EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110558/2019 & 4110571/2019

Held in Glasgow on 23 and 24 February 2020

Employment Judge P O'Donnell

Mr MG Donnachie	**Claimant** **In Person**
Mitie Limited	**Respondent** **Represented by:** **Mr J Gardiner - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant was unfairly dismissed. The Tribunal awards the sum of £5,135.63 (Five thousand one hundred and thirty five pounds sixty three pence) as compensation for unfair dismissal.

REASONS

Introduction

1. The Claimant has brought a complaint of unfair dismissal. The claim is resisted by the Respondent.

Preliminary issues

2. At the outset of the hearing, the Tribunal sought to clarify why the Claimant had lodged two ET1 forms and if he was seeking to pursue different claims under each ET1. The Claimant explained that he sought to lodge his ET1 online using his phone and that it crashed at the end of the process so he started the process again in order to be sure that his claim was lodged. He explained that the only claim he sought to pursue was one of unfair dismissal. The hearing proceeded on the basis that the only claim before the Tribunal was one of unfair dismissal.

3. The Claimant sought to add documents to the joint bundle prepared by the Claimant. The Respondent objected to these on the basis that they appeared to relate to an accident the Claimant suffered in 2018 and were not relevant to the matters to be determined by the Tribunal. The Claimant replied that it was after his lawyers contacted the Respondent about his accident that issues were raised about his conduct. In response to a question from the Judge, the Claimant clarified that he sought to argue that the alleged misconduct was not the genuine reason for his dismissal and that these documents were relevant to that argument.

4. The Tribunal allowed the documents to be added to the bundle on the basis that, having heard no evidence as yet, it was impossible to properly determine the relevance of the documents. The Tribunal considered that it would be in keeping with the overriding objective, particularly the need to ensure fairness to both parties, to allow the documents to be added under the caveat that the Respondent could object to the relevance of the documents when they were led in evidence and could make submissions on their relevance in their submissions.

Evidence

5. The Tribunal heard evidence from the following witnesses:-

    a. The Claimant.

    b. David Wiseman, the Respondent's service support manager, who made the decision to dismiss the Claimant.

    c. Sharon McWee, the Respondent's regional operations manager, who heard the Claimant's appeal.

    d. Jacqueline MacFarlane, the Respondent senior account manager, who heard the Claimant's disciplinary hearing in November 2018.

6. There was an agreed bundle of documents prepared by the parties. A reference to page numbers in the judgment are reference to pages within the bundle.

7. For the most part, there was no dispute of fact between the Claimant and the Respondent's witnesses. There were, however, four matters in relation to which

the Tribunal had to determine the credibility and reliability of the evidence given by the witnesses.

8. First, there was a dispute as to the date on which the Claimant's continuous service commenced; the Claimant gave the date of 6 June 2009 whilst the Respondent's records produced at p129 record the date as being 14 November 2010.

9. The Respondent had taken over the Claimant's employment when they took over the cleaning contract and so relied on the information provided by the previous employer. Indeed, that employer was not the first contractor for whom the Claimant worked and he worked for another employer before that.

10. In these circumstances, there was no-one from the Respondent who could give direct evidence when the Claimant first commenced employment and they relied on the information provided to them by another person. The Tribunal preferred the direct evidence of the Claimant regarding his start date and found that this was 6 June 2009.

11. Second, there was a dispute of fact between the Claimant and Mrs MacFarlane as to whether she told the Claimant at the end of the disciplinary hearing held on 12 November 2018 that he would receive a final written warning in relation to the matters discussed at that hearing. Mrs MacFarlane stated that she told the Claimant at the end of the meeting that he would receive a final warning in order that he would be reassured that he was not going to lose his job. The Claimant asserted that this was not said.

12. The note of the hearing (p131) made no mention of the sanction to be applied to the Claimant. Although the various minutes of the meetings held during the process leading to the Claimant's dismissal were not intended to be a verbatim account of those meetings, the Tribunal considered that such a significant issue as the sanction being applied to the Claimant would have been recorded if it had been discussed.

13. In these circumstances, the Tribunal preferred the evidence given by the Claimant in relation to this matter. This is not to say that the Tribunal considered

Mrs MacFarlane to be deliberately deceitful but, rather, that she had misremembered what had been discussed at the meeting.

14. Third, there was a dispute between the Claimant and Mrs McWee as to whether she was shown a video recorded on the Claimant's phone showing him using the clocking-in machine at his workplace.

15. Again, this was not recorded in the minutes and, although these were not verbatim, the Tribunal considered that such a significant matter would have been mentioned in the minutes. The Tribunal, therefore, preferred the evidence of Mrs McWee. As with Mrs MacFarlane, the Tribunal did not consider that the Claimant had sought to deliberately lie about showing the video but had misremembered what happened.

16. Finally, there was an assertion made by Mrs McWee during her evidence under cross-examination that the Tribunal did not consider to be credible and reliable. She asserted that after the appeal hearing, she spoke to other employees of the Respondent working at the same site as the Claimant to see if they had experienced difficulties with the clocking-in machines at the site and that they stated that they had not.

17. No statements were taken from these employees and Mrs McWee did not reconvene the appeal hearing to discuss with the Claimant what was allegedly said by the other employees. No mention of this was made in the appeal outcome letter (pp186-187) nor was this pled in the ET3. The evidence did not emerge during examination-in-chief and only came out partway through cross-examination.

18. Given that the central pillar of the Claimant's case was that the clocking-in machines at the site were faulty and that he had produced evidence from others who worked at the site (although not employees of the Respondent) in support of this, the Tribunal considered that steps taken by the Respondent to investigate this assertion are highly significant and would have been raised by the Respondent at some point in the internal processes or at the hearing rather than emerging as a matter of chance during cross.

19. In these circumstances, the Tribunal did not consider that this assertion by Mrs McWee to be credible or reliable. The Tribunal did not consider that she was seeking to be deliberately deceitful but, rather, that she made this assertion in the heat of the moment under the pressure of cross-examination.

Findings in fact

20. The Tribunal made the following relevant findings in fact.

21. The Respondent has a contract to provide cleaning services to Beam Suntory (BS) at their site at Springburn. They won this contract from a previous contractor (Team Contract Services Ltd). The Claimant had been employed by Team and transferred to the Respondent's employment when they won the contract.

22. The Claimant's continuous employment commenced on 6 June 2009 and he was dismissed with effect from 21 May 2019. He was employed as an industrial cleaner.

23. The Respondent operates a clocking-in system that is used to monitor their hours and generate their wages. Employees call an automated phone number when they start work and input a unique PIN which logs them in. They then repeat this process when they finish work for the day which logs them out.

24. There is an additional clocking-in system at the BS site which all those working on the site (that is, BS employees and employees of any contractor) must use when entering or leaving the site. The purpose of this system is to monitor who is on site for health and safety purposes, particularly if there is a fire (the BS site is a bonded whisky warehouse where there is a higher risk of fire) so that the fire service can be informed who is on site.

25. The BS clocking-in system involves workers swiping a card at a machine and then pressing a button to log in or log out. The screen on the machine then confirms that the worker has been logged into or out of the site. These machines are located at various places throughout the site including the gatehouse where people enter the site and at entrances to the various buildings on the site.

26. It is a requirement that all workers clock-in or out when entering or leaving the site and a commitment to ensure that this was followed was an important factor in the Respondent winning the contract.

27. The card used for clocking-in is also used when workers move between buildings and this is used to monitor who is in any area of the building in the event of a fire.

28. Issues arose in relation to the Claimant and the BS clocking-in system in November 2018 when concerns were raised by Helen McLaughlin of BS (who was the Respondent's contact at BS) about inconsistencies in the Claimant's clock-in records.

29. A disciplinary hearing was organised for 12 November 2018 which was held by Jackie MacFarlane, the Respondent's senior operations manager, and attended by the Claimant. A note of the meeting is at p131.

30. In the course of the meeting, the Claimant accepted that he did not always clock in and out although he disputed the number of errors on the basis that there had been issues with staff clocking in and his card had needed to be rebooted to work after he used a temporary card.

31. Ms MacFarlane reminded the Claimant that he must clock-in and out and that he should report any issues with this.

32. The Claimant indicated that he felt that Ms McLaughlin had issues with him and Ms MacFarlane replied that he should not give Ms McLaughlin a reason to get on his back.

33. The meeting concluded with Ms MacFarlane again reminding the Claimant of the need to clock-in and out and the Claimant confirming that he would do so.

34. Ms MacFarlane decided to issue the Claimant with a First and Final Written Warning in relation to the failure to consistently clock-in and out. A letter dated 15 November 2018 was prepared confirming this (p132) but was sent to a different "Michael Donnachie" employed by the Respondent. The Claimant was not aware of the warning until March 2019 when it was mentioned during a meeting regarding a different matter in which the Claimant was issued with a letter of concern (p134). A letter of concern is not a formal disciplinary sanction

under the Respondent's disciplinary policy. When the error with the November letter was discovered, a copy was provided to the Claimant.

35. In April 2019, BS raised further concerns with the Respondent regarding inconsistencies with the Claimant's clock-in records.

36. The Claimant was invited to an investigatory meeting with Craig Lorimer (the Respondent's service support manager) on 24 April 2019 by letter dated 17 April 2019 (p145). Due to a typographical error in the Claimant's address (numbers in his house number had been transposed), the Claimant did not receive this letter in the post and was subsequently handed the letter by his supervisor.

37. The Claimant attended the meeting with Mr Lorimer on 24 April 2019 and handwritten notes of this meeting are at pp147-154:-

    a. The meeting opened with Mr Lorimer asking the Claimant if he had received the letter of November 2018 and the Claimant explaining that he had not received this until March 2019.

    b. The Claimant asked how he could appeal this if he had not received it and Mr Lorimer replied that the Claimant would have to take that up with Ms MacFarlane.

    c. The Claimant was shown the clock-in records provided by BS (pp135-143) and Mr Lorimer stated that there were a number of occasions when there were errors in the clock-in or out times. Mr Lorimer stated that he would ask for CCTV to have a look at these dates.

    d. The Claimant indicated that he went home early on one date because his son was ill and that he would have spoken to his supervisor about this. He would not recall the exact date.

    e. He went on to explain that the "out" button on one of the machines had been sticking and had to be changed.

    f. Mr Lorimer asked if this had been reported to anyone and the Claimant said he had told Ms MacFarlane. Mr Lorimer said that it should be reported to security.

g. Mr Lorimer made reference to 30 January 2019 when the Claimant left the site twice and the Claimant explained that he had been asked by Debbie Watson to go off site to get gloves.

h. The Claimant asserted that the BS system did not work and Mr Lorimer replied that the Claimant need to provide evidence of this. He went on to say that he would look to get answers about the BS system.

i. The Claimant was then asked about his clock-in and out times on specific days but he could not recall these days and asked if he could check the calendar as he may have had a holiday on one of these days. He then recalled that he had a holiday on 17 January 2019.

j. Mr Lorimer stated that he needed to go and get more information and speak to the client (this was a reference to Helen McLaughlin).

k. The Claimant then indicated that Greig Stewart and David Smart could give statements as they had had issues with the clock-in system.

l. Mr Lorimer stated that he would need to look at all the evidence.

38. Despite what was said at the meeting, there was no evidence that Mr Lorimer carried out any further investigations such as interviewing other staff or the people identified by the Claimant as possible witnesses, looking at the issues raised by the Claimant about the BS clock-in system or speaking to the client. No evidence was led from Mr Lorimer and the Tribunal was not taken to any documents showing any further steps taken by Mr Lorimer to investigate the matter.

39. The next step in the process was that the Claimant was invited to a disciplinary meeting with David Wiseman (service support manager) on 9 May 2019 by letter dated 3 May 2019 (p155). This letter contained the same transpositional error in the Claimant's address as had been in the invite to the investigatory meeting. As a result, the meeting was re-arranged for 15 May 2019. The Claimant was provided with a copy of the handwritten note of the investigatory meeting and the clock-in records provided by BS.

40. The disciplinary meeting took place on 15 May 2019 and a note of the meeting is at pp158-160:-

    a. Mr Wiseman asked the Claimant about his written warning and he again explained that he did not receive the letter until the end of March and the circumstances in which this happened. Mr Wiseman stated that he did not know anything about this and it would need to be logged as a different case.

    b. Mr Wiseman went through the clock-in records from BS and asked the Claimant why he was not clocked in on 11 February 2019. The Claimant replied that he must have been off on this date and that he would always report his absence. He confirmed that he did not claim any pay for this day.

    c. Mr Wiseman then asked about 12 and 13 February 2019 when the Claimant had clocked-in in the morning and then clocked-in again at lunchtime. The Claimant was not sure what had happened on those dates and suggested that the button did not work when he was clocking-in and out at lunchtime.

    d. The Claimant was then asked about 14 February 2019 when there were multiple clocking at around the same time. The Claimant could not explain what had happened on those dates.

    e. Mr Wiseman then asked about a missing time at lunchtime on 12 March 2019 and the Claimant suggested this was another problem with the button on the machine.

    f. He was then asked about having clocked-out at 11.32 on 11 February 2019 and the Claimant explained that this was because his son was taken to hospital and that Mr Lorimer knew about this.

    g. Mr Wiseman then took the Claimant through a number of missing clock-in or out times on 10 January, 4 February, 8 February, 18 February and 21 February 2019; these were a combination of missing times at lunchtime and others when the Claimant had clocked out early. The

Claimant suggested that some of these arose from problems with the button and others where he had been allowed to leave early.

h. The Claimant was asked about the number of clock-in and out times on 30 January 2019 and he explained that he been asked by Debbie Watson (an employee of BS) to go off site and buy cleaning products such as gloves and green pads.

i. Mr Wiseman then asked the Claimant why he clocked-out at 12.52 on 3 January 2019. The Claimant could not recall the reason and asked if Mr Wiseman could check this.

j. The Claimant was asked why he clocked out early on 6 March and he said that he spoke to Mr Lorimer about this.

k. He was also asked why he clocked-in at 12.26 on 15 January but he could not recall and asked if Mr Wiseman could check.

l. There was a further missed time on 16 January which the Claimant attributed to the button on the machine not working.

m. Finally, he was asked about there being only one time recorded on 22 January 2019 and he explained that he had been “jumped” on the way to work and that Mr Lorimer took him to hospital.

n. There was then a recess and when the hearing resumed, Mr Wiseman stated that the data did not add up and that the system could not be flawed.

o. The Claimant responded that he had statements from other workers about flaws with the system. Mr Wiseman stated that there were inconsistencies with him and, when the Claimant stated that he had proof, that if the system were flawed then there would be issues for everyone.

p. The Claimant did accept that there were some matters which he could not explain.

q. Mr Wiseman went on to state that he could understand if the system did not work some of the time but that BS would not use a flawed system.

r. The Claimant indicated that he had statements from people that show that there were issues with the system. He went on to say that he felt that Helen McLaughlin had problems with him and that the complaint was personal.

s. The meeting concluded with Mr Wiseman stating that he would review the evidence and issue a decision within 7 working days.

41. The statements to which the Claimant referred at the disciplinary meeting are produced at pp178-185.

a. There was a typewritten statement signed by Greig Stewart which stated that he had the same "TMS" problems (this is a reference to the BS clocking-in system) as David Smart.

b. A typewritten statement signed by six individuals which stated that "last year" after a meeting with their supervisor they discovered an issue with certain TMS clock-in terminals. The statement went on to say that it had been thought that people were not clocking-in or out but that it was discovered that they had been using a terminal which was not registering them properly.

c. There was a typewritten statement signed by one individual which stated that in "June/July last year" they had been told by their manager that they had not been clocking-in or out. They ensured that they had been clocked-in the next day but were told that they had not and that this problem continued for a week.

d. A typewritten statement from Tracey Devlin, label store co-ordinator, who confirmed that she had checked some of the same dates as the Claimant and discovered that she had missing clock-ins on those dates but had been on site and clocked-in.

e. A handwritten statement from Alan Wylie who confirmed that he had an unauthorised absence recorded on 10 January (the year is not given) but had been at work that day.

f. A handwritten statement from an individual who confirmed that they had had discussions with a Jade Milson regarding holidays in circumstances where the whole engineering section had issues with holidays last year. They state that there were told to keep their own record of holidays as the TMS system was not working correctly and HR were hoping to have it fixed for the following year.

g. A handwritten statement from David Smart who stated that he had had problems with clock-in card; several days it had not clocked him in; on one day he had to have four different cards; the same date, it had recorded him as late when his manager could confirm this was not the case; on other days, he had been logged down as having unauthorised absences; on other days, he had missing clocking.

42. After the disciplinary hearing, Mr Wiseman carried out some further investigation. He asked BS for access to their CCTV to confirm if this recorded the Claimant coming on and off site but BS (through Ms McLaughlin) declined this request. He also discussed the statements provided by the Claimant with the client who explained to him that these related to different anomalies where the system was preventing people from accessing certain areas of the site as opposed to not clocking them in or out.

43. Mr Wiseman also compared the Claimant's clocking record with those of another employee, John Hain. He also confirmed the Claimant's explanations where the Claimant had been absent or finished work early with his managers and was satisfied that there were explanations for these dates.

44. Although, Mr Wiseman was satisfied that some of the anomalies with the Claimant's clock-in time had explanations, he was not satisfied overall. In particular, he noted that the anomalies tended to occur at lunchtime and he was of the view that the Claimant was taking a longer lunch than was permitted and did not clock-in because this would show what he was doing. Mr Wiseman was

also concerned with the volume of anomalies compared to Mr Hain who did have some anomalies but not the same number.

45. He also did not consider that the statements from the Claimant provided an explanation for the anomalies in the records on the basis of the explanation given by the client.

46. Mr Wiseman came to the conclusion that the Claimant was taking more time at lunch and that this was fraud. He also considered that the clock-in system was important for fire register purposes.

47. Mr Wiseman decided that the Claimant should be dismissed and this was confirmed in a letter dated 21 May 2019 (pp161-162). The letter did not make reference to Mr Wiseman's views regarding the Claimant taking longer for lunch and the reason given for his dismissal was the missing clock ins and outs in themselves. The letter states that the Claimant did not provide any reasonable answer for these in circumstances where the Claimant knew the correct procedure which was important for security and health and safety on site. Reference was made to the Claimant's final written warning for the same issues and it was concluded that dismissal was the appropriate sanction.

48. The letter was again initially sent to the wrong address as the Respondent made the same error with the Claimant's house number as they had made in earlier correspondence. A copy was eventually sent to the correct address.

49. The Claimant appealed his dismissal by letter dated 5 June 2019 (pp169-171). The Claimant made reference to the fact that he was not aware of the final written warning for several months. He complained that no CCTV was checked to confirm that he was clocking in properly and that the Respondent had taken no statements from other people. He made reference to the statements which he had provided and the fact that none of those people were spoken to by the Respondent. He also raised his concerns that Helen McLaughlin had a personal issue with him.

50. Sharon McWee was appointed to deal with the appeal and she invited the Claimant to a meeting on 20 June 2019 by letter dated 11 June 2019 (p172).

51. A note of the appeal meeting held on 20 June 2019 is at pp173-177:-

    a. The meeting commenced with a discussion of the circumstances surrounding the Claimant's written warning. Ms McWee asked the Claimant what he had thought when he did not receive an outcome and he replied that he did not think that anything had happened.

    b. Ms McWee asked about the statements to which the Claimant referred in his appeal letter and he explained that he gave the statements to Mr Wiseman and showed her the statements on his phone.

    c. Ms McWee asked the Claimant why he did not try another area if he had problems clocking in and out and he explained it would depend on whether he was leaving from the front or back of the building.

    d. Ms McWee asked whether the people who gave statements used the back of the building and the Claimant replied that they used the front and the gatehouse but that BS staff had problems clocking in and out.

    e. The meeting moved on to a discussion about the Claimant's allegation about the personal issues which he alleged the client had with him.

    f. The Claimant was asked what outcome he was seeking and he replied that he wanted his job back.

    g. He was asked if he had any mitigating circumstances and he responded that he had family issues arising from bereavements and the birth of his son.

52. Ms McWee reviewed the statements provided by the Claimant after the meeting but did not consider these were relevant because these were provided by BS employees and not employees of the Respondent. Further, she noted that many of the statements had no dates or related to different periods of time than the anomalies in the Claimant's records.

53. If there had been issues with one of the machines, Ms McWee considered that the Claimant could have used another machine. She considered that the

Claimant had worked at the site for a long time and was aware of the need to ensure that he was clocked in.

54. In circumstances where the conduct was the same as that which resulted in the final written warning, Ms McWee considered that dismissal was the appropriate sanction. She, therefore, decided to uphold the decision to dismiss.

55. The outcome of the appeal was confirmed in a letter dated 1 July 2019 (pp186-187). The letter stated that the Claimant had not followed the correct procedure for clocking in and out following a final written warning for the same issue. It went to say that the thirteen people who had had issues with the clocking system did not have the same amount issues as the Claimant, some were in the previous year and some were not on the same dates and times as the Claimant. The letter stated that the Claimant understood it was his responsibility to inform management of any issues with the system. The letter concluded that the issue with the Claimant clocking in and out remained and that he had not provided sufficient or compelling reasons for the original decision to be altered and the appeal was unsuccessful.

56. The Claimant did not claim benefits after his dismissal.

57. The Claimant registered with two agencies after his dismissal and got work with Gist for a short period through one of them. He worked for 12 days with Gist for four hours a day at £8 an hour.

58. He also went to Queenslie Industrial Estate and handed in his CV to all the businesses on the estate. One of them, United Wholesale, offered him work and he worked for them from 30 September to 3 October 2019. He worked 8am to 6pm at £8 an hour.

59. In the meantime, he had also applied for a job with Euro Carparks that he had learned about from a family member. He was interviewed on 4 October and offered the job at the end of the interview. He commenced employment in this job on 7 October 2019 earning £20,500 a year gross and his take home pay was £1400 a month.

Respondent's submissions

60. The Respondent's agent made the following submissions.

61. He stated that the reason for the Claimant's dismissal was a potentially fair reason; it was conduct arising from the failure to clock in and out properly.

62. He advanced three simple statements of law which applied to this case:-

    a. It is enough for the decision to dismiss to be within the band of reasonable responses.

    b. When assessing fairness, the Tribunal should look at the information available to the decision-makers at the time.

    c. It is not for the Tribunal to substitute its own decision.

63. The following submissions were made in relation to the fairness of the decision:-

    a. It was reasonable for the decision-makers to conclude on a factual basis that the Claimant was not clocking-in or out properly.

    b. The witnesses had looked at the log of anomalies which showed different kinds of issues; the Claimant seemed to have come in late and left early; Mr Wiseman had listened to the explanation for these and on the whole been satisfied; there were also instance where the Claimant clocked out or in but not both, usually at lunchtime (for example, 10 & 16 January, 12, 13 & 18 February, 12 March); on 21 February, there was a missing clock-in with three recorded where there should be two or four.

    c. Mr Wiseman was entitled to find that there was no proper explanation for these instances. There was a suggestion that the button may have stuck but neither Mr Wiseman nor Ms McWee had it explained to them why this only happened at lunch or why the Claimant could not use a different machine. When the machine did not work then the name of the employee would not appear on the screen; the Claimant would have been aware of this and raised it.

d. In terms of the statements produced by the Claimant, it was submitted that there were various issues with these:-

   i. P178 – this statement did not describe the problem.

   ii. P179 – this related to a problem in 2018 and was a problem which soon became evident and not similar to this case.

   iii. P180 – this statement related to issues in June and July 2018 and only lasted a week.

   iv. P181 – this was limited to a few dates and was a different issue.

   v. P183 – this related to an unauthorised absence when the employee was not clock in at all.

e. It was confirmed that CCTV was asked for and not provided by the client. It was not clear what additional steps could be taken.

f. The personal conflict raised by the Claimant was not mentioned in the investigation meeting and only at the disciplinary. There was no suggestion that the logs had been falsified.

g. Enquiries were made at the end of the disciplinary and appeal hearings. Taken as a whole the dismissal was fair. In any event, further investigations would have made no difference because the additional information was against the Claimant.

h. In terms of whether there were sanctions other than dismissal, it was submitted that the Claimant was aware that the November 2018 disciplinary hearing was related to clocking-in and he had agreed that he needed to clock in and out every time. He was aware of the importance of this from a safety perspective to the client.

64. In terms of compensation, if the Tribunal found that the Claimant had been unfairly dismissed, the following submissions were made:-

a. The start date for the Claimant should be taken as 15 November 2010 as this is the date recorded at p129. In this case, his length of service would be 8 full years.

b. If the Tribunal finds that the dismissal was procedurally unfair then a *Polkey* deduction should be made because any such failings would make no difference and so a 100% reduction should be made to both basic award and compensatory award.

c. In addition, a deduction for contributory fault should be made; the Claimant failed to check the screens to ensure he was clocked in or out and had he done so then he would have been aware of this allowing him to report this.

Claimant's submissions

65. The Claimant made the following submissions.

66. He believed that he could have been given a warning before the final written warning and that the Respondent let this build up too much.

67. He could not understand why CCTV was not viewed and why the Respondent could not speak to BS employees about the problems they had with clocking in.

68. He admitted that he had made some mistakes but he had been there 10 years.

69. In relation to contributory fault, he submitted that he only knew sometimes that the machine had no registered him.

Relevant Law

70. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

71. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is conduct.

72. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

73. The test for whether a dismissal on the grounds of conduct (or misconduct) is set out in the well-known case of ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**.

74. The test effectively comprises 3 elements:-

    a. A genuine belief by the employer in the fact of the misconduct

    b. Reasonable grounds for that belief

    c. A reasonable investigation

75. It is important to note that, due to changes in the burden of proof since *Burchell*, the employer only has the burden of proving the first element as this falls within the scope of s98(1) with the second and third elements falling within the scope of s98(4).

76. In order for there to be a reasonable belief, especially where there is a dispute as to whether or not the employee committed the misconduct in question, the employer must have some form of objective evidence on which to base their conclusion.

77. If the Tribunal is satisfied that the requirements of *Burchell* are met then they still need to consider whether dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

Decision

78. The Tribunal will address each of the issues it requires to determine in assessing the fairness of dismissal in turn.

Was there a potentially fair reason for dismissal?

79. The Tribunal held that the Respondent had shown that they had dismissed the claimant for reasons which would fall within "conduct" for the purposes of s98(1) ERA and that there was, therefore, a potentially fair reason for dismissal.

80. The Claimant had not sought to argue that the reason for his dismissal could not fall within the description of "conduct".

81. In these circumstances, the Tribunal was of the view that the reason given by the employer clearly fell within that category of potentially fair reason.

Did the respondent have a genuine belief in that the claimant had committed the misconduct in question?

82. The Claimant sought to suggest that the client (that is, Ms McLaughlin) had a personal agenda in seeking to have him dismissed.

83. The Tribunal made no findings as to any motivation that Ms McLaughlin may or not have had in relation to the Claimant. Indeed, it considered that this was entirely irrelevant to the issues to be determined. What mattered was the Respondent's motivation in the context of whether there was a genuine belief on their part.

84. There was no evidence to suggest anything other than a genuine belief on the Respondent's part; they were faced with an employee who, on the face of the clocking logs produced, had not been following the proper process. They proceeded to address that through the disciplinary process and there was no evidence that they had some other motive for this. Indeed, the Claimant did not lead any evidence to suggest any other motive on the Respondent's part and his evidence was focussed on the motive of the client.

85. In these circumstances, the Tribunal finds that the Respondent had a genuine belief that the Claimant had committed the misconduct in question.

Had there been a reasonable investigation?

86. The Tribunal has examined the steps taken by the Respondent to investigate at each stage of the disciplinary process and examined this process as a whole to consider whether any investigation was reasonable.

87. The investigation by Mr Lorimer can be described as cursory at best. Other than speaking to the Claimant, there was no evidence that he took any steps to investigate the allegations against the Claimant. Indeed, the Claimant made more effort than Mr Lorimer to gather further information about the allegations.

88. This is despite the fact that Mr Lorimer had indicated, during the investigatory meeting, that he would look into various matters further and the Claimant had asked for specific points to be checked in circumstances where he could not recall, for example, when he had taken holidays. Mr Lorimer did nothing further and simply escalated the matter to a disciplinary hearing.

89. Mr Wiseman did take some steps to investigate further such as asking for CCTV footage, looking at Mr Hain's clocking record and speaking to the client about the statements provided by the Claimant (although it is noted that he did not speak to the Claimant again about what these steps disclosed after taking them).

90. However, what he did not do is interview any other employee of the Respondent about the case. The Tribunal considers that it would have been both reasonable to do so and that this failure is significant for two reasons.

91. First, given that the Claimant had asserted problems with the clocking machines and produced statements in support of this assertion, it would have been reasonable for the Respondent to investigate this further and an obvious option for them was to speak to their other employee to determine whether any of those other employees had faced similar problems and the degree to which they faced these.

92. Second, Mr Wiseman's evidence was that a material factor in his decision to dismiss was his view that the Claimant was taking excess time for his lunch and was seeking to avoid this being spotted by not clocking in or out at lunchtime. It would have been reasonable for him to investigate this further by asking other

employees (which would include the Claimant's supervisor) whether there had been any issue with the Claimant leaving early for lunch or coming back late.

93. Further, this matter was not even put to the Claimant, either at the disciplinary hearing or in the dismissal letter, to allow him the opportunity to rebut the assumptions being made by Mr Wiseman, either at the hearing or in his appeal (which meant that this could not be cured on appeal).

94. The Tribunal considers that a reasonable employer faced with the assertion from the Claimant that there was an alternative explanation for the alleged misconduct and having a suspicion that the Claimant's actions were intended to disguise misconduct would take steps to investigate those further.

95. A similar consideration applies in relation to the appeal by Ms McWee. She did not proceed on the view that the Claimant was taking excessive lunch breaks but she was faced with the same assertion regarding the alleged issues with the functioning of the clocking machines. A reasonable employer would have interviewed other staff to identify if there were such problems.

96. Ms McWee did assert that she interviewed other employees but, for the reasons set out above, the Tribunal did not consider this assertion to be credible and reliable.

97. The Claimant did make other complaints about the investigation specifically in relation to viewing CCTV. The Tribunal accepted that the Respondent did ask for CCTV footage from their client and that this was refused. It is difficult to see what more the Respondent could do and the Tribunal considers that this does not, in itself, render the dismissal.

98. Taking the disciplinary process as a whole, and taking account of the size and resources of the Respondent, the Tribunal considers that the Respondent's failure to interview other staff about the issues which arose in the course of the disciplinary process (specifically, the Claimant's assertion of problems with the clocking system and Mr Wiseman's view of why the Claimant was missing clocking times at lunch) means that the investigation carried out by the Respondent was not reasonable.

Did the Respondent have a reasonable belief?

99. The Tribunal considers that the failings in the investigation go beyond a procedural issue and have a bearing on the question of whether the Respondent had formed a reasonable belief.

100. In relation to Mr Wiseman's view that the Claimant was taking excessive time off at lunch, the lack of a reasonable investigation means that there was no objective evidence to support this view other than the coincidence in times and so his conclusion was not one which was reasonable in all the circumstances of the case.

101. However, the Tribunal has taken account of the fact that this was not a factor in Ms McWee's reasoning at the appeal and that the process as a whole was concerned with the fact that the Claimant had anomalies in his clocking records and whether there was an explanation for this. There were clearly anomalies in the Claimant's record and the Tribunal therefore had to assess whether the Respondent's belief that there was no explanation for these anomalies was one which they could reasonably hold.

102. There is no question that the Claimant presented an explanation which was rejected by the Respondent. The Tribunal considers that, given the lack of any effort by the Respondent to interview other employees to investigate if they had similar problems with the clocking system, the Respondent did not have any objective evidence on which they could reject that explanation.

103. Indeed, the Tribunal considers that Mr Wiseman did not approach the Claimant's explanation with an open mind and had pre-judged the matter. The note of the disciplinary meeting clearly shows that Mr Wiseman had taken the view that the BS system could not be flawed and that BS would not use a flawed system before the Claimant had presented the statements he had obtained. The Tribunal considers that these comments demonstrate a closed mind on behalf of Mr Wiseman.

104. Mr Wiseman's view of the BS system was based solely on the assertion that if there was a problem then others would have had similar problems. He was then

presented with evidence that others did have such problems but this did not affect his thinking at all.

105. The only thing which Mr Wiseman did when presented with this evidence was to ask the client about what was said in these statements and then accepted, without question, the explanation that these workers had not had problems clocking in but, rather, that they had issues in accessing parts of the site. With all due respect to Mr Wiseman, a plain reading of the statements provided by the Claimant make no mention whatsoever about accessing parts of the site and clearly talk about problems with clocking in. The Tribunal was of the view that the alacrity with which Mr Wiseman accepted the client's explanation was yet more evidence that he had closed his mind on this matter.

106. In these circumstances, the Tribunal considers that it was not reasonable for Mr Wiseman to reject the evidence presented by the Claimant based solely on the explanation from the client and in the absence of any evidence that contradicted the Claimant's evidence.

107. The Tribunal also considers that Ms McWee's reasons for rejecting the Claimant's evidence were not ones which provide a reasonable explanation for doing so. She stated that she did not put any weight on the statements provided by the Claimant because they were provided by BS employees and not those of the Respondent. Yet, as she accepted in cross-examination, both groups of employees used the same machines and the same system for clocking in and out.

108. She also took issue with the timing of the problems that others had with the clocking system. However, the Tribunal could not see why the fact that others had problems at different times means that the Claimant could not have had problems on the days on which he had anomalies. If anything, this suggests there are long-running or repeat problems with the system. In any event, at least one statement very clearly stated that the person in question had checked the very same dates on which the Claimant had anomalies and found that they had the same. However, this statement was disregarded by Ms McWee.

109. Looking at the disciplinary process as a whole, the Tribunal considered that the Respondent had not held a reasonable belief that the Claimant had failed to properly follow the clocking procedure. In particular, Mr Wiseman came to a view as to why there were anomalies at lunchtime on the basis of no objective evidence and both he and Ms McWee did not act reasonably in rejecting the evidence provided by the Claimant to support his explanation that the clocking system did not function properly and, instead, concluding that he had not properly followed the clocking process.

Did the Respondent follow a fair procedure?

110. The Tribunal has already identified that the Respondent did not carry out a reasonable investigation in relation to a failure to interview other employees and also the failure to put to the Claimant that he was, in Mr Wiseman's opinion, taking excessive lunch breaks.

111. However, there were also other issues in the process followed by the Respondent. In particular, the Respondent was singularly incapable of correctly addressing correspondence to the Claimant with multiple letters going to the wrong address and, in one instance, to the wrong "Michael Donnachie".

112. In most circumstances, such failures would not, in the Tribunal's view, be sufficient to render the dismissal unfair especially where the correspondence was ultimately delivered to the Claimant.

113. However, one of the pieces of correspondence which was not addressed properly was the Claimant's final written warning. As a result, the Claimant was unaware that he was under the shadow of this warning for months. The Tribunal did note the Claimant's evidence was that, after the November hearing, he was aware of the need to ensure he clocked in and out properly so it cannot be said that the Claimant did not know that he was under scrutiny in relation to this issue.

114. The warning is highly relevant to the question of whether dismissal was within the band of reasonable responses which will be addressed below and the Tribunal did consider that the failure to deliver the warning did have an impact on whether the Claimant had an opportunity to appeal the warning.

115. The Claimant gave evidence that he did not think he could appeal the warning when he received it in March 2019 because it said it had to be appealed within 5 days of the letter which was dated November 2018.

116. Ms McFarlane gave evidence that she believed that a letter would have been issued by HR in March 2019 explaining that the November letter had not been sent due to an administrative error and giving him the opportunity to appeal. However, no such letter was produced in evidence and Ms McFarlane's evidence was speculative as to what she believed would have been done and not what was done.

117. None of the managers who held the various hearings in the later disciplinary process addressed the issue of the warning and the Claimant's opportunity to appeal. All of them sought to deflect this issue and none of them suggested that the Claimant be given to appeal that warning at that later time given the issues that there had been with this.

118. In the Tribunal's view, the Respondent did not follow a fair procedure overall in the failure to properly investigate the case, the failure to put Mr Wiseman's opinion on the Claimant's conduct to the Claimant, the failure to timeously inform the Claimant of his final warning allowing him the opportunity to appeal this.

Was dismissal in the band of reasonable responses?

119. In light of the Tribunal's conclusion on the issues above, the issue of whether dismissal was in the band of reasonable responses was academic to a degree as it had concluded that the dismissal was substantively and procedurally unfair. However, the Tribunal has addressed this issue for the sake of completeness.

120. The Tribunal does not consider that it can be within the band of reasonable responses for the Respondent to dismiss the Claimant in circumstances where it was not reasonable for them to have concluded that the Claimant had failed to follow the clocking in process.

121. The Tribunal does take account of the existence of the Claimant's final written warning and, had the Respondent reached a reasonable belief, this would have meant that dismissal was a sanction open to the Respondent although there

would still have been the issue of the procedural fairness where the Claimant had not been offered a proper opportunity to appeal the warning.

Conclusion

122. The Tribunal held that, although there was a potentially fair reason for dismissal and that the Respondent held a genuine belief in that reason, the Claimant's dismissal was unfair because the Respondent had not reach a reasonable belief after carrying out a reasonable investigation, the procedure followed was not fair and dismissal was not within the reasonable band of responses.

Remedy

123. There were a number of issues that the Tribunal required to determine in considering what compensation it would be just and equitable to award in respect of the claim for unfair dismissal.

124. First, it was submitted on behalf of the Respondent that the Claimant's compensation should be reduced under the *Polkey* principle in circumstances where the Tribunal found that the dismissal was procedurally unfair.

125. In light of the Tribunal's findings that the Claimant's dismissal was not just procedurally unfair but also unfair on substantive grounds, the Tribunal did not consider that any reduction of compensation on the *Polkey* principle should be applied.

126. Second, the Respondent had submitted that a deduction should be made for contributory fault on the basis that the Claimant had failed to clock in and out on occasion.

127. The Tribunal did consider that the Claimant had contributed to his dismissal; there was undisputed evidence that the machines used to clock in and out would indicate on their screens if the process had been successful. In these circumstances, it would have been obvious to the Claimant, if he paid attention to the screen, whether or not the process had worked. He could then have flagged this with security or with his employer. The Claimant did not do so and, as a result, problems with the process had not been brought to the Respondent's

attention until such time as the Claimant had accumulated a number of anomalies and the Respondent's client had raised concerns.

128. The Tribunal has to consider the amount of any reduction for contributory fault and whether it should apply to either basic award, compensatory award or both.

129. The Tribunal considered that a reduction of 50% should be applied; it considered that the failure of the Claimant to pay attention to the screens on the machine and raise problems with the process had had a significant contribution to his dismissal given the fact that this lead to him accumulating anomalies to the point it became a concern. The Tribunal balanced this against the fact that there were significant failings by the Respondent in dismissing the Claimant as set out above and it would not be just and equitable to reduce any award by such a degree as to not adequately compensate the Claimant for those failings.

130. The Tribunal was also of the view that the reduction for contributory fault should only apply to the compensatory award.

131. Turning now to the calculation of the award to be made and starting with basic award. The Claimant was 30 years of age when he was dismissed and had been employed with the Respondent for 9 complete years. He was paid £313.38 per week gross. He was therefore entitled to a basic award of 8.5 weeks' wages at £313.38 per week = **£2663.73**.

132. The Claimant sought damages for loss of wages from the end of his employment with the Respondent. The Claimant found new employment which replaced the wages he had with the Respondent on 7 October 2019. The Claimant's period of loss was, therefore, 20 weeks. The Claimant earned £261.69 a week net with the Respondent. The Claimant's loss of earnings are therefore 20 weeks at £261.69 a week = £5233.80.

133. The Claimant did earn money from temporary employment during the period of loss:-

    a. He was paid £8 an hour at Gist working for fours a day for 12 days - £384.

b. He was paid £8 an hour at United Wholesale working 8 hours a day for 4 days - £256

134. The Claimant's net loss of wages was therefore **£4593.80.**

135. The Tribunal considered that **£350** was an appropriate sum to award in respect of loss of statutory rights.

136. The unadjusted compensatory award is, therefore, £4943.80. The amount after application of the reduction for contributory fault is **£2471.90.**

137. The total compensation award is, therefore, **£5135.63**.

Employment Judge: P O'Donnell

Date of Judgement: 25 February 2020

Entered in Register,

Copied to Parties: 28 February 2020