come across them again. He had produced a transcription of one of the shorter recordings. He said that the recording/transcriptions highlighted inconsistencies in the minutes and showed that matters were omitted. The respondent objected strongly saying that it was not in the overriding objective or fair and just to continue with this evidence. Mr Dunn contended that the claimant had not provided a good reason for why it was only produced on the morning of the hearing. He therefore asked me to exclude this evidence. In the alternative, he indicated that the respondent would be applying for the hearing to be adjourned if the recording was admitted and would make an application for costs against the claimant in relation to any adjourned hearing today. I invited the claimant to consider whether he wanted to proceed with this application on the basis that if it was admitted, an adjournment was likely to be required. The claimant upon considering the matter with his lay representative decided not to pursue this application.

4. Having concluded the evidence and oral submissions at 3.45 p.m., the hearing was adjourned for a reserved decision to be made.

The Issues

5. The issues I needed to determine were explained at the outset of the hearing and were as follows:

   5.1. Was the claimant dismissed for a potentially fair reason pursuant to section 98(2) of the ERA i.e. misconduct. In determining that, the Tribunal must consider:

      5.1.1. Did the respondent believe the claimant was guilty of misconduct?
      5.1.2. Did the respondent have reasonable grounds to hold that belief?
      5.1.3. Had the respondent formed that belief having carried out a reasonable investigation given the circumstances?

   5.2. Was the dismissal procedurally fair and follow the ACAS Code of Practice?

   5.3. Was the dismissal within the range of reasonable responses?

   5.4. If the dismissal was procedurally unfair, what was the percentage chance of the claimant being fairly dismissed?

   5.5. Should there be an uplift or decrease in compensation to reflect any breach of the ACAS Code of Practice?

   5.6. Did the claimant contribute to his dismissal and if so should any compensation awarded be reduced to reflect any contributory conduct?

   5.7. Did the claimant commit acts amounting to gross misconduct thereby entitling the Respondent to terminate his employment without notice?

Findings of Fact

6. The claimant himself gave evidence and submitted written witness statements from Mr C Wheatley ("CW") and Mr C Thompson ("CT"), both former employees of the respondent dismissed at the same time as he was. The respondent's witnesses were Mr S Mahmout, Contracts Manager ("SM"), and Ms C Eastwood ("CE"), Head of Security Personnel, who were both employed by the respondent at the relevant time. I also have considered the relevant parts of the joint bundle of documents produced by the parties ("Bundle"). On the relevant evidence raised, I make the following findings of fact:

   6.1. The respondent is the provider of a range of commercial security services to a wide range of clients and employees 438 people. The claimant was employed by the respondent since 17 February 2014 as an Assistant Site Manager and had spent most of his employment working on the site owned by Meggitt Aircraft Braking Systems ("Meggitt"), one of the respondent's clients, in Coventry. The claimant's employment contract was at pages 36a to 36p of the Bundle. The disciplinary procedure applicable to the claimant is shown at pages 42 to 50aa. At page 50 under the list of non-exhaustive examples of behavior which will fall within the definition of gross misconduct there is included the following statements:

   "*Actions which have brought the company into disrepute*"; and
   "*use of uniform, equipment or identification without permission*"

   6.2. The claimant had been Assistant Manager at the respondent's Meggitt site since July 2018. There were no prior disciplinary issues involving the claimant prior to the incident leading to his dismissal. He had a good relationship with colleagues and had received positive feedback on his performance from his managers. His duties were managing the overall security of the site, monitoring visitors entering and leaving, carrying out safety checks and ensuring the premises was always secure. The claimant knew that Meggitt worked with the Ministry of Defence and was a high-profile client of the respondent and understood that a breach of security on site could be a serious matter.

   <u>Failed Penetration Test and Meeting on 13 May 2019</u>

   6.3. Just before the incidents that led to dismissal, the respondent had been responsible for a breach of security on the Meggitt site. Meggitt had carried out what is known as a penetration test whereby simulated attempts are made by the client to gain unauthorised access to the site on a date unknown to the respondent to test the security arrangements in place. This took place in early May 2019. Two attempts were made on one day to gain access by a third party engaged by Meggitt. This was part of a process Meggitt were undertaking in order to gain accreditation by the Ministry of Defence that they supplied products to. The first attempt involved individuals trying to scale the exterior fence, but the respondent's employees prevented this and the individuals were escorted off site. Later the same day two individuals were allowed access to site through

the main security barrier by employees of the respondent in a vehicle that was not registered for the automatic number plate recognition system, so without the correct checks being carried out. There is no suggestion that the claimant was personally involved in these actions. As a result of this, the respondent decided to hold a meeting with all security staff on the Meggitt site on 13 May 2019 and the minutes of this meeting were shown at pages 50e to 50h of the Bundle. The claimant attended this meeting together with all his colleagues.

6.4. During this meeting, the respondent's Operations Manager, Mr M Wilson ("MW"), explained the seriousness of the breach and reminded employees of their responsibilities. It is noted in the minutes:

"MW discussed duties and the role of security on site and that they were all SIA licenced officers and we are the first line of defence for the site. We must carry out our security duties correctly and make sure of the safety and integrity of the site is always upheld."; and

""the Penetration incident was discussed, and MW explained the importance of how greatly we had failed. All staff needed to understand the ongoing implications for Kings and themselves also involving the new Antsy project."

6.5. The claimant confirmed in response to cross examination that he was aware the failing the penetration test amounted to a major breach of the respondent's security obligations and was a serious matter having attended the meeting that day.

Jurassic Park Video

6.6. On 14 May 2019 (the day after the meeting with MW), the claimant was working on site with three other employees, Mr M Pawson ("MP"), CT; and CW, who is also the claimant's brother and was the manager on shift at the time. It had been a particularly busy morning, with many visitors on site for a client meeting, but had quietened down by the afternoon. CT had an idea to make a video based on a scene in Jurassic Park and discussed and agreed this with the claimant and CW. This idea appears to have come from CT finding a screwdriver with an amber coloured handle which looked like the walking stick used by a character in the film. CT decided to play the role of that character in the film, and CW a dinosaur (and he printed out a picture of a dinosaur to wear as a mask). The claimant was asked to and agreed to film the scene on his mobile phone.

6.7. The claimant said he took a break from his work at that time (authorised by his manager CW) as he was entitled to have a break from the screen work he was carrying out under HSE requirements. The scene was then filmed outside the back door of the security office. An audio clip of the film was played on another mobile phone speaker and the claimant filmed CW and CT acting out the scene from that clip. CW and CT were wearing their respondent uniforms during the video. The claimant did not appear

or speak in the video. The scene was approximately 25 seconds long. The claimant sent the video he had taken to CT via a WhatsApp group and then CT posted it on his Facebook page, tagging the claimant, CW and MP (who were his Facebook friends). The video was viewed during the hearing and a still from the clip is shown at page 51. Later that day CT spoke to a colleague on site who worked on reception who had seen the video and said it was funny and that she and her colleagues were going to make a video that was funnier. CT discussed this conversation with the claimant and CW and they all decided to make another video the next day.

Lord of the Rings Video

6.8. On 15 May 2019 after their shift had ended, the claimant, CW and CT made a further video. CT was dressed as Gandalf and CW was driving his son's toy car. It was filmed by the claimant at the Meggitt premises main gate barrier. This was the same barrier that the respondent's employees had permitted access to unauthorised employees during the failed penetration test earlier in the month. CT said the line "*You shall not pass*" and the video panned out to CW in a child's toy car. The clip was around 15 seconds long. It was viewed during the hearing and a still is shown at page 52. The claimant again forwarded the video to CT on a WhatsApp message and CT posted it on his Facebook page tagging CW and the claimant.

6.9. In response to cross examination the claimant agreed that had someone from the client viewed the videos they would have recognised the site as the Meggitt site but it would not have been clear that this was made during working time. He said that he did not expect the client to see the videos. He accepted that the videos may have seemed unprofessional but said that they did not contain any derogatory or harmful comments and they were just intended to be funny. He did not make a direct link between the failed penetration test and the content of the second video although he could see now how it could have been perceived by the client to be that way. The claimant was not aware that CT had posted the videos on Facebook, but he knew that CT had shared the first video with other employees working on the Meggitt site before the second video was made.

Complaint from Meggitt

6.10. On 18 May 2019, the respondent received a complaint from Mr P Bolton an employee of Meggitt. Mr Bolton had viewed the videos as he was a Facebook friend of CT. The complaint expressed Meggitt's shock and concern that the videos had been uploaded to Facebook and that one of the videos appeared to mock a recent security breach. On receipt of this complaint, MW telephoned CW and informed him that there were videos on Facebook that needed to be taken down. CW was with the claimant when he received this call as he was at the claimant's daughter's birthday party. This was when the claimant became aware that the videos had been posted on Facebook. CW then telephoned CT and informed him to

take the videos down, which he did.

Investigation

6.11. The respondent decided to carry out an investigation and suspended the claimant, CT and CW on 20 May 2019. The letter of suspension is shown at pages 53 and 54. The letter explained that the reason for the suspension was to allow the company to carry out an investigation into the following allegations:

- Conduct and behavior on Saturday 18th May 2019
- Misuse of client property on Saturday 18th May 2019
- Actions which could have brough the company into disrepute on Saturday 18th May 2019
- Misuse of uniform, equipment without permission on Saturday 18 May 2019.

6.12. The claimant attended an investigatory interview with MW on 22 May 2019. The minutes of that meeting were shown at pages 55 to 58. The claimant contended that the minutes of the investigatory meeting were incomplete, and that certain information was not included. He did not sign the minutes of the meeting. The claimant was informed by MW at the conclusion of the meeting that it would proceed to a disciplinary hearing and was invited to a disciplinary meeting by a letter dated, which is shown at page 59 and 60 of the Bundle. This letter confirmed that the claimant was being invited to a meeting to discuss an allegation of Gross Misconduct relating to the same allegations set out at paragraph 6.11 above and was advised that "*the outcome of this hearing could result in your dismissal*". The claimant was advised of his right to be accompanied.

Disciplinary Hearing

6.13. A disciplinary meeting took place on 24 May 2019 and was chaired by SM. The claimant attended this meeting and was not accompanied. Ms S Howell, HR Officer at the respondent ("SH") took notes. A typed version of minutes of the meeting were shown at pages 61-64 of the Bundle. The hearing started by the claimant being asked about the disciplinary pack and he said at this point that he was not happy with the minutes of the investigatory meeting. He pointed out where he said there were errors and omissions and SH said that the minutes would be amended to reflect this. The claimant admitted that he filmed the videos and that he discussed the ideas for the in advance with CT and CW. The claimant was asked about leaving the desk to go and film the video leaving MP on his own. He stated that there were normally 5 people on site, although only 4 were there on that day; that 2 people normally go on a break together and that the filming took place in earshot of MP. He was asked about his intentions regarding the filming of the Lord of the Rings video and whether he understood the severity of the situation regarding the penetration test. The claimant confirmed that he did but that it

"wasn't our intention to be taking the micky out of that, but I can see why the client would be annoyed"

6.14. The claimant acknowledged that it was not a responsible thing to do making the videos looking back, but that it was an attempt to lighten the mood. When asked whether he understood that the videos could cost the respondent the contract and everyone's job on site the claimant confirmed that if he had known it would be that serious, he could not have done it. He explained that he did not know that the client had seen the post. He said he was on Facebook, although he hardly looked at it and he did not know the videos had been posted on Facebook. The claimant apologised for his actions.

6.15. There was some evidence given by the claimant that at some point during the disciplinary hearing, SM had suggested to the claimant that the first video made was mocking the client by suggesting that they were dinosaurs. There is no reference to this in the minutes of the hearing and SM does not mention this. The claimant indicated that this was something he had discovered on listening to his audio recordings and he did not put this allegation in his claim form or witness statement as he had only recently gained access to the audio recordings after the statement had been prepared. I make no findings on whether this was said as this is not directly relevant to the issues to be determined.

6.16. The hearing was adjourned, and SM gave evidence about his decision-making process at paragraph 27-29 of his witness statement. He stated that:

"Particularly taking into account the recently failed penetration test, in leaving their post to go and produce two videos, Aaron and his colleagues had left the site vulnerable and this was unacceptable" and

"His actions, and those of his colleagues, were highly embarrassing for the Company and unprofessional. He should have been aware of the potential consequences to the Company and his apparent failure to grasp this was not acceptable"

6.17. SM concluded that the claimant was guilty of the allegations against him. He considered the appropriate sanction and took into account whether the claimant knew or should have known that his actions were wrong, concluding that he did. He considered that the misconduct amounted to gross misconduct because of

"the clear breach of company policy and the fact that his actions had brought Kings into disrepute with one of its clients, demonstrated by their filing a formal complaint about them to the company"

6.18. He decided that summary dismissal was appropriate and following the adjournment, reconvened the meeting and dismissed the claimant for gross misconduct. Confirmation of summary dismissal was provided in a letter sent to the claimant on 4 June 2019 which is shown at page 65 to

66 of the Bundle. This outlined the reason for dismissal as:

"*I don't think you realise the severity of this incident, I don't believe at all that the filming only took five minutes to do.*
You have filmed a video during working hours, bearing in mind you were understaffed, you've taken a break with 2 other colleagues all at the same time and you have allowed it to be posted onto Facebook, you could have untagged yourself or told them to take it down.
The client has seen this and notified us at Kings, which as a business this is highly embarrassing and unprofessional, you have not thought of the repercussions.
Your behavior was totally unacceptable, childish and irresponsible as a Deputy Manager which may have cost the company the contract"

SM explained in evidence that the length of the video and how long it took to film was ultimately not the reason for dismissal. The issue was what was portrayed in the videos and the actions of the claimant in deciding to be involved in the making of them.

Appeal

6.19. The Claimant appealed against his dismissal by way by letter of 11 June 2019, which was shown at page 67-69 of the Bundle. The claimant appealed on a number of grounds. He complained that the minutes and the letter confirming dismissal all had the date of the video incorrect and that the minutes were not a true reflection of what was discussed. He complained that no evidence was provided during the investigation, specifically mentioning the lack of CCTV evidence or a witness statement from MP. He contended that none of the points he made during the hearing specifically about: the filming of the second video being off site, out of working hours and not in uniform; that the second video was not based on the penetration test; that he played no part in uploading the videos to Facebook; that he could not be seen in either video; and that he was on a break during the filming of the first video in accordance with HSE guidelines were taken into consideration when deciding to dismiss him. He also complained about procedural failings, namely that he had less than 48 hours to prepare for the meeting (he suggested in his witness statement this was evidence of "*a plot to axe my job)*"; the independence of SH has a note taker at the disciplinary meeting, having been involved in the investigation; the fact that there was a 12 day delay in the issuing of the minutes and that it took only 10 minutes for the decision to dismiss to be made. Lastly he complained that there was inconsistency of treatment mentioning other incidents where guards were not dismissed, after an incident involving fighting, using phones/ipads whilst on duty and also breaching confidentiality, all of which are said to be Gross Misconduct in the employee handbook.

6.20. The appeal was held on 26 June 2019. There was a delay in the appeal meeting as it had to be rescheduled. CE chaired the meeting and Ms K Fisher from HR was in attendance from the respondent. The claimant attended and was not accompanied. The minutes of the appeal

hearing were shown at pages 73-81. During the appeal hearing all the grounds raised by the claimant in his letter of appeal at paragraph 6.19 above were discussed.

6.21. CE adjourned the meeting to decide. During the adjournment she contacted the contact at the client who had made the complaint and was informed that the complaint still stood and that they did not want the individuals involved in the videos back on site. CE describes how she reached her conclusions at paragraphs 19 to 21 of her statement. She said she reached the conclusion that the claimant was guilty of the allegations made as he had admitted to filming the videos which had resulted in the client complaint. She also concluded that he failed to understand the severity of his actions and had shown very little remorse until the end of the appeal meeting. She concluded that the respondent's client had lost all faith in the persons involved in the videos and did not want them back on site. On the specific points raised by way of appeal she firstly confirmed that the dates on the letters and notes were incorrect, but this did not detract from the fact that the videos were made. She went on to conclude that not viewing CCTV evidence of taking a statement from MP was not required or relevant. She also reached the conclusion that the claimant was not correct in stating that the second video was filmed off site.

6.22. In terms of the various procedural matters, she stated that the claimant's suggested amendments to the minutes would be noted; she found that 48 hours' notice being given to attend the disciplinary hearing was reasonable especially as the initial investigatory meeting had been delayed at the claimant's request; she did not consider that a 12 day wait for minutes was unreasonable nor that the shortness of the adjournment on the disciplinary hearing was an issue. She acknowledged the view of the claimant that the second video was not based on the penetration test, but concluded that because of the short time frame from the failure to the video being made, it was reasonable for the client to have had that perception. As to other cases where misconduct was alleged and dismissal did not result, she stated that each matter is considered on a case by case basis and a decision made after a full investigation.

6.23. CE went on to consider whether dismissal was appropriate in the circumstances. She stated that she was aware of the claimant's good disciplinary record and length of service but concluded that he knew or should have known that his conduct was wrong. She concluded that dismissal was appropriate due to the severity of the incident and that it had resulted in a complaint being made against the respondent by one if its client which she stated had "*brought the company into disrepute at a crucial point in time*". CE was clear in her evidence that she did not take this decision lightly but felt that it all the circumstances of the case it was the appropriate disciplinary sanction to have taken.

6.24. The decision was confirmed in writing by letter dated 3 July 2019 shown at pages 82 and 83 of the Bundle.

The Law

7. The claimant complains of unfair dismissal contrary to **Section 94 of the ERA**. The respondent alleges that the dismissal was on the grounds of misconduct. The employer must (a) show the reason for the dismissal and that it is one of the potentially fair reasons set out in **section 98(1) and (2)** and; (b) if the employer has done this, then the Tribunal must then determine whether dismissal was fair or unfair under **section 98(3A) and (4)** depending on the circumstances including the size of the administrative resources of the respondent.

8. Conduct is one of the six potentially fair reasons for dismissal set out in **section 98**. If a dismissal is asserted to be on the grounds of conduct, then the test laid down in **British Home Stores –v- Burchell [1978] IRLR 379** requires an employer to show that:-

   8.1. it believed the employee was guilty of misconduct;

   8.2. had reasonable grounds to hold that belief;

   8.3. it formed that belief having carried out a reasonable investigation, given the circumstances.

9. In determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether "*the dismissal lay within the range of conduct which a reasonable employer could have adopted*" as set out in the case of **Iceland Frozen Foods v Jones [1982] IRLR 439**.

10. The "range of reasonable responses" test applies not only to the actual decision to dismiss, but also to the procedure adopted by the employer in putting the dismissal into effect - **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.**

11. In a claim for breach of contract, the question for the Tribunal is whether there has been a repudiatory breach of contract justifying summary dismissal. The degree of misconduct necessary in order for the employee's behavior to amount to a repudiatory breach of contract is a question of fact for the Tribunal to determine. The test set out in **Neary and anor v Dean of Westminster [1999] IRLR 288** is that the conduct:
"*must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain [the employee] in his employment*".

West London Mental Health NHS Trust v. Chhabra [2014] IRLR 227 - for misconduct to amount to gross misconduct there does need to be some sort of "willful" or deliberate breach of the employee's duties.

In **Adesokan v Sainsbury's Supermarkets Ltd [2017] IRLR 346**, the Court of Appeal explained that the focus is on the damage to the relationship between the parties.

Conclusion

Unfair Dismissal

12. When considering the claimant's complaint of unfair dismissal, I find that the respondent has discharged the burden of proof in showing that conduct was the reason for dismissal. SM, the dismissing officer, genuinely believed that the claimant had committed acts of misconduct and had brought the company into disrepute by filming videos on site which having been viewed on Facebook by a client, led to a complaint. It was clear as to what he concluded at the end of the disciplinary hearing (see paragraphs 6.16-6.18). The appeal hearing heard by CE reviewed this decision in detail, and I was also satisfied by the genuineness of her belief that the claimant was guilty of misconduct as alleged (see paragraphs 6.21-6.22). Other than a statement in his witness statement that there had been a "*plot to axe my job*", the claimant does not suggest or provide any evidence of what any alternative reason for dismissal might be.

13. Secondly, when considering whether the respondent had reasonable grounds for that belief, I have also concluded that it had. Evidence gathered during the investigation was clear and there was very little factually in dispute to consider, as the claimant had admitted in general terms the conduct complained about. At the disciplinary hearing, other than the length of time the claimant took to film the first video, the intentions regarding the second video and when he was aware of it being posted on Facebook, there was very little for SM to make findings on about the facts of the incidents. The claimant admitted to what had taken place and was open about what his intentions were (paragraphs 6.13 and 6.14). All relevant matters were considered by SM during the disciplinary hearing and the claimant was given the opportunity to comment. However, ultimately, SM was clear that the length of time it took for the first video to be filmed was not a decisive factor but the fact that the videos had been made at all and the content (see paragraph 6.18).

14. The respondent considered all the relevant evidence and, it was a reasonable conclusion for SM to reach that the claimant had breached company policy and brought the respondent into disrepute as evidenced by the complaint being made (see paragraphs 6.16 and 6.17 above). The proximity of the videos being made to the failed penetration test and the meeting held by MW to remind employees of the seriousness of their role and duties was a key and highly relevant factor (paragraph 6.16). It is not for this Tribunal to interfere or reach a different conclusion suffice to say it was not outside the so called band of reasonable responses for SM to conclude that the claimant was guilty of misconduct as a result of the actions found to have taken place.

15. Thirdly when considering whether the belief that the respondent had was formed following a reasonable investigation, I have also found that it was, given the size and administrative resources of the respondent. The claimant admitted that the videos had been filmed by him, the first one being made whilst at work and the second just after. The videos were available for the respondent to view. The investigations carried out around how and why the

videos were made were reasonable, proportionate and appropriate (see 6.12, 6.13 and 6.14 above). It was suggested that the investigation into the matters was insufficient, given that the respondent did not obtain a witness statement from MP or view CCTV evidence from the date the first video was made. I have concluded that the respondent's decision not to get a witness statement from MP was reasonable given that the claimant had admitted that the core allegation in question had taken place. MP could not have shed any further light on this, and neither would have viewing CCTV evidence changed this essential fact. Although the length of time the claimant was away from his desk when the first video was made was discussed during the hearing and referred to in the dismissal letter, this was not the core reason for dismissal. It played a part in the overall factual matrix, but the essence related to the content and the context of the videos themselves. The claimant was given every opportunity to put his own position forward on this matter during the investigation and disciplinary process.

16. Having addressed the reason for dismissal, I must then go on to look at whether the dismissal was reasonable in all the circumstances. I must firstly consider whether the dismissal was procedurally fair. My conclusion is that it was. The investigation carried out by the respondent was thorough and satisfactory (see conclusions above). I find that the respondent's procedure fell within the requirements of the ACAS code and was one open to the respondent. The procedural irregularities that the claimant tries to suggest took place and which he raised at appeal were not significant in the overall scheme of things. There were errors in the dates on the letters, but this did not change the substance of the allegation and the claimant was always aware what he was being accused of. There was no undue delay and the claimant was given every opportunity to put forward his view of what should happen. Ultimately the respondent reached a different conclusion on this but the process by which it reached the conclusion was a fair one.

17. The key issue to determine is therefore whether the dismissal was within the range of reasonable responses. I conclude that it was. The respondent reasonably determined that the claimant had committed an act of misconduct by taking part in the making of the two videos which resulted in a client complaint. The claimant submitted that dismissal was too harsh, given his length of service and previous good disciplinary record and performance. I have no doubt that the claimant was a good worker and the impact on the claimant and his family of losing his job over what may seem to many as a trivial matter is significant.

18. However, the respondent determined that because of the proximity to the failed penetration test and the meeting with all staff on 13 May 2019, the making of these videos the very next day was highly unprofessional. It concluded that an important client seeing such videos at that time would be right to be concerned about how seriously the respondent and its employees were taking its security. Irrespective of the intention of the claimant and his fellow employees, the impact of the videos in terms of the client's perception of the respondent and was severe. The claimant was relatively senior, and the respondent concluded that he had failed to appreciate what impact making such a video might have on his employer and its clients. In those

circumstances it was certainly open to the respondent to conclude the dismissal was appropriate and it was plainly within the range of reasonable responses. The arguments raised by the claimant about inconsistent treatment do not assist further here. No details were given on the incidents referred to for me to be able to reach any conclusions regarding alleged inconsistent treatment. Given the consequences of the actions of all three employees involved (including the claimant), dismissal was a course of action that the respondent employer was lawfully able to take in response to what had taken place.

19. On these grounds, I find that the claimant's complaint of unfair dismissal fails and is hereby dismissed. As there is no finding of unfairness, it is therefore not necessary to consider what the percentage chance of a fair dismissal was, nor whether the claimant's conduct contributed to his dismissal.

Breach of Contract/Wrongful dismissal

20. With respect to the claimant's complaint of wrongful dismissal, the issue to determine here is whether there has been a repudiatory breach of contract justifying summary dismissal., I am required to make a determination on the facts as I see them on the balance of probabilities. Firstly, I also conclude, for all the reasons set out above (paragraphs 13-15), that the claimant did as a matter of fact commit acts of misconduct by being involved in the making of videos which led to client complaints.

21. The main issue to address therefore is whether that misconduct is serious enough to justify summary dismissal. I have considered whether it amounted to deliberate conduct which undermined the trust and confidence inherent in the contract of employment and have concluded that it did. The claimant, having been informed on the 13 May that the respondent had been involved in a serious failure of security (paragraph 6.4 above), took the decision the very next day to involve himself in making a lighthearted video on a client's site during working time. He became aware that the video had been shared with other staff on site (paragraph 6.7) and then went on to make a further video clearly showing the client's site. I conclude must have appreciated that this video was likely to be shared as well. Given the proximity in time to the problems with security access, this was a very ill-advised course of action, whatever the intention was.

22. The client having seen the videos, reacted badly and this reflected poorly on the respondent's ability to provide effective security and did impact its reputation with this client. The client understandably was unhappy to have the employees involved in further security of its site. The actions of all three employees including the claimant amounted to conduct serious enough as to make any further relationship and trust between the respondent and the claimant impossible – i.e. conduct involving a repudiatory breach of contract. The instances of misconduct did take place, and for the reasons set out at paragraph 21 above, I conclude that these were deliberate or wilful repudiatory acts. Therefore, the claimant's summary dismissal under the

terms of his contract of employment was justified.

23. His claim for breach of contract is also therefore dismissed.

Employment Judge Flood

Date: 6 February 2020