EMPLOYMENT TRIBUNALS

Claimant: **Mr N Baldwin**

Respondent: **Harsco Metals Group Limited**

Heard at: **Cardiff** **On: 14 August 2020**

Before: **Employment Judge Harfield**

Representation:
Claimant: Mr Khan (Solicitor)
Respondent: Mr McGlashan (legal representative)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant's complaints of unfair dismissal and wrongful dismissal are not well founded and are dismissed.

REASONS

Introduction

1. The claimant presented complaints of unfair dismissal and wrongful dismissal on 14 January 2020. The respondent filed an ET3 response form denying the claims. The case was due to be heard on 14 May 2020 but due to restrictions arising out of the Covid19 pandemic it was converted to a telephone case management hearing. Case management orders were made and the case was relisted to 14 August [22- 29]. A further case management telephone hearing was heard by Employment Judge Howden-Evans on 30 June 2029 [30 -34] about attempts to retrieve CCTV evidence and other final preparatory steps for the hearing. A final case management telephone hearing took place before Employment Judge Moore on 12 August 2020 about attendance arrangements for the hearing.

2. The case came before me on 14 August 2020. The hearing took place in person with social distancing measures in place. This meant there were a limited number of individuals allowed in the Tribunal room at any time. However, the proceedings were broadcast into an observation room for observers which was, in effect, an extension of the Tribunal room. I had a bundle extending to 132 pages. Numbers in brackets in this decision relate to the page numbers in that bundle. I received written witness statements from the claimant and Mr Hennah for the claimant. I had written statements from Mr Bennett and Mr Feehan for the respondent. I also heard oral evidence from all witnesses. The respondent provided written closing submissions. Both representatives made oral closing submissions. I have not repeated all their submissions here but I have taken them fully into account. I was also given an agreed chronology, cast list and joint list of issues.

Agreed joint list of issues

3. The agreed joint list of issues are:

Unfair Dismissal

(1) Whether the respondent dismissed the claimant for a potentially fair reason falling within sections 98(1) or (2) of the Employment Rights Act 1996 ("ERA");

(2) Whether the respondent acted reasonably or unreasonably in treating the potentially fair reason as sufficient reason for dismissing the claimant, considering section 98(4) of the ERA. In particular whether:

(2.1) the respondent had a genuine belief that the claimant had committed gross misconduct

(2.2) it was reasonable for the respondent to hold that belief

(2.3) the respondent reached that belief after it had carried out as much investigation as was reasonable in the circumstances

(2.4) the respondent adopted a fair procedure

(2.5) dismissal was the appropriate sanction for the claimant striking a clocking in machine and initially denying he had struck it

(2.6) the respondent considered alternatives to dismissing the claimant

(2.7) before dismissing the claimant, the respondent considered:

(2.7.1) the claimant's explanation of the incident

(2.7.2) the claimant's length of service

(2.7.3) the claimant's good work record

(2.7.4) the claimant's offer to pay the damage to the clocking in machine

(2.7.5) the impact that dismissal would have on the claimant.

(3) Whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer may have adopted in the circumstances.

(4) If the respondent dismissed the claimant unfairly, whether any award of compensation should be reduced to reflect the likelihood that the respondent would lawfully have dismissed the claimant in any event, pursuant to Polkey v AE Dayton Services Limited [1987] ICR 142.

(5) If the respondent dismissed the claimant unfairly, whether any award of compensation should be reduced to reflect the claimant's contributory fault.

(6) Whether the claimant has taken reasonable steps to mitigate his loss.

(7) If not, what loss the claimant would have suffered had be taken those steps.

Breach of Contract

(b) Whether the respondent was entitled by contract and by statute, pursuant to section 86(6) of the ERA, to dismiss the claimant without notice or pay in lieu of notice.

The relevant legal principles

Unfair Dismissal

4. Section 94 ERA gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it is applicable:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--
…(b) relates to the conduct of the employee..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(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."

5. Under section 98(1)(a) of ERA it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At that stage, the burden of showing the reason is on the respondent. If discharged, the burden of proof when assessing fairness under section 98(4) is neutral.

6. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause the employer to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, it was said:

> *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."*

7. In cases involved alleged misconduct the tribunal must have regard to the test set out in British Home Stores v Burchell [1980] ICR 303 (often referred to as the "Burchell test.") In particular, the employer must show that the employer genuinely believed that the employee was guilty of the conduct. Further, the tribunal must assess whether the respondent had reasonable grounds on which to sustain that belief, and whether, at the stage when the respondent formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

8. The Tribunal must also have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

9. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.) Such an approach also applies to the assessment of any other procedure or substantive aspects of the decision to dismiss an employee for a misconduct reason.

10. As part of the investigation an employer must consider any defences advanced by an employee but there is no fundamental obligation to investigate each line of defence. Whether it is necessary for an employer to carry out a specific line of enquiry will depend on the circumstances as a whole and the investigation must be looked at as a whole when assessing the question of reasonableness: (Shrestha v Genesis Housing Association Ltd [2015] IRLR 399). When assessing whether a dismissal is unfair a relevant consideration can be whether the employee or their representative, during the course of the disciplinary process, asked for a particular investigative step: Stuart v London City Airport Limited [2013] EWCA Civ 973. In Strouthos v London Underground Limited it was emphasised that disciplinary charges against an employee should be precisely framed and that normally only those matters formally identified as the disciplinary allegations should form the basis for a dismissal. I also remind myself of the decision in South West Trains v McDonnell [2003] EAT/0052/03/RH and in particular that:

> *"Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an*

investigation might have been dealt with differently, or were arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole fair?"

11. Any defect in disciplinary procedure has to be analysed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal may be rendered unfair where there is a defect of such seriousness that the procedure itself was unfair or where the results of defects taken overall were unfair (Fuller v Lloyds Bank plc [1991] IRLR 336.) Procedural defects in the initial stages of a disciplinary process may be remedied on appeal provided that in all the circumstances the later stages of the process (including potentially at appeal stage) are sufficient to cure any deficiencies at the earlier stage. The appeal should be treated as part and parcel of the dismissal process: Taylor v OCS Group Ltd [2006] EWCA Civ 702.

12. Disparity in treatment by an employer between how it deals with employees in comparable situations can be a relevant consideration. It is possible that a decision made by an employer in truly parallel circumstances may be sufficient to support an argument that it was not reasonable for the employer to dismissal the claimant and that some lesser penalty would be appropriate. However, whilst an employer should consider truly comparable cases of which it is known or ought reasonably to have known, the employer must also consider the case of each employee on its own merits which includes taking into account any mitigating factors. The tribunal should ask itself whether the distinction made by the employer was within the band of reasonable responses open to the employer or so irrational that no reasonable employer could have made it. The tribunal should again not substitute its own views for that of the employer. The tribunal's focus must also remain on whether it was reasonable for the employer to dismiss the claimant. If it was reasonable for an employer to dismiss the claimant then the mere fact that an employer may have been unduly lenient in another case does not render the claimant's dismissal unfair. In Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 the EAT cautioned that "there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument." (See also London Borough of Harrow v Cunningham [1998] IRLR 256 , Walpole v Vauxhall Motors Ltd [1998] EWCA Civ 706 CA and MBNA Limited v Jones UKEAT/0120/15/MC),

13. If the Burchell test is answered in the affirmative the Tribunal must still determine whether the decision of the employer to dismiss rather than

impose a different sanction (or no sanction at all) was a reasonable one. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Generally to be gross misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) it is for the Tribunal to consider:

(a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and

(b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is the employee's attitude towards their conduct.

Wrongful Dismissal /Notice pay breach of contract claim

14. Dismissal without notice is a prima facie in breach of the contractual term as to notice unless the dismissal was in itself a response to the claimant's own repudiation of the contract. The burden of proof therefore falls on to the respondent to show that there was a repudiatory breach of contract by the claimant prior to the date of dismissal in order to avoid liability for what would otherwise be a breach of contract.

15. The necessary conduct entitling the employer to dismiss summarily is usually restricted to conduct said to amount to gross misconduct. The classic statement of what constitutes gross misconduct is in Neary v Dean of Westminster [1999] IRLR 288 that the conduct:

> "*must so undermine the trust and confidence that is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."*

16. Unlike the unfair dismissal claim, in the wrongful dismissal claim it is therefore a matter for me to assess, on the balance of probabilities, whether the claimant committed the gross misconduct alleged. If the allegations are made out I have to assess whether their nature and gravity is such as to fall within the ambit and meaning of gross misconduct.

Findings of fact

17. In respect of the unfair dismissal claim I make the following findings of fact. The claimant worked for the respondent as a machine operator. He started

working for the respondent on or around 11 May 2008, based at the Celsa Steel Works. The respondent is a supplier of services and technology in the mental production process and has a variety of sites across the UK. It is also part of a wider global corporation.

18. The claimant was summarily dismissed on 4 October 2019. That dismissal and this case is relates to events with a clocking in machine on 1 October 2019 and, in particular, the display screen which was found not to be working properly. The clocking in machine is used by the respondent to keep track of employees' time and attendance. It is also used to check holidays and overtime. Employees can clock in using a fingerprint. The machine has a display screen that shows information such as the user's name and whether an entry has been accepted or declined. The machine also has buttons.

19. On 1 October 2019 Mr Bennett (General Manager - Celsa Operations) went to clock in just before 8am and saw that the screen looked damaged. His opinion was that it looked like impact damage as he thought the crystals of the screen had been damaged and the ink inside had run into pools. He thought that the impact area was around the "retry button."

20. Mr Cotter, Operations Supervisor, was tasked with interviewing the workers about how the machine came to be damaged. Mr Cotter interviewed the claimant and two other colleagues and they signed incident statements.

21. CE, who clocked in at 5:12am told Mr Cotter the machine had been working when he clocked in and he had not noticed anything out of the ordinary [65]. AL clocked in at 5:25am and told Mr Cotter that "*the clocking machine screen was not working it looked like it had been hit" [66].*

22. At about 12:50pm the claimant was called into the office by Mr Cotter. The claimant had clocked in at 5:24am. He signed a statement [67-68] as follows:

> *"Q. Are you aware of any incident that should have been reported today?*
>
> *A. No*
>
> *Q. Was the clocking machine working this morning when you clocked into working?*
>
> *A Yes*
>
> *Q. Did the clocking machine register when you clocked in*

A. Yes

Q. It registered at the first attempt.

A The second attempt I think my hands were wet when I got off my bike.

Q Did you notice anything untoward this morning

A. No

Q. Did you strike the clocking machine

A. No

Q. Do you know it's a gross misconduct for damaging company property.

A. Yes"

23. Mr Cotter also viewed some CCTV footage. That footage is no longer available as it was not retained by the respondent. The claimant was suspended by Mr Cotter and left the premises. Mr Bennett watched the CCTV footage. He says it showed AL clocking in with no issues and that it then showed the claimant trying to unsuccessfully clock in twice before he formed a fist, brought his hand back and struck the machine with force with the side of his fist. Mr Bennett says the footage then showed the claimant trying to clock in a third time before leaving the scene. He states that CE then tried to clock in and that the footage showed CE pointing to the screen. The claimant says the CCTV footage could not be described as showing him forming a fist bringing his hand back and striking the machine with force. He says it showed him tapping the machine with the side of his hand. I return to this dispute below.

24. On 2 October 2019 the claimant received a letter from Mr Bennett requiring him to attend a formal meeting on 4 October 2019 [69]. The letter said "*whilst clocking into work you allegedly struck the clock screen causing this to break."* The letter warned the claimant that the issue was extremely serious and could ultimately result in dismissal. The claimant was offered the right to be accompanied by a work colleague or trade union official. The claimant was sent the respondent's code of conduct, statements, and a USB stick containing CCTV footage.

25. The claimant attended the meeting with Craig Bennett and Claire Young (HR). He attended alone. The CCTV evidence was played. The subsequent decision letter [70 – 71] states that the claimant at the meeting had

explained he had arrived at work "*and had attempted to clock in on the Kronos machine, however the machine had beeped and the screen had gone blank."* It states: "*You claim you knocked the machine, and on the second attempt the clock accepted your fingerprint. You assumed this was because your finger had been wet."* The claimant says that he told Mr Bennett at the disciplinary hearing that the first two attempts did not work and so he gave the machine a tap with his hand and tried it again and it worked. I find that the decision letter is a fair summary of what the claimant initially said to Mr Bennett.

26. At the disciplinary hearing Mr Bennett then described what he thought the CCTV footage showed, which was the claimant taking 3 attempts to clock in and that the claimant had struck the machine's screen after the second attempt with the fingerprint being accepted on the third attempt. Mr Bennett put it to the claimant that the footage did not match what the claimant told Mr Cotter that the screen was working correctly and he had clocked in without issue. Mr Bennett told the claimant that the statement given to Mr Cotter and the claimant's explanation during the disciplinary meeting did not match the CCTV evidence.

27. Mr Bennett also told the claimant that the person clocking in before had reported no issues with the screen but that the person clocking in after the claimant had reported that the screen had been damaged. He told the claimant that the screen on the clock had been damaged beyond repair and that (as recorded in the decision letter) "it clearly shows the point of impact being around the "retry" button."

28. The claimant said to Mr Bennett he had only tapped the screen for it to work and he had not intended to break it. He offered to pay for the damage. Mr Bennett asked the claimant if he had any issues outside of work that may have caused him to lose his temper. The claimant said he had some issues but they would not give reason to strike the clock. The claimant again offered to pay for any damage.

29. Mr Bennett adjourned the meeting to reflect and returned to give his oral decision to dismiss the claimant. The decision letter says:

> "*I informed you that I now had a full opportunity to consider the facts of the investigation and take into account any mitigation. I have serious concerns around your attitude and conduct on the day. You struck the clock with enough force to break the screen, willfully and deliberately damaging company property. Your statement of events, and discussions during the meeting do not match the CCTV evidence leaving me doubting your trustworthiness. There is an implied term of trust in the employee/ employer relationship that I feel has been damaged beyond repair. This serious breach of confidence along*

with the serious and deliberate damage to company property leaves me no option other than to terminate your contract of employment with immediate effect. My decision therefore is for you to be summarily dismissed for Gross Misconduct."

30. Mr Bennett said in evidence, which I accept, that his particular concern was that the claimant had denied striking the machine when Mr Cotter asked him. He said that had the claimant admitted damaging the screen as soon as the claimant did it then he may have given the claimant a final written warning and required the claimant to pay for the damage. Mr Bennett said, however, that as he considered the claimant had lied he felt that trust was gone. He referred to the claimant working in the dust plant which is a hazardous and important part of the Celsa operation involving operatives often working unsupervised. He said it was important that he could trust his employees and he needed to think about the safety of everyone who worked on the site. He said he did not think it was possible that the claimant had not realised he had damaged the machine because he considered the screen showed impact damage.

31. The claimant appealed [72 – 73]. In the appeal letter the claimant said "*I hit the machine as clocking myself in did not work and then when I tapped it it did work.*" He said that in 11 years of employment he had "never stepped out of line", was always on time, did overtime, did his work to the best he could, put safety first and kept his head down. He referred to the respondent keeping his job open previously when he served a prison sentence. He said that he had always reported incidents on site, completed paperwork, behaved in a responsible manner, was a number two team leader, and that this should all show how responsible he could be and there should be 11 years worth of trust. He wrote "*I said I'm sorry and hold my hands up for the machine and have offered to pay for the damage and didn't realise I broke it until I was called in office and suspended and then sacked*."

32. An appeal meeting was held by Mr Feehan (Business Manager) on 15 October 2019. The claimant was offered the right to be accompanied.

33. Given the claimant said in his appeal grounds he had never stepped out of line and had a good record prior to the appeal hearing Mr Feehan looked into the claimant's disciplinary history. Mr Feehan found that on 19 January 2015 Mr Bennett had issued the claimant with a final written warning because of poor attendance [52- 53]. The claimant had a Bradford factor score of 432. The claimant had referred at the time to having a persistent cough he could not shake and that he had been having personal problems at home which were now under control. He was offered and declined a referral to occupational health. The warning expired on 18 January 2016. Mr Feehan then found that on 11 November 2016 Mr Bennett had issued a written warning for poor attendance. The claimant had a Bradford factor of

90. The notes show the claimant had referred to having family issues but had said they should not cause further absences [55- 56]. The warning was due to expire on 11 November 2017. In the meantime on 3 July 2017 Mr Bennett had held a further formal meeting with the claimant to discuss poor time keeping and his attendance record. The claimant had a Bradford factor score of 637. The notes show the claimant saying he did not have any underlying health issue and he had some personal issues which should now be sorted. The claimant was given a final written warning [57 – 58] due to expire on 3 July 2018.

34. Mr Bennett met the claimant on 5 April 2019 to discuss unacceptable time and attendance record. The record states that the claimant's Bradford score had reduced since a meeting in January 2018 but that continued absences with no contact with supervisors "causes major operational issues for them." There do not appear to be records provided of that January 2018 or the live final written warning. The claimant was told that the final written warning already in place would stand until 4 April 2020 [61 -62]. On 13 May 2019 Mr Bennett met with the claimant and extended the final written warning to 12 May 2020 because the claimant had (on 17 April 2019) reversed his company truck into a parked forklift truck. The claimant had admitted not looking properly. He again referred to having personal issues at home.

35. At the appeal hearing the claimant said again that he thought he should still have the trust of management due to his work and length of service. He said that what happened was accidental and that he did not mean to break the machine [75]. The minutes record Mr Feehan saying to the claimant that the trust issue came into it "*due to his lack of honesty around this incident*." It records the claimant again stating that he did not think he had initially broken the machine when he struck it. He said that he had always reported incidents on site, this was the only incident during his employment and he felt dismissal was unfair.

36. Mr Feehan referred to the claimant's previous disciplinary history and stated that Mr Bennett "*had already given him 2nd chances due to having 2 final written warning on his record."* The minutes state that the claimant again said he would be willing to pay for financial losses.

37. Mr Feehan wrote to the claimant with his decision on 22 October 2019 [76-77]. He upheld the decision to dismiss. The letter said:

> *"You are already in receipt of a final written warning for your time and attendance, and also a final written warning following a damage incident. Therefore I am unable to take your previous "good record" into account as per the request detailed in your appeal letter. I believe and am of the opinion that during the incident on the 1st*

October 2019 you demonstrated unacceptable behaviour, causing serious and willful damage to company property. This behaviour cannot be tolerated and is tantamount to Gross Misconduct."

38. Mr Feehan said in evidence to the Tribunal he was satisfied the claimant had behaved unacceptably by willfully causing serious damage to company property. He said that he had hoped to find something in the claimant's employment history that would persuade him to revoke Mr Bennett's decision but that the claimant's length of service was not enough to persuade him that it was appropriate to interfere with the decision to dismiss. He said he knew the claimant well after working with him for a number of years and that the claimant was good at his job and it would take time, effort and money to recruit and train a replacement such that the appeal decision was not one made lightly.

39. I am mindful that in the claimant's unfair dismissal claim it is not the role of the Tribunal to decide for itself what happened. I have to apply the case law principles outlined above. However, as a matter of context it is helpful to record here that the claimant's evidence to the Tribunal was that when he clocked in the machine made one bleep sound and not two (which would have shown a successful clock in). He said he refreshed it and tried again but it did the same. He said he then "*gave it a little tap and it bleeped twice and clocked me in. I think it was playing up due to the water ingress as it was raining heavily that morning. The screen was blank, not displaying but that wasn't a problem as it often did that and were able to clock in. I've done this previously."* In his evidence to the Tribunal he accepted it was actually the third attempt on which his clocking in worked. He said that he did not tell this to Mr Cotter because it was about 8 hours after he had clocked in and that tapping the screen was not something he did deliberately or was of any significance to him at that point in time. He said in his evidence he would not consider it as striking the screen with any force. He stated he just tapped the clock to "wake it up", that the tap had worked and he had been able to clock in and therefore in his mind the clocking in machine was working.

Discussion and Conclusions

The reason for dismissal?

40. The claimant in evidence was unable to identify an ulterior motive behind Mr Bennett deciding to dismiss him. On the evidence before me, in my judgment and as a finding of fact, I find that what was operating in Mr Bennett's mind when deciding to dismiss was:

(i) he genuinely believed the claimant had deliberately struck the clocking in machine without good reason to do so and that in doing so had damaged the screen;
(ii) he genuinely believed that the claimant had not been honest in his account given to Mr Cotter at the fact finding stage;
(iii) that the claimant, in not being candid about what he had done, left Mr Bennett feeling that he was no longer able to trust the claimant in a role that involved unsupervised working in a safety critical work environment.

41. As such the reason or principal reason for the claimant's dismissal related to the conduct of the claimant, and therefore was a potentially fair reason for dismissal under section 98(2)(b).

Reasonable grounds for belief based upon a reasonable investigation?

42. It is important to bear in mind here that I have to primarily look at what information was before Mr Bennett at the time he decided to dismiss the claimant, together with what he reasonably could have known if a reasonable investigation had been undertaken (in the sense of it being within the range of reasonable responses). I cannot therefore decide these issues just on the basis of the evidence presented before me afresh at the tribunal hearing. As explained above that is not the Tribunal's role in an unfair dismissal claim.

43. I am satisfied that the respondent reasonably held the belief in misconduct based upon a reasonable investigation (in the sense of being within the range of reasonable responses open to a reasonable employer in the circumstances). This is for the following reasons.

Belief the claimant had deliberately struck the clocking in machine and had damaged the screen

44. Mr Bennett had before him the evidence of CE that the clocking machine was working at 5:12am. I consider it was within the range of a reasonable investigation to interpret that account as including a statement that the screen of the clocking in machine was working; as the screen was part of the wider whole machine. Mr Bennett then had before him the CCTV evidence, in respect of which it is not disputed, it at least showed the claimant unsuccessfully clocking in twice and then making contact with the screen with his hand. Mr Bennett also had before him the statement from AL who logged in 1 minute after the claimant saying (in response to a very open question) that "the clocking machine was not working it looked like it had been hit." Mr Bennett also had his own experience of seeing the machine at around 8am that morning when he himself had clocked in and saw damage to the screen which he, similarly to AL, considered looked like it had been hit.

45. In my judgment that provided reasonable grounds for a belief, based on a reasonable investigation, that the claimant had deliberately struck the screen causing damage.

46. The claimant was able to give Mr Bennett his account that he had only tapped the screen to make it work and had not intended to break it. Mr Bennett had to take the claimant's version into account but he was not bound to accept it. The disciplinary outcome letter shows that Mr Bennett did take the claimant's version of events into account as he recorded the claimant telling him that he had "knocked" the machine and that he had "only tapped the screen for it to work but had not intended to break it." Ultimately Mr Bennett was entitled to reach a viewpoint on the whole evidential picture before him. It was not outside the reasonable range of responses to not accept the claimant's account. Moreover, even on the claimant's account of tapping the machine with the intention of making it work, it still involved the claimant deliberately making contact with the screen in a manner in which Mr Bennett was entitled to find was not authorised. There was no evidence actually before Mr Bennett of some widescale known or authorised practice of staff striking the screen to make the machine work.

47. Likewise it was within the range of reasonable responses for Mr Bennett to conclude that the claimant's actions had caused damage to the screen and that therefore the claimant had made contact with the screen with sufficient force for that to result. He had his own observations and that of AL. He had the CCTV evidence. I have taken into account that the claimant disputes that the CCTV evidence showed him pulling his fist back and striking the screen with force. The CCTV evidence is no longer available as the respondent failed to secure the footage and the copy on the USB stick is damaged. However, its' content caused sufficient concern to call the claimant the disciplinary hearing. On balance on the evidence available before me I am unable to conclude that it was outside the range of reasonable responses for Mr Bennett to have concluded the CCTV evidence (together with the other evidence) showed sufficient force behind the contact such that damage to the screen was caused.

48. The claimant says that there were other employees that could have been spoken to. He did not ask for others to be spoken to at either the disciplinary hearing or at appeal stage. I do not find that it was outside the range of a reasonable investigation to limit the written statements to those that were obtained and made available to the claimant. The respondent had the individual clocking in before the claimant who said the machine was working fine, they had the individual clocking in immediately after the claimant who said the screen was not working and it looked like it had been hit, and they had the CCTV evidence consistent with AL's suggestion.

49. The claimant says that the respondent failed to gather sufficient evidence to demonstrate that the screen was actually damaged or that his actions caused any such damage. It is said the respondent should have obtained some expert evidence or shown the damage to the claimant or taken contemporaneous photographs. I do not find, however, that the respondent understood at the time that the claimant was disputing the screen was damaged/broken. Mr Bennett recorded the claimant saying he had not *intended* to break the screen (as opposed to saying no damage was done) and he would pay for any damage to the machine [70 – 71]. The claimant's grounds of appeal said "*I said I'm sorry and hold my hands up for the machine and have offered to pay for the damage and did not realise I broke it until I was called in the office and suspended and then sacked."* The claimant said in evidence he was trying to safeguard his job and not rock the boat and so he took the respondent's word for it at the time that the screen was damaged. If so, it did not put the respondent on notice there was a dispute that needed investigating. The claimant could have himself asked to see the alleged damage but did not do so (or indeed potentially gone to look at it as he was leaving the building). I consider it likely that if he had done so that such a request would have been accommodated.

50. The claimant also says no invoices for replacing the screen were provided (and he questions whether work was ever actually necessary or done on the machine). To the extent it is at all relevant, I accept Mr Bennett's evidence that the screen was replaced sometime later. But there is nothing to suggest the evidence now requested would have been available as at the time of the disciplinary hearing or appeal (or as I have said that the claimant disputed damage or asked to see such evidence).

The claimant had not been honest with Mr Cotter

51. There were also reasonable grounds for Mr Bennett's conclusions that the claimant had not been honest with Mr Cotter. Mr Bennett had the claimant's signed statement telling Mr Cotter that the clocking in machine was working (or did so on the second attempt), that he had not noticed anything untoward, was not aware of any incident that should have been reported and did not strike the clocking machine. As against that Mr Bennett had the CCTV evidence showing the claimant making contact with the machine. This was sufficient for Mr Bennett to reasonably believe the claimant had not been honest with Mr Cotter. The claimant had been specifically asked, and he denied in response, striking the machine.

52. There is no contemporaneous evidence to show the claimant at the time of the disciplinary hearing told Mr Bennett what he subsequently told the Tribunal in terms of not having recalled, when initially interviewed by Mr Cotter, the incident because of the lapse in time before being spoken to the day in question and because tapping the clock was a run of the mill incident

he had no particular recollection of and put no significance to. The record of the disciplinary hearing in the decision letter just records the claimant saying he had not intended to break it. There is no record of the claimant telling Mr Bennett that he had honestly answered Mr Cotter with what he could recall at the time. As discussed further below, the claimant had not had notification in the invite to the disciplinary hearing that this was a specific allegation. However, it was put to him by Mr Bennett and on the face of it, it was an explanation that the claimant would have been capable of giving to Mr Bennett. The claimant knew he was going to be asked to account for what the CCTV footage seemed to show. His witness statement given to Mr Cotter related to the same incident. He should reasonably have appreciated he was likely to be asked about the discrepancy between the two.

53. In his appeal letter the claimant did say he did not realise he had broken the machine "until I was called in the office and suspended and then sacked." But he did not otherwise explain his conduct when interviewed by Mr Cotter. He knew by then what Mr Bennett's concerns were as they were in the letter of dismissal. At the appeal hearing itself there was a discussion between the claimant and Mr Feehan about a perceived lack of honesty around the incident. The claimant again stated that he did not think he had initially broken the machine when he struck it but again there is no record of the claimant at the time giving his wider explanation as to why he did not think he had mislead Mr Cotter and why he had answered Mr Cotter's questions as he did. As such, what the claimant now puts forward as an explanation he says shows he did not deliberately misled Mr Cotter was not fully put by him to either Mr Bennett or Mr Feehan for them to take into account.

54. In my judgment it was also within the range of reasonable responses for Mr Bennett to conclude that the claimant must have known he had at least struck/made contact with the clocking in machine given the impression Mr Bennett took from the CCTV footage. In turn this again gave reasonable grounds for considering that the claimant had not been fully candid at his investigation meeting with Mr Cotter where the claimant had, in effect, denied anything had happened. Going further, Mr Bennett also considered that the claimant would have known he had damaged the machine because of the impact damage Mr Bennett believed he saw, which was supported by AL's evidence. This also led Mr Bennett to believe the claimant had not been truthful with Mr Cotter. Again I do not consider that belief to have been outside the range of reasonable conclusions open to an employer in these particular circumstances. Mr Bennett used his own judgment, knowledge and experience in conjunction with the wider evidence. As I have already observed, it was also never put to Mr Bennett at the time that, for example, expert evidence should be obtained.

55. It was put to Mr Bennett in cross examination that Mr Cotter only asked the claimant whether the machine was working and that he was not asked about the screen. It is not, however, outside the range of a reasonable investigation to consider that such a question and answer exchange about the machine included the screen, given it was part of the wider machine. The claimant also said that he was asked whether he had "struck" the machine by Mr Cotter and that his actions did not amount to striking so that he had not misled Mr Cotter. That said the claimant himself in his own ET1 said that he had struck the machine with his hand. It was within the reasonable range for Mr Bennett to have considered the claimant denying striking the machine was in contradiction to what he saw the CCTV evidence show. The claimant also argued before me that he answered Mr Cotter to say the machine was working because it did; he was ultimately able to clock in despite the glitch. Again, however, it was within the range of a reasonable investigation to reach the view the claimant had not been candid with Mr Cotter looking at the statement overall in conjunction with the CCTV evidence. The claimant in the fact finding witness statement had not mentioned striking or knocking the machine because the screen was not working.

Loss of trust

56. Bearing in mind the above finding as to Mr Bennett's reasonable believe that the claimant had not been honest with Mr Cotter, in my judgment Mr Bennett also in turn had reasonable grounds for his belief that he could no longer trust the claimant in a safety critical role. To his credit the claimant himself conceded in evidence that trust was critical in the kind of work that the claimant was undertaking.

Other procedural concern raised - The framing of the honesty allegation

57. The claimant says that the allegation that he had been dishonest with Mr Cotter was not put as a specific allegation when he was notified of the disciplinary hearing. The allegation is simply framed as "the purpose of the formal meeting is to discuss the incident on 01/10/19 whilst clocking into work you allegedly struck the clock screen causing this to break."

58. Any provision of a relevant ACAS Code of Practice which appears to the tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The Acas Code in particular says:

> *"9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. The notification should contain sufficient information about the alleged misconduct or poor*

> *performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include witness statements, with the notification…*

59. The allegation of dishonesty was not squarely put to the claimant in the invitation to the disciplinary hearing. That it was not put in the letter, particularly bearing in mind it was an allegation of dishonesty, is a factor pointing towards unfairness.

60. In relation to that defect I have to consider whether overall the respondent's procedure was a fair process including through to appeal stage. Is it a defect of such seriousness that it renders the dismissal unfair?

61. On the one hand an allegation of dishonesty is a serious one. However, it is also relevant to note that prior to the disciplinary hearing the claimant had access to the CCTV footage and his statement given to Mr Cotter and should reasonably have appreciated the discrepancy between the two. Although that is certainly not to say that it is an employee's job to second guess what disciplinary allegations outside of those in the formal letter may also be levelled. Further, as already mentioned above, Mr Bennett specifically put the discrepancy to the claimant at disciplinary hearing and the claimant was given the opportunity to say what he wished. The claimant did not do so but there was nothing that obviously prevented the claimant telling Mr Bennett why he had said what he did to Mr Cotter. The claimant's explanation that he was asked about the incident hours after it occurred and he did not see it of significance and therefore did not recall it or mention it to Mr Cotter was an explanation which the claimant always would have held and have been able to give, particularly once he had the CCTV footage.

62. Furthermore once the claimant had Mr Bennett's decision letter he was firmly aware of the nature of the allegation as it was said "*Your statement of events, and discussions during the meeting do not match the CCTV evidence leaving me doubting your trustworthiness."* The claimant would therefore have been able to give his account in his appeal letter but did not do so other than the reference I have already set out above. Likewise he did not give his explanation to Mr Feehan at the appeal hearing but would have had the full opportunity to do so. Whilst I note that Mr Feehan did not see the CCTV evidence, I accept that Mr Feehan was not simply exercising a review of Mr Bennett's decision making. He said, and I accept, that he looking to see if the claimant could give him something to persuade him to overturn Mr Bennett's decision. Mr Feehan was considering the situation with a fresh pair of eyes. The appeal hearing was therefore capable of correcting any earlier defect in the claimant not having been told in the invite to the disciplinary hearing of the dishonesty allegation.

63. Looking at it in the round and in the particular circumstances, including the appeal stage, I therefore do not consider that this particular defect of itself rendered the dismissal unfair within the meaning of the case law authorities and section 98(4). Nor did it, as I have already said on what is a linked point, mean that the investigation fell outside the reasonable range.

The decision to categorise the misconduct as gross misconduct and the sanction of dismissal

64. In my judgment the respondent did act within the band of reasonable responses in choosing the categorise the misconduct as gross misconduct. I am satisfied that Mr Bennett did not take into account the previous warning which was live but looked at the events relating to the clocking in machine independently in their own right. There the misconduct found did not just relate to the striking of a clocking in machine. It also related to the conclusion the claimant had not been fully honest with Mr Cotter and the ensuing conclusion that this fundamentally undermined the trust and confidence that Mr Bennett had previously held in the claimant. Whilst it is certainly not the full answer to the point, it is relevant to note in that regard that both "dishonesty" and "deliberate and serious damage to company property" are examples of potential gross misconduct within the respondent's non contractual code of discipline [49]. I am also satisfied that Mr Bennett did not automatically classify the conduct as being gross misconduct, but that he gave individual thought to the particular circumstances. His treatment of the claimant in past processes, and indeed in the other cases relied upon by the claimant as allegedly showing disparate treatment compared to other employees show that he did tend to make nuanced individual decisions. He was not a manager who rushed to dismiss employees.

65. In my judgment the respondent also acted within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. It is said that the claimant could have paid back the cost of making good the damage, and that sufficient weight was not given to his 11 years good service (for which he had received a long service award). It is said the respondent did not take into account the impact losing his job would have on the claimant and did not consider alternative sanctions to dismissal.

66. The claimant did offer to pay for the damage both to Mr Bennett and to Mr Feehan. They were aware of that and did take it into account. But for Mr Bennett the issue was not the cost of the damage but his loss of trust in the claimant and his concern about then employing the claimant in a high trust environment. This led Mr Bennett away from alternatives to dismissal which I find he did actively consider. In particular he considered, and rejected, giving a written warning and requiring the claimant to pay for the damage.

Given his conclusions on honesty and trust, Mr Bennett's reasoning for applying the sanction of dismissal was, in my judgment, within the reasonable range.

67. Again, I am also satisfied that Mr Bennett did consider the claimant's individual circumstances. He asked the claimant if there were any personal problems that may mitigate his conduct. The claimant said there was nothing that would cause him to strike the screen. Mr Bennett would have known the likely impact dismissal would have on the claimant; it was self evident. Mr Bennett was aware of the claimant's positive qualities and also aware of the claimant's disciplinary history in relation to the warnings given for attendance and the vehicle collision but chose not to take these into account and dealt with the clocking in related events independently in their own right. That was an approach favourable to the claimant. As I have already said Mr Bennett took account of the claimant's explanation of the incident, but he was not ultimately bound to accept it.

68. Similarly, Mr Feehan went to check the claimant's assertions about his good service only to find what he did about the claimant's live warnings. Mr Feehan actively considered whether there was a basis on which he could revoke Mr Bennett's sanction of dismissal, noting the claimant was good at his job and had long service but concluded that there was not. Likewise, the decision to maintain the sanction of dismissal at appeal stage remained within the reasonable range.

69. In reaching these conclusions I have taken into account what is said about alleged disparity in treatment between the claimant and other disciplinary sanctions against other employees. I am not satisfied that the examples raised by the claimant are truly parallel comparable cases. They largely involved accidents at work (or equivalent near misses) in which whilst being serious incidents the employees had admitted their mistakes and Mr Bennett had decided to give them another chance, imposing sanctions short of dismissal. They show the central importance of honesty to Mr Bennett. This approach had previously included the claimant himself when he had a collision at work on the back of an existing live warning and was not dismissed. The decision making processes in all the instances put forward show Mr Bennett making individual, nuanced decisions. The difference for Mr Bennett on this particular occasion was his conclusion that the claimant had not been honest with Mr Cotter and he felt that destroyed trust and confidence in the claimant. That was the material consideration and not the value of the damage to the clocking in machine. The distinction here was within the band of reasonable responses open to the respondent.

70. In conclusion in all the circumstances, including the size and administrative resources of the respondent and in accordance with equity and the substantial merits of het case, the respondent acted reasonably in treating

conduct as a sufficient reason for dismissing the claimant. The claimant's unfair dismissal claim does not succeed and is dismissed.

Wrongful dismissal

71. For the wrongful dismissal claim I do have to consider for myself whether, applying the balance of probabilities, the claimant, in effect, committed gross misconduct.

72. I am satisfied that the claimant did strike the screen of the clocking in machine. I accept that he did not do so with an intent to cause damage. I find it is likely the claimant did so out of misplaced frustration rather than, as I have said, an intent to actually damage the machine. In my judgment it is likely the claimant was initially unaware of the CCTV footage and that when Mr Cotter called him to the investigation meeting the claimant was not forthcoming about what had happened and knowingly denied striking the machine and knowingly misinformed Mr Cotter that he did not notice anything untoward or of any incident that should have been reported. I do not accept as likely the claimant's account that he was unaware of the incident. I may not have reached the view that the claimant striking the clocking in machine (whilst clearly misconduct) constituted gross misconduct with the sanction of summary dismissal. However, I am satisfied that the claimant's conduct in not being upfront about what had happened and in denying striking the machine when he had in fact done so, in conjunction with the striking of the machine, was gross misconduct and was conduct that so undermined trust and confidence such as to amount to a repudiatory breach of contact by the claimant.

73. The wrongful dismissal claim therefore does not succeed and is dismissed.

Employment Judge Harfield
Dated: 2 December 2020

JUDGMENT SENT TO THE PARTIES ON 3 December 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS