EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Rizwan Ali	**v**	(1) British Telecommunications Plc (2) Aurelius Alpha Limited (3) Rivus Fleet Solutions Limited

Heard at: Bury St Edmunds **On:** 30 and 31 July 2020

Before: Employment Judge M Warren

Appearances
For the Claimant: In person.
For the Respondent: Mr M Sellwood (Counsel).

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals
This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

JUDGMENT

The claimant's claims of unfair dismissal and for notice pay fail and are dismissed.

REASONS

Background

1. After early conciliation between 4 October and 14 October 2019 following dismissal on 9 July 2019, Mr Ali issued these proceedings claiming unfair dismissal and notice pay on 18 October 2019. The case was listed for a hearing in Cambridge over 2 days starting on Thursday 30 July 2020. Unfortunately, because of the Covid-19 crisis it has not been possible for the hearing to go ahead as an attended hearing. Fortunately, we were able to proceed using the HMCTS CVP Platform without objection and without significant difficulty. I am grateful to the parties and witnesses for their co-operation, which helped ensure that this hearing was possible.

Issues

2. The respondent says that it dismissed Mr Ali by reason of his conduct, that conduct being, to use shorthand, clocking offences.

3. Mr Ali identified to me at the beginning of the hearing that the reasons he says his dismissal was unfair were in summary, as follows:

   3.1 He was targeted for raising a grievance about underpayment of holiday pay.

   3.2 He was dismissed in order to save costs.

   3.3 He was dismissed in order to avoid payment of a redundancy payment.

   3.4 Two other people who did the same as he did were not dismissed.

   3.5 Although he had gone home as alleged, he was working from home.

   3.6 That he was not suspended and continued working for three months after the conduct was discovered, demonstrated that the respondent did not genuinely regard his conduct as gross misconduct.

   3.7 His appeal was not heard by an independent third party.

   3.8 The respondent deleted a remark by the Appeal Officer, (Mr Read) from a recording of the appeal hearing, words to the effect that Mr Ali, "would not do it again" as an explanation for why he was not suspended.

   3.9 No one from Human Resources attended the disciplinary hearing or the appeal hearing, which was a breach of policy.

   3.10 The respondent used incomplete data from software called Harrier.

4. Mr Ali confirmed that he did not pursue the complaint raised in his claim form that the Appeal Officer was not senior to the Disciplinary Officer.

Evidence

5. I was provided with a bundle in pdf format in three parts, running to page number 355, with a separate index. I was assured in respect of each witness that those witnesses had the bundle available to them and it was possible for them to be referred to pages in the bundle.

6. I had before me witness statements for the claimant as follows:

   6.1 Mr Ali.

   6.2 Mr Rochester, Mr Ali's Trade Union representative.

   6.3 Mr Beizsley, Mr Ali's former manager.

   6.4 Mr Cooper, a former colleague.

   6.5 Ms Pestell, a former colleague.

7. For the respondents I had witness statements from:

   7.1 Mr Rideout, Mr Ali's manager at the time of dismissal and Investigating Officer.

   7.2 Ms Bairstow, the Dismissing Officer.

   7.3 Mr Read, Appeal Officer.

8. I heard oral evidence from Mr Ali, Mr Rochester, Mr Beizsley, Mr Rideout and Mr Read.

9. Most notably, I did not hear oral evidence from the Dismissing Officer, Ms Bairstow. I was informed that she no longer works for the respondent and was not willing to attend voluntarily. Her witness statement bearing her signature and dated 7 June 2020 states that she had taken voluntary redundancy in September 2019.

10. I did not hear oral evidence from two of Mr Ali's witnesses, Mr Cooper and Ms Pestell.

11. Although I read and took into account the evidence contained in the witness statements of those witnesses who did not attend, I treated such evidence with circumspection as they were not here to have their evidence challenged under oath. That includes the evidence of Ms Bairstow.

12. There are other documents that I received separately, not within the bundle. Namely, the transcripts of two recordings of the disciplinary and appeal hearings. I was also provided with the recordings. I listened to a part of the recording of the appeal hearing that I was directed to by Mr Ali, more of which is discussed below.

13. At the outset of the hearing after a short introduction and identification of the issues, I adjourned to read the witness statements. I did not have time to read the documents referred to in the witness statements. Upon resuming, I explained that to the parties and also made the usual point that a Tribunal does not read a bundle in its entirety, it will only look at those documents to which the parties direct it.

The Law

14. Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

> "*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)*
>
> *(a) depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

15. We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden of proof in respect of the reasonable grounds and the investigation is neutral.

16. If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

17. The band of reasonable responses test also applies to the question of whether or not the employer's investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.

18. I should look at the overall fairness of the process together with the reason for dismissal. It might well be that despite some procedural imperfections, the employer acted reasonably in treating the misconduct as sufficient reason for dismissal, see Taylor v OCS [2006] IRLR 613.

19. In this case, the respondent says that Mr Ali was guilty of gross misconduct, justifying dismissal without warning. The test for gross misconduct, or repudiation, 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 its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.

20. Section 207(2) of the Trade Union & Labour Relations Act 1992 provides that any Code of Practice produced by ACAS under that Act which appears to an Employment Tribunal to be relevant shall be admissible in evidence and shall be taken into account. One such code of practice is the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). I have had regard to that code in reaching my decision.

Facts

21. It was agreed that the correct respondent is Rivus Fleet Solutions Limited, (a company formally known as BT Fleet Solutions Limited) which is the third respondent. The third respondent is owned by Aurelius Alpha Limited, that is the second respondent, which bought the third respondent from British Telecommunications Plc in October 2019. The claims against the first and second respondents should be dismissed in any event.

22. The respondent manages fleets of vehicles for customers. Mr Ali had been employed as a customer service advisor since 19 November 2011.

23. The respondent's disciplinary policy includes in its non-exhaustive list of examples of gross misconduct, copied in the bundle at page 295, the following:

> "• Theft, fraud or other acts of dishonesty (like deliberately falsifying records to inflate your commission or expense claims, abusing your company credit card, phone and expenses).
>
> …
>
> • Any behaviour, either at work or externally that could have a negative impact on our business, brand or reputation (including doing something obscene, indecent or malicious) or that has significant negative impact on your role.
>
> • Serious misuse of our systems, like email, intranet, internet and equipment, eg mobile phone/laptop (including breaches of the acceptable use, internet, social media or phone policies).

…

- Seriously breaching our Standards of Behaviour policy (including breaking the rules on conflict of interest, offering or receiving a bribe, anti-corruption and bribery)."

24. The Standards of Behaviour policy includes the following:

> "**Use of company systems and services**
>
> Our company computer system is vital to the operation of our business and contains a lot of highly confidential information which could seriously damage our business if it were disclosed. Therefore it's really important that our information and information systems are protected. Please ensure you read and understand our information security policies in relation to Acceptable Use and BT Security Policies."

25. The Acceptable Use policy under the heading, Systems & Information security, includes the following:

> "1.1.2 We will not let anyone else use our user accounts or system access …
>
> 1.1.4 We will not bypass, attempt to bypass, or disable security controls …
>
> 1.1.7 We will not tamper or misrepresent our identity to obtain physical or logical access …
>
> 1.1.9 We are all personally responsible for keeping our assets and the things we use to do your jobs safe and secure (eg passwords, information, computing equipment, ID cards, security keys etc)."

26. Mr Ali worked weekend night shifts: Friday, Saturday and Sunday nights, 7pm to 7am for which he was paid a supplement shift allowance for unsocial hours. That supplement represented a monthly payment of £1,540 out of a total gross pay of £3,774.

27. Mr Ali was engaged on a contract the respondent held to provide a 24 hour vehicle maintenance and repair service to Network Rail. He worked in a building with Network Rail staff. One other person worked on that shift with him, Mr Cooper. It was a term of the respondent's contract with Network Rail that two people would be on site at the service desk at all times, including at night time and at weekends.

28. Mr Ali's role included taking telephone calls in relation to issues with vehicles. Those calls were taken using software called Harrier. It is common ground that over a weekend night time shift, only one or two calls would be received.

29. Between 2012 and 2015 Mr Ali was managed by Mr Beizsley. Mr Beizsley left the respondent's employment in 2015 and a Ms Kay Cotton became Mr Ali's manager until Mr Rideout took over in 2017.

30. When Mr Rideout took over management of Mr Ali and his colleagues, there was an outstanding grievance by Mr Ali and his colleagues with the respondent about their shift allowance not being reflected in the holiday pay that they received, (an issue arising out of the case of Lock v British Gas). Mr Rideout resolved that outstanding issue, which resulted in back payments being made in respect of holiday pay. Unfortunately, someone made a mistake in the calculations and treated a month as equating to 4 weeks, which meant that there remained an underpayment. This too was resolved, but not as quickly as Mr Ali and his colleagues would have liked. Through his Union, Mr Ali and his colleagues raised a grievance. There is a dispute as to whether or not that grievance was, "against" Mr Rideout. The grievance is not in the bundle. Mr Ali complains that the respondent has failed to disclose this. Equally, one would have thought Mr Ali would himself have had a copy of the grievance raised on his behalf or that he would have been able to obtain a copy of it from his Union and through his Union representative, (who has attended today to give evidence) but he has not done so. Mr Rochester, (Mr Ali's union representative) was taken to passages in the appeal transcript in which he stated that Mr Ali's grievance was not personal against Mr Rideout, but was against the respondent. He was unable to deal with that point adequately in cross examination and on the basis of this evidence, I find that the grievance was not raised against Mr Rideout personally, although it may have been delivered to him as the manager of the people who raised the grievance.

31. Part of Mr Ali's point is that Mr Rideout refused to deal with initial emails pointing out the miscalculation. Those emails are not in the bundle. Mr Ali criticises the respondent for not disclosing them. Equally, one might have thought that Mr Ali would have had access to them, but I would accept the greater blame probably lies with the respondent for failing to disclose these emails. I find it more likely than not that Mr Rideout did not deal with those emails promptly, or at least the respondent did not act swiftly enough, which caused the grievance to be raised through the Union.

32. In 2019, the respondent lost the Network Rail contract to a rival company, Hitachi. During the hearing in its latter stages, uncertainty arose as to whether the respondent had sold the business to Hitachi or whether it had lost the contract in a re-tender exercise. Mr Rochester said that it was a contract they had sold. He did so in the context of discussion from which it would have been apparent that it would have favoured the claimant if that was so. We all overlooked the fact that Mr Rideout's unchallenged evidence the previous day, (paragraph 9 of his witness statement) was that the respondent had lost the Network Rail contract to a competitor, (Hitachi) in a re-tender exercise. I find that to be the case.

33. The respondent was to cease working on the Network Rail contract on 31 July 2019. The Transfer of Undertakings (Protection of Employment) Regulations 2006 [TUPE] would of course apply. The operation was to transfer from Milton Keynes to Trowbridge. The respondent's employees engaged on the Network Rail contract had the option of either transferring to Trowbridge or taking redundancy, which under TUPE would have been payable by the transferee, Hitachi.

34. That the contract had been lost to Hitachi became public knowledge in early 2019.

35. Someone called Ms Fatile worked on the weekend day shift. In the autumn of 2018, the respondent had issues with Ms Fatile being late for work and not being contactable. This led Mr Rideout to call for data on times at the weekend when staff on the contract were arriving and leaving for a period of 8 weeks during October and November 2018.

36. The data collected included:

    36.1 When staff swiped in and out through security barriers to the building in which they worked;

    36.2 When they logged into the respondent's system for monitoring attendance, called Silverlight; and

    36.3 When they logged into and out of the telephone software called Harrier.

37. Mr Rideout found that there were occasions when Mr Ali had swiped to exit the Network Rail building and had logged off Harrier, but had remained logged into Silverlight. It looked to him as if Mr Ali and Mr Cooper were logging each other in and out of Silverlight, so that it appeared that they were still at work, whereas they had not yet arrived, or had left the building.

38. Mr Rideout raised the matter informally with Mr Ali, explaining the issue to him in an email of 8 March 2019, (page 100) followed by an informal discussion on 11 March 2019. Mr Ali said that he understood he was allowed to work from home, provided that the second team member was on the premises. He provided an email from Mr Beizsley giving him permission to work from home on a particular specific weekend.

39. It was decided that these matters warranted formal investigation, which was to be carried out by Mr Rideout. He conducted a formal fact finding interview with Mr Ali on 29 March 2019, the notes of which are at page 106.

40. Mr Cooper was also investigated and interviewed, as was Ms Fatile, for similar issues. Mr Rideout also interviewed Mr Ali's supervisor, Ms Edwards.

41. Mr Ali subsequently supplied further emails from both Mr Beizsley and his successor as Mr Ali's manager, Ms Cotton. Those emails were further examples of those manager's giving him permission on specific occasions to work from home.

42. During the interview with Mr Rideout, Mr Ali confirmed that he had never been given permission to decide for himself when he or his colleague could work from home. He did not think this was a problem, reciting the fact that he could produce emails of examples when he was granted permission to work from home on specific occasions.

43. When it was put to him during the fact finding interview that in the space of about 8 weekends, he appeared regularly to have left site from between 2 and 5 hours before the end of his shift, appeared to have travelled home but not to have logged back into Harrier when arriving home, Mr Ali's explanation was that would probably have been times when he felt unwell or tired during his shift and so had chosen to drive home for his own safety. He also confirmed that he understood that the practice of leaving work early was wrong. He said that the reality was there was simply very little work to be done.

44. Mr Rideout's conclusions as a result of the investigations were that:

    44.1 Mr Cooper and Mr Ali had admitted a common practice, one would go home and the other remained at work, both would remain logged in to Silverlight and the one who remained at work would log them both off at the end of the shift.

    44.2 Mr Ali had accepted he had not had permission to go home as and when he wanted.

    44.3 Ms Edwards had confirmed that she had not given either of them permission to return home so long as one remained in the building.

    44.4 Mr Ali admitted he knew that going home early was wrong, his excuse was that there was little to do.

45. Mr Rideout decided to recommend disciplinary action, set out in his investigation report dated 3 April 2019, (page 104).

46. Mr Cooper and Ms Fatile were investigated, but both resigned before any disciplinary action could be taken against them.

47. There was delay in finding a Disciplinary Officer, but on 21 June 2019 a letter was written to Mr Ali inviting him to attend a disciplinary hearing, (page 125). The allegations stated in this letter were that Mr Ali had falsified records for financial gain, had unauthorised absences from work, had abandoned his duty and had wasted company time.

48. Particulars of the allegations set out in the letter were that on multiple occasions between 28 October and 30 December 2018:

    48.1 A colleague had logged him on and off the Silverlight system and that he had done the same for colleagues, in order to give the false impression that he had remained on site for the duration of his shift, for which he was paid a premium rate.

    48.2 That he had left site early, in some cases up to 5 hours before the end of his shift, in order to return home to work without permission.

    48.3 That he had failed to log back into the Harrier system when working from home, thus being unable to accept calls from customers.

    48.4 He had travelled home during working hours without permission from his line manager.

49. The letter informed him of his right to be accompanied and enclosed the investigation report, the documentary evidence and the disciplinary policy and procedure.

50. The disciplinary hearing took place on 3 July 2019. Mr Ali was accompanied by his Trade Union representative Mr Rochester, who was the local branch secretary. The hearing was recorded. One of Mr Ali's complaints is that nobody from Human Resources attended. He accepted in cross examination that no policy of the respondent required Human Resources to attend a disciplinary hearing. He said that he thought as a matter of custom and practice, either another manager or somebody from Human Resources should attend. In fact, the Disciplinary Policy provides, (page 282) that if a meeting is recorded by consent, a notetaker need not attend and that Human Resources may attend.

51. In the transcript of the disciplinary hearing, I can see that Mr Ali said that the reason he had left early during the relevant period was because his mother was not very well and had been in hospital at the end of October. He acknowledged that he should have called someone to inform them. He did also say that at two or three o'clock in the morning, it was pointless trying to do so. He acknowledged he had never asked Mr Rideout for authority to leave because he was strict. He acknowledged that he should have permission. In cross examination, he accepted he had not gone to Mr Rideout for permission to leave early because he thought he would say no.

52. The disciplinary hearing was chaired by Ms Bairstow. After the hearing, she investigated some points raised by Mr Ali. She confirmed with Mr Rideout that Mr Ali had not been the only person investigated, Mr Cooper and Ms Fatile had also been investigated, but they had resigned. She discussed with Mr Rideout a complaint Mr Ali had made to the effect that Mr Rideout had not given him a return to work meeting after Mr Ali had been absent from work a period of time due to stress in

February 2019. Mr Ali had referred to this as illustrating his poor working relationship with Mr Rideout. Mr Rideout confirmed that he had not conducted a return to work interview, which he acknowledged was an oversight on his part.

53. Ms Bairstow found the four allegations proven and she found that they amounted to gross misconduct. Her decision was that Mr Ali should be dismissed without notice. She confirmed her decision in a letter dated 8 July 2019, (page 136). The letter included a rationale for her decision, which begins at page 139. This includes the following:

    53.1 One reason offered for leaving work early by Mr Ali was his mother's illness, she did not accept that as a reasonable excuse.

    53.2 The emails Mr Ali had produced were from managers who had given him permission to work from home on specific occasions, which simply demonstrated that he knew he needed express permission to work from home on any occasion.

    53.3 She did not accept that relationship issues between Mr Rideout and Mr Ali prevented Mr Ali from obtaining permission to leave early or work from home.

    53.4 Mr Ali did not have authority to go home early. That others may have been doing so was not an excuse.

    53.5 Mr Ali was not the only person investigated.

    53.6 Mr Ali's absences could have jeopardised the respondent's relationship with its customer. He was in breach of security guidelines by sharing his log in details with others and allowing others to log in for him.

    53.7 He had not met the respondent's standards of behaviour.

54. By email dated 10 July 2019, Mr Ali appealed. His email is at page 143. There are eleven grounds of appeal:

    54.1 There had not been a fair investigation as witnesses had not been spoken to or statements taken.

    54.2 The issues relating to Mr Ali's grievance against Mr Rideout was not investigated.

    54.3 The Harrier phone information used had been demonstrated to be inaccurate.

    54.4 He did not admit misleading by logging on or off Silverlight. There was no proof of wrongdoing with regard to logging on or off.

54.5 Travelling home had been done during his lunch or down time, not in company time.

54.6 Working from home had been agreed by his supervisors.

54.7 No deception was used by Mr Ali, his entry and exit records are transparent.

54.8 The termination of his contract during the week of transfer to Hitachi saved BT £26,500 in redundancy payment.

54.9 There had been inconsistent outcomes for Ms Fatile and Mr Cooper.

54.10 His conduct could not be regarded as gross misconduct as the respondent chose not to suspend Mr Ali on discovering the conduct alleged.

54.11 The respondent had failed to follow its procedures and failed to comply with its duty of care, by not conducting a return to work meeting after absence due to stress and by not providing a night time work assessment or a lone working assessment.

55. The appeal hearing took place on 29 August. Mr Ali was accompanied by Mr Rochester again. This hearing was also recorded, therefore no one else from the respondent attended other than the Appeal Officer, Mr Read.

56. One issue arising out of the recording is that Mr Ali says that it is obvious the respondent has edited the recording at a particular point, (51 minutes and 11 seconds into the recording) to cut out Mr Read saying that the reason Mr Ali was not suspended was because Mr Rideout did not think Mr Ali would do it again. In the first place, having listened to the recording, I do not agree that it is obvious that the recording has been edited. No evidence that it has been edited has been produced, other than inviting me to listen to it. Furthermore, the transcript of the recording shows that on two occasions, (later in the recording) Mr Read specifically makes that precise point, that he thought Mr Rideout probably did not suspend Mr Ali because having discovered his conduct and it having been drawn to Mr Ali's attention, Mr Ali was not likely to do it again. Given that those statements appear twice in the appeal hearing, it is not plausible that the respondent went to the trouble of editing an earlier comment to the same affect. I find it more likely than not that the recording was not edited.

57. One further part of the appeal recording I was asked to listen to later during cross examination, is at 16 minutes and 23 seconds. Mr Ali suggested one could hear him telling Mr Read that everyone had the same log in details for Silverlight and that the password was 1234. Leading up to that point, the transcript and the recording clearly show that Mr Ali acknowledged that individuals had passwords and one needed the other persons passwords if one was to log in on their behalf. He implicitly

acknowledged that other people had given him their passwords so that he could log them in, but he expressly did not admit that he had shared his password with anybody else. Shortly after that, the recording becomes so quiet one cannot hear what is being said. I acknowledge I could just about hear the words, "1234". It was not possible to tell whether Mr Ali was telling Mr Read that everyone's password was 1234 or whether he was saying that his own password was 1234. Given what Mr Ali had said immediately before the recording went quiet, I find that it is most likely Mr Ali was not stating that everybody had the same password, but was saying that either he, or somebody else's password, was 1234.

58. Also of note in the appeal transcript is:

58.1 Mr Rochester expressly stated that the grievance was not against Mr Rideout, it was against the business.

58.2 Mr Ali said he felt Mr Rideout did not have his interests at heart, reciting his failure to provide him with a return to work meeting.

58.3 He said that he was going home because he was tired, not because he was sick.

58.4 Because of his relationship with Mr Rideout, he did not want to share the personal issue of his mother with him.

58.5 Mr Rochester suggested that Mr Ali had not been properly supervised or managed, which is what gave rise to the situation.

58.6 Mr Rochester also said "… he was doing the best for the company but he seems to have actually have [sic] a bit of a failing in what he failed err [sic] about being in that office".

58.7 Mr Ali gave as a reason for going home early, that there were no calls and nothing to do for 12 hours, so what difference did it make if he wanted to do some of his shift from home?

59. Mr Read's decision was to uphold the decision to dismiss. His appeal outcome letter is dated 4 September, (page 207) and again a rationale is attached to the decision letter, which is at page 208. I make the following observations from the outcome documents:

59.1 Mr Read noted that Mr Ali had not taken out a grievance specifically against Mr Rideout, but against the respondent and that Mr Rideout had spent time resolving the matter.

59.2 Mr Read agreed on investigating the data, that of 6 occasions when Mr Rideout had identified Mr Ali had not attended the building at all, on 5 such occasions he had in fact logged into Harrier at home and so was able to take calls. However, on examining the additional data which he had called for, he also noted that on those occasions,

Mr Ali had logged off Harrier early. In those instances, there were two offences being committed; firstly, that Mr Ali had not gone into work at all, without having permission not to do so and secondly, in any event whilst working from home, he had logged off and therefore stopped working, early, on one such occasion, 6 hours early.

59.3 From the additional data obtained, Mr Read had also found that when Mr Ali had gone into the Network Rail premises, there were very many occasions in the 8 week period when he had logged off Harrier early and consistent with that a few minutes later, had swiped out of the building but nevertheless, he had remained logged into Silverlight to the end of the shift.

59.4 Mr Read noted that Mr Ali had admitted logging others in to Silverlight using their log in, although he denied that others did that for him, or that he gave others his log in details.

59.5 Mr Read noted that the email evidence Mr Ali had produced to the effect he had been granted permission to work from home on specific occasions, merely confirmed in his mind that Mr Ali knew very well he had to have permission to work from home and did not get it.

59.6 Mr Read's conclusion was also that the process had nothing to do with the pending redundancy, nor was Mr Ali being targeted unfairly by Mr Rideout.

Conclusions

60. The first issue which I have to decide is whether or not Mr Ali was dismissed for a potentially fair reason. The respondent says that the reason for dismissal was conduct. Mr Ali says that the reasons for dismissal were variously, being victimised by Mr Rideout for raising a grievance against him, that the respondent was seeking to save costs and that the respondent was avoiding having to make a redundancy payment.

61. Clearly, a significant difficulty the respondent has is that the dismissal decision maker did not give evidence. I have had regard to her witness statement content, but treated it with circumspection because she was not here to have her evidence tested. However, that does not mean that I should automatically conclude that the reason for dismissal is as contended for by Mr Ali. Mr Ali's difficulty is the lack of credibility in the reasons for dismissal he puts forward.

62. Whilst the date for dismissal was very close to the date of transfer to Hitachi, the avoidance of a redundancy payment is unlikely to have been a motive. Because the respondent lost the contract to Hitachi in a tendering exercise, under the Transfer of Undertakings Regulations, if an employee is made redundant because of a transfer, it is the transferee, (i.e. in this

case Hitachi) that is responsible for the redundancy payment. Mr Ali had an option of either moving to Trowbridge or taking the redundancy. That was an option presented to him by Hitachi. If he chose not to go to Trowbridge, Hitachi would have to pay him the redundancy monies. His decision would be neither here nor there to the respondent.

63. For the same reason, Mr Ali's argument during the hearing that the respondent was trying to reduce costs by reducing the number of people in the team, simply does not make sense in the context that during the period in question, it was well known that the team was to be transferred to Hitachi.

64. There was no grievance against Ms Bairstow. It is possible that she could have been influenced by the fact that a grievance had been made against Mr Rideout but on balance, it is more likely she was not so influenced. Could it be that Mr Rideout has set up Mr Ali so that he would be dismissed, as an act of revenge for the grievance? Having heard evidence from Mr Rideout, I do not find that a credible assertion. I find that Mr Rideout was not so motivated.

65. Further, I find that a grievance was not raised against Mr Rideout personally. There is the potential for him nevertheless to have been irritated by the challenge of Mr Ali and his colleagues to the recalculations. However, as I have said, I find that was not a motive behind Mr Rideout's investigations and he did not, "set up" Mr Ali.

66. When one examines the evidence uncovered by Mr Rideout and Mr Read, one can see that the respondent had clear documentary evidence that Mr Ali was frequently and habitually leaving work early but remaining logged in, with his work colleague logging him out at the end of the shift. On 5 occasions in a 8 week period, he did not go into work at all. His actions were on every occasion, without authorisation. On the basis of that evidence and having regard to my foregoing discussion about the reasons put forward by Mr Ali, my conclusion is that it is more likely than not that the reason for dismissal was the potentially fair reason of Mr Ali's misconduct.

67. The fact that the respondent did not accede to Mr Ali's request that a third party from outside the respondent organisation be appointed to hear his appeal does not render the dismissal unfair. There is no reason to have departed from usual industrial relations practice in this case, by having the appeal heard by somebody independent of the Dismissing Officer and with the genuine freedom to overturn that decision if appropriate.

68. The absence from the Disciplinary and Appeal hearings, of somebody from Human Resources or indeed a second manager, does not render the dismissal unfair. There is no requirement in the respondent's policy for somebody from Human Resources or a second manager to attend, and even if there was such provision in the policy, failing to follow the policy would not necessarily render the dismissal unfair, it would depend upon

the circumstances. There was no unfairness in the way that these hearings were conducted. They were recorded so there can be no doubt about what was said and reading the transcripts, one can say that they have been conducted fairly.

69. There was in my view a thorough investigation, an investigation that was within the range of reasonable responses.

70. Mr Ali argues that the respondent should have gone further and obtained more data on the use of his work laptop on BT systems, (his repeated reference in evidence to Bitlocker). Mr Read explained that obtaining such data would be a time consuming and convoluted exercise within the BT organisation. In any event, it simply demonstrates that Mr Ali rather misses the point, which is that he was meant to be at work, he was not at work, he was pretending to be at work, and when at home, was often not logged into Harrier and therefore not in a position to do the prime duty incumbent upon him, which was to take telephone calls in the middle of the night relating to the vehicles for which the respondent was responsible.

71. On that basis there were reasonable grounds for Ms Bairstow and subsequently for Mr Read, to conclude that Mr Ali was guilty of the misconduct alleged.

72. Given the amount of evidence against Mr Ali, I conclude that it is more likely than not that Ms Bairstow's belief in his guilt was genuine. On the basis of that evidence and having heard oral evidence from Mr Read, I find that he also genuinely believed in Mr Ali's guilt.

73. That leads me to the question of whether the decision to dismiss was within the range of reasonable responses.

74. There is no inconsistency in the way that Mr Ali was treated as compared to his two colleagues. They were both investigated and both resigned before disciplinary action could be taken against them.

75. That a person has not been suspended from work when allegations arise is sometimes an indication that the allegations, if true, are not genuinely considered to be so serious as to amount to a fundamental breach of the contract of employment, entitling the employer to dismiss without notice. Equally though, suspension should not be a, "knee jerk reaction". Mr Rideout did not suspend Mr Ali because he was confident that once his practice of leaving work early to go home had been discovered, he was not likely to do it again. That does not alter the fact that once the investigation has been carried out and the facts established, the respondent is entitled to regard the conduct of Mr Ali as having been dishonest and amounting to a breach of the implied term of mutual trust and confidence, such that it would not feel able to trust him again going forward and therefore, to dismiss him.

76. Mr Ali was dismissed without notice and without prior warning. His dismissal was for gross misconduct. That is what we refer to as summary dismissal. Was that a decision by the respondent that was within the range of reasonable decisions a reasonable employer could reach on the facts? Of course, another employer might have given him a warning. I doubt it would have been as lenient as a first written warning, but perhaps a final written warning. However, the decision to dismiss can still be within the range of reasonable responses, even though a different employer may have been more lenient.

77. The fact of the matter is that Mr Ali was dishonest. He pretended to be at work when he was not. He went home without permission, when he knew he needed permission. He was on occasions, not available to take phone calls from service users when he should have been. He was paid a significant premium for working through the night at weekends. During the period investigated, he frequently did not do so. The decision to dismiss in those circumstances is within the range of reasonable decisions of the reasonable employer.

78. For these reasons, Mr Ali's claim of unfair dismissal and for notice pay fail and are dismissed.

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Employment Judge M Warren

Date: 11 August 2020

Sent to the parties on: .7 September 20

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For the Tribunal Office