Case No: 1306785/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr L Butler

Respondent: Synergy Health (UK) Limited

Heard at: **Midlands West** **On:** **18 19 August and 3 September 2020**

Before: **Employment Judge Woffenden**

Representation
Claimant: Mr R Ennis, solicitor
Respondent: Mr C Edwards

JUDGMENT having been sent to the parties on 8 September 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was a technician employed by the respondent at its New Cross site. He claims that his dismissal on 30 April 2019 was unfair and that the respondent made an unauthorised deduction from his final payment of wages. ACAS was notified under the early conciliation procedure on 11 June 2019 and the certificate was issued on 11 July 2019.The ET1 was presented on 21 August 2019. The ET3 was received on 24 October 2019. The hearing was conducted by video conference.

Issues

2. The parties had agreed a list of issues for the tribunal to determine as follows:

Unfair Dismissal

2.1 What was the reason for the dismissal? The respondent's case is the reason for the dismissal was conduct, a potentially fair reason within the meaning of ERA 1996 s.98. Specifically ,that the claimant refused to follow a reasonable

management instruction and left his workstation early, when already subject to a final written warning for identical behaviour .The claimant's case is that the instruction to remain at his workstation was neither lawful or reasonable.
2.2 Whether the respondent genuinely believed in the misconduct based on reasonable grounds.
2.3 Whether this belief was reasonably held after a reasonable investigation.
2.4 Did the respondent follow a fair procedure. In particular, the claimant will say
2.4.1 he should not hve been disciplined again before his appeal had been concluded;
2.4.2 it was not appropriate for Mr Preston to hear the appeal against the final written warning ;
2.4.3 it was not appropriate for Ms Heitzman to hear both disciplinaries.
2.5 Whether dismissal fell within the range of reasonable responses.
2.6 If he is found to be unfairly dismissed ,to what compensation is the claimant entitled ?In particular, what if any reduction should be made by reason of the claimant's conduct and /or in accordance with principles set out in **Polkey v AE Dayton Services**?

Unlawful Deduction from Wages

2.7 Was the respondent entitled to deduct £372 from the claimant's wages to recover an alleged overpayment of wages?

Procedure, Documents, and Evidence Heard

3 I heard from the claimant .I heard from the following witnesses on behalf of the respondent : Ms Jacqui Heitzman (an Operations Manager for the respondent); Mr Daniel Preston (General Manager at the respondent's New Cross site);and Ms Janet Doyle(General Manager at the respondent's Knowsley site).

4 There was an agreed bundle of documents of 229 pages ('the Bundle'). I have read only those documents in the Bundle to which I was taken by the parties.

5 Mr Ennis confirmed in discussion of the list of issues at the commencement of the hearing that the claimant made no allegation of procedural unfairness in relation to the appeal conducted by Ms Doyle.

Findings of fact

6 The claimant was employed by the respondent (which provides sterilisation and decontamination services of medical devices) as a technician at one of its sites at New Cross Hospital Wolverhampton ('New Cross') working 15 hours a week (at weekends) .His period of continuous employment began on 11 August 2010 and ended on 30 April 2019 when he was dismissed for misconduct during the currency of a final written warning which had been imposed for a period of 12 months on 16 April 2019.

7 The terms and conditions of his employment provided that the claimant be paid at an hourly rate of £6.98 per hour and that '*pay progression will be in line with the requirements of the Agenda for Change Handbook*.' Further it was provided that if he left the respondent deductions could be made from his wages to cover any sums he might owe the respondent ;in particular it was said that '*If mistake was made in the payment of any monies due'* ,the respondent *'expected to be*

notified immediately and the error would be corrected at the next available opportunity.'
Under the terms and conditions of employment his precise start and finish times were to be agreed locally. It is common ground that his shift began at 12.00pm and ended at 5pm.

8 The nature of the work required the claimant to wear specialist protective clothing while working which he had to change into and out of.

9 The respondent has a disciplinary procedure ,stage 3 of which states that '*If there is a further offence, or if the offence is sufficiently serious to warrant only one written warning, in effect both first and final warning, or if there is a further recurrence of a lesser offence, a final written warning will be issued by either the employee's line manager ,senior manager, or Director*.'
Stage 4 provides that if there is a further offence or if, exceptionally, the offence is serious enough to justify dismissal without prior warnings ,an employee will be dismissed without prior warnings .Such actions may be taken by a senior manager or a Director. It goes on to say that as an alternative to dismissal the respondent may at its discretion impose as a disciplinary measure demotion (temporarily or permanently) or transfer to another job (with or without a reduction in pay) or suspension without pay for up to 5 working days in addition to the imposition of a final written warning **.**Full reasons for dismissal or alternative action are to be confirmed in writing. The non-exhaustive definition of gross misconduct includes '*Gross insubordination or refusal to follow instructions*.'

10 The respondent operated a clocking in process at New Cross. There was a main Kronos clock machine above which was a laminated notice dated 3 March 2016 put there by a member of the respondent's administrative department which read ' *All staff clocking in/out must ensure it is on the hour as deductions will be made if late clock in early clocking out as Kronos will be checked daily. It is your responsibility to check your times*.'

11 On 13 July 2015 Mr Anderson (then General Manager at New Cross) had imposed a final written warning on the claimant for his failure to follow the respondent's sickness reporting procedures. The claimant considered he had complied with the procedures displayed in the rest room which he believed were applicable and appealed against the imposition of the warning, but his appeal was unsuccessful.

12 In October 2015, the respondent undertook an enquiry at its sites to ascertain whether time for changing in and out of clothes was allowed at the beginning /end of a shift. The table of responses indicated that the general manager at New Cross (Mr Anderson) had confirmed that it was not. The then Operations Director sent an email to Ms Doyle (among others) saying
'The position for me is clear and will be reinforced by the RMs across all sites. Unless contractually bound at transfer from NHS sites, there should be NO allowance for changing time at either end of a shift.
Staff should be changed and ready to commence work at start of shift and they should not leave their area of work until their normal shift end time.'
In other words, he expected employees to change into their specialist protective clothing before the start of their shift and change out of it after the shift had ended.

13 Mr Preston (who had begun work as General Manager at New Cross on 6 March 2017) summarily dismissed the claimant in February 2018, but he successfully appealed. The respondent 's Regional Manager for the North West (by then Mr Anderson) wrote to the claimant on 23 May 2018 to confirm this and in that letter he said '*There has been a catalogue of significant errors relating to this case and I would like to take this opportunity to apologise for any upset and distress caused by these failings.'* It was said that his appeal had highlighted the immediate need for management retraining in relation to the handling of employee related issues which was being arranged for the management team at New Cross. There was no evidence before me that any such retraining was carried out.

14 There was a Time Keeping Policy in the agreed bundle of documents but the claimant was never shown it during the disciplinary procedure and ,although Ms Doyle referred to its contents in her witness statement, there was no evidence before me about whether and if so when the respondent had introduced it or that Ms Doyle took it into account in her decision making.

15 In February 2018, a SynergyTrak performance Analysis and Clocking system was introduced at New Cross one of the purposes of which was to enable the respondent better to monitor staff performance and productivity. In addition to the Kronos clocking in machine, additional clocking in machines (CICO) were placed in the production areas.

16 Ms Heitzman had commenced employment with the respondent as the Production Manager at New Cross on 21 May 2018. When she began her employment, she underwent an induction and became aware that staff were required to clock in and out and stay in their production area for the duration of their shift. It was her evidence that in late 2018 and in order to reinforce the above she had put up a notice which was in identical terms to a later notice she had put up dated 26 June 2019 and read:
'Please make sure you are in production areas at the Start of your shift and until End of your shift.
Ensure you clock In and Out each time you leave a production area.' and that the original notice had gone missing at about the time of the disciplinary action against the claimant which ensued in April 2019. However, she did not refer to the existence of or produce such a notice in the disciplinary hearings she conducted with the claimant even though he asked her for supporting documentation that stated he could not leave production areas until 5 pm. She told him she was not aware of any documentation and would ask HR if there was anything in place. The claimant was not cross-examined about the existence of an earlier notice. I did not find Ms Heitzman's evidence under cross-examination about the circumstances in which the second notice was put up (as a reminder to staff) credible. I find the first and only notice put up by Ms Heitzman was that dated 26 June 2019.

17 On 27 June 2018 the respondent sent employees a letter about a three year pay deal from it said which all its employees employed on Agenda for Change terms and conditions would benefit as from 1 April 2018.Details were given of the new Agenda For Change pay scales for 2018/19 and the percentage increases which would apply over the next three years. Those pay scales had been published by the NHS. On 22 January 2019 the respondent became aware that published information contained errors and sent the claimant a letter telling him

that the respondent had applied the incorrect salary rates for Agenda For Change bands since I April 2018 and he was one of those affected .The correct pay rate would be applied from 1 January 2019.He was told there would be further communications to confirm the overpayment amount and how the overpayment would be recovered .He was assured that procedures for applying changes to Agenda For Change rates had been reviewed to ensure there was no repetition of the mistake. The respondent had also sent him a letter on 7 March 2019 telling him his terms and conditions of employment were unchanged but also saying that the respondent had been paying him and hundreds of other employees the wrong hourly rate and the overpayment would be 'recuperated '(sic).

18 Despite his successful appeal the claimant did not return to work until 2 April 2019 pending the resolution of various matters. The first day at work passed without incident but on 3 April 2019 things began to go awry.

19 Prior to his dismissal in February 2018 the claimant would leave his work station in the production area remove his specialist protective clothing change back into his own clothes and assemble before the clocking machine to observe it tick over to 5 pm in order to leave at 5 pm .

20 On 3 April 2019 a supervisor reported to Ms Heitzman that that she had been told by another supervisor that the claimant had been seen tidying up early at 16.46pm and had informed him he needed to work till the end of his shift. At the supervisor's request Ms Heitzman spoke to the claimant and asked him to work till the end of his shift, but he said he would be leaving at 5 pm. She told him he had to change in his own time .He said he was not prepared to agree to this because he was entitled to change back into his own clothes and what she was saying was a change to his terms and conditions of employment.

21 Ms Heitzman saw the claimant again before his shift began at 12.00pm. She told him again that he needed to remain in the production area for the duration of his contracted hours and told him this had been the case for the last few years. He asked for a copy of his terms and conditions of employment which she said would be the same as other staff members .She also asked him not to leave the production area early again , and told him that he needed to do what all the other staff did which was get paid for the hours they had worked. She warned him if he did not carry out the request, he might face disciplinary action as a result. He told her this was not the case when he was last at work. At 16.56 that day Ms Heitzman saw the claimant entering the male changing rooms. When she asked him why he had left the production area early he said he had not and would be leaving the building at 5.00pm.She told him it would be noted and he then left .

22 Ms Heiztman then took advice from the respondent's HR department and decided to arrange a disciplinary hearing. A letter dated 8 April 2019 told the claimant a disciplinary meeting had been arranged for 11 April 2019, the reason for which was '*Gross Misconduct (section 10.5 in employee handbook*)' namely *'gross insubordination or refusal to follow instructions*.' It went on to say *'As **you aware**, it is Steris at New Cross customs (sic) and practice to ensure every member of staff are in production /training areas at the start/end time of their contracted hours.'* He was warned the outcome of the meeting may include dismissal and a copy of the respondent's disciplinary procedure was enclosed. Ms Heitzman explained under cross examination that the phrase '*custom and*

practice' meant it was not written down anywhere but the letter was a template provided by HR and she was unable to provide any more detail about it .

24 The claimant continued to clock out at 5pm on 9 and 10 April 2019 having left the production area before 5pm and changing out of the specialist protective clothing and into his own clothes before clocking out.

25 The claimant attended the disciplinary hearing at 13.30 pm on 11 April 2019. It was conducted by Ms Heitzman. Typed notes were prepared of this meeting by a notetaker and of the other disciplinary and appeal hearings the claimant subsequently attended. He did not at the time and does not today accept those notes as an accurate record of what was said at those hearings but would not explain which parts (if any) were inaccurate and in what respect. Those notes were prepared at or around the time of the hearings and in the absence of any substantive challenge by the claimant as to their accuracy I find they are an accurate (if not verbatim) record of what was said by the attendees.

26 During the hearing the claimant was markedly unco-operative but it is clear that at no time did Ms Heitzman ask him to explain to her why he was not complying with her instruction that he should not leave the production area until the end of his shift at 5pm.Having established that the CICO reports confirmed he was not working up to 5pm in the production area, after a brief adjournment she told the claimant that she was imposing a final written warning for 12 months ('FWW') . The imposition of the FWW was confirmed in a letter to the claimant dated 16 April 2019 in which Ms Heitzman said the meeting had been held to '*investigate the following 'Gross insubordination or refusal to follow instructions. Specifically, following conversations explaining about clocking in and out at the correct time and explaining to you that you are paid up to and including 5pm, you continued to leave the production areas earlier than 5pm'.*

27 Ms Heitzman's evidence in her witness statement was that the claimant had not engaged in any dialogue about why he considered it reasonable to clock out before the end of his shift but that is hardly surprising since she did not ask him about this. She also gave as part of her rationale for the imposition of the FWW that he had provided no satisfactory explanation, but I find she did not ask him for an explanation at that hearing .When she spoke to him on 3 and 4 April 2019 he had told her both that the position had changed since he was last at work and that he considered her request a change to his terms and conditions. In addition to his failure to provide a satisfactory explanation her evidence was that she imposed the FWW because he had repeatedly said he would be leaving before the end of his '*contracted hours*' and had adopted an evasive approach during the disciplinary hearing.

28 After the disciplinary hearing on 11 April 2019 at which the FWW was imposed and on 16 April 2019 the claimant continued to leave the production area before 5pm and change out of the specialist protective clothing and into his own clothes before clocking out at 5pm.

29 On 16 April 2019, the claimant appealed against the FWW to Mr Preston on the grounds the respondent failed to act reasonably and/or in accordance with best practice and published guidelines.

30 On 17 April 2019 Ms Heitzman suspended the claimant on full pay pending investigation into his' *ongoing refusal to comply with a reasonable management request ie leaving your workstation before time you are actually paid up until*.' Although the letter confirming the suspension of the same date stated its purpose was to allow an impartial and fair investigation there was no evidence before me that any further investigation was carried out.

31 The claimant emailed Mr Preston on 18 April 2019 to say that in view of his '*record of mismanagement where I was concerned ,typified by, but not restricted to your obvious determination to [falsely] dismiss me last year*,' he suggested the respondent consider whether it was '*sensible to put both myself and yourself in a position where I might be similarly subjected to inappropriate attention .To that end I suggest that you consider ,along with your superiors ,whether or not such a meeting as you propose should take place*.' He said if the hearing did go ahead he would attend but saw '*little prospect of a fair, genuine or objective finding or outcome*.' In an exchange of emails that day Mr Preston said he was required to be appeals officer as Ms Heitzman's line manager and the current process was entirely unrelated to the previous disciplinary process and the claimant told him that his reply missed the point.

32 Mr Preston duly conducted the appeal hearing on 23 April 2019.The claimant asked that his objection to Mr Preston doing so be noted which it was. The claimant complained of the lack of documentary evidence provided by Ms Heitzman for the change to his terms and conditions of employment although she had confirmed that they had remained unchanged. He had never been subject to the requirement to clock out at shift end and the new procedure constituted a change to his terms and conditions to which he had not agreed. He said he was '*seeking a criminal activity'* for extortion stealing his time and for coercion in depriving him of his liberty. Mr Preston adjourned the hearing and examined clocking in records going back to 2017. On his return after 40 minutes he told the claimant about his further investigations and said the odd person had clocked out a bit early but not continuously and the clocking in /out process had been in place for 18 months. The claimant said his obligation ended at 5 pm and Mr Preston said he disagreed ;-a technician was paid until 5 pm in the production area and working till 5.00pm was entirely reasonable to which the claimant responded he thought it was entirely unreasonable.

33 Mr Preston upheld the imposition of the FWW and confirmed his decision in a letter to the claimant dated 29 April 2019.

34 The day after the appeal hearing Ms Heitzman wrote to the claimant inviting him to attend a disciplinary hearing on 30 April 2019 the reason for which was '*further gross insubordination or refusal to follow instructions'* in that having been given the FWW on 11 April 2019 he then left the work place early on 11 and 16 April 2019. He was warned the outcome may be dismissal.

35 Ms Heitzman conducted the disciplinary hearing on 30 April 2019. The claimant said he was working to the notice that people have to clock out on time. He asked whether his contracted hours were specific to a task and was told they were not ,they were to be performing the role of a technician for the full duration of his contracted hours and when he asked how work was defined he was told as completing the duties in his job description. It is common ground that the claimant was not given a job description. Ms Heitzman said he was paid for his

working hours and the claimant said his contract did not say he had to be in a specific area or engaged in a particular activity. He pointed out Mr Preston had said the custom and practice in question had been place for 16 months but she had told him it had always been the case. After an adjournment Ms Heitzman said the new system had come in 18 months ago not 16 months ago, so longer than he had thought.

36 When asked by Ms Heitzman if he had anything to add the claimant said that the respondent ceased to pay him at 5pm and if it wanted him to complete anything outside that it should pay him. If he had to be on the premises, then he had to be paid for every minute. He should be paid to get changed and to sign out. She concluded the hearing at 2.00pm and announced her decision at 2.44 saying that he had previously been given a final written warning and there were two other occasions when he had left production early and that she had *'no other option but to dismiss*' him on grounds of misconduct with a payment in lieu of notice. She confirmed his right of appeal to Ms Doyle (general manager at the respondent's Liverpool site). Ms Heitzman accepted under cross-examination that the claimant would not have been dismissed if he had not had a FWW.

37 The claimant appealed in a letter to Ms Doyle dated 7 May 2019 in which he complained his dismissal had been wrong unfair unreasonable and disproportionate. Having explained he had previously been dismissed in February 2018 and reinstated on appeal on his existing terms and conditions he said he was dismissed this time following a dispute about his terms and conditions of employment. The claimant made it very clear that he did not know what other staff had been asked to do or what they did at the end of their shifts and those matters were not relevant for him. He complained of the absence of documentation to support the respondent's position that it had always been the case employees had always to remain in the production area up to the end of the shift or that this was a new requirement or that either were established policy or practice and his contract required him to be notified in writing of contractual changes. During his employment the established policy was to allow time finishing production to enable clocking out at the appointed time which could be confirmed by clock records and interviewing colleagues and he referred to a notice near the clock requiring employees to clock in/out on the hour. He complained about the authoritarian and confrontational approach taken by management and the absence of dispute resolution procedures. He said that '*Management had acted to investigate itself and applied selective resonating in reaching it's(sic) decision to dismiss me'*. He denied misconduct. He said he was entitled to leave when his contractual hours were finished and to disregard an instruction to stay. It was not a '*reasonable management request'* but '*an extortionate demand*' requiring him to submit to the loss of his right to freedom of movement and agree to provide unpaid services. He concluded by saying '*I am under no obligation to recognise or engage with the company other than in the context of paid employment. The moment I cease to be in receipt of payment is the same moment that the company ceases to have any requirement of me, including attendance at it's (sic) premises*.'

38 Ms Doyle heard the claimant's appeal on 29 May 2019. The claimant explained he had previously always left the building on time and said he had asked one other person (who he did not identify) about the change and they had said the change came in and they had accepted it. He described the change to the clocking in system as a big change and under his contract he should have

been notified of any change in terms in writing. There was a discussion about whether the claimant was or was not working for the 15 hours for which he was paid. The claimant explained his position which was if he was in attendance in his' *scrubs*' subject to the respondent's instructions he was working .Ms Doyle said he had been instructed to stay in his department till the end of his shift and he said if that kept him in work for longer without paying him it was not reasonable. Ms Doyle explained that the opinion of the business was if everyone was allowed 5 minutes at the end of the shift that was a lot of downtime resulting in loss of technician productivity. He referred to a photograph he had of the notice on the clock. Ms Doyle asked to him to email it but he said there was no reason why he had to do so and she could contact the managers. When pressed by Ms Doyle he eventually said he would think about providing it. Ms Doyle said if she did not receive it by 5 pm on the Friday she would assume it was not coming. In the event he did not provide the photograph but emailed her with the text of the notice.

39 Following the appeal hearing Ms Doyle carried out further investigations with Ms Heitzman and the member of the respondent's administrative department responsible for the notice dated 3 March 2016.She concluded the notice had been taken down in April 2019 as a result of the introduction of the SynergyTrak performance Analysis and Clocking system and replaced with a notice in the same terms as the notice put up by Ms Heitzman in June 2019 and that the earlier notice had been put up to highlight to staff that if they clocked out earlier than the end of their shift this would be identified as an exception requiring a review and approval in order to avoid deductions being made. She compared the clocking out records for the claimant and other staff on 9 11 and 16 April 2019 and found he had clocked out at 16.59 on each occasion meaning he had left the production area some time before that. She also recalled the inquiry undertaken in October 2015. There is no evidence that the outcome of these further investigations were provided to the claimant to enable him to comment on them before she made her decision on the appeal. There is no evidence she spoke to any other staff about why they stayed in the production area until the end of their hours of work before clocking out and for how long they had been doing so. She concluded that it was the respondent's custom and practice to ensure that staff were in the production area at the start and end time of their contracted hours and that this predated the claimant's dismissal in 2018 and subsequent absence ,the evidential basis for which was the email to her and others from the Operations Director in October 2015.

40 On 7 June 2019 Ms Doyle wrote to the claimant to inform him that his appeal was unsuccessful .She said she had a reasonable belief that despite repeated requests verbal and via the respondent's disciplinary procedure he continued to refuse to follow a reasonable management request .She said ' *You stated that any amendments to your contract should be notified to you in writing .Any introduction of Business performance management /productivity or other monitoring tools are not deemed by the Business as a change to your contract*.' She went to say that all staff had been asked to follow the same management request which was '*New Cross custom and practice'* to ensure staff are in production or training areas at the start/end time of their contracted hours .She referred to the email from the Operations Director in 2015 .She also said she had the reasonable belief that New Cross had for several years kept to that direction and it was custom and practice for staff to be in production areas at the start/end of shift .It had not been adhered to by all staff previously but was now monitored

since the introduction of Synergy Trak and therefore the request was now being followed by all staff.

41 It is common ground that the claimant did not complain (as Mr Ennis does now) during the disciplinary procedure which culminated in the rejection of his appeal against dismissal about Ms Heitzman being the person who raised the complaint about him and also the investigator and disciplinary officer. Ms Heitzman however accepted under cross-examination that in being the investigator and the person who decided there should be disciplinary proceedings and the disciplinary officer she was judge in her own case. She felt the disciplinary meetings would give him the chance to change his ways and comply with what was expected of him.

42 The claimant presented his claim on 21 August 2019 having been issued with an ACAS EC Certificate on 11 July 2019.

The Law

43 Section 98(1) and (2) of ERA provide that:

> "(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."

44 Section 98(4) of ERA provides that:

> "(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."

45 It was held in the case of **Sainsbury's Supermarkets Ltd v Hitt [2003]IRLR 23 CA** that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for

a conduct reason.

46 In conduct cases the tribunal derives considerable assistance from the test set out in the case of **British Home Stores Ltd -v- Burchell [1978] IRLR 379 EAT,** namely: (i) did the employer believe that the employee was guilty of misconduct; (ii) did the employer have reasonable grounds for that belief; (iii) had the employer carried out as much investigation into the matter as was reasonable in all the circumstances. The first question goes to the reason for the dismissal. The burden of showing a potentially fair reason is on the employer. The second and third questions go to the question of reasonableness under Section 98(4) ERA and the burden of proof is neutral.

47 I remind myself that it is not for the tribunal to substitute its view of what was the right course for the employer to adopt. 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 the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair **(Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT).** In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702** tribunals were reminded they should consider the fairness of the whole of the process. They will determine whether ,due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness or not of the decision –maker the overall process was fair, notwithstanding any deficiencies at an early stage. Tribunals should consider the procedural issues together with the reason for dismissal .The two impact on each other and the tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.

48 The ACAS Code of Practice :Disciplinary and Grievance Procedures (2015) which tribunal are required to take into account when considering relevant cases states at paragraph 6 that '*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing*. 'It also states at paragraph 27 that in relation to appeals that any appeal '*should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case*.'

49 In **Farrant v the Woodroffe School [1997] UKEAT 1117_96_0810** it was held that where the conduct relied upon by the employer is the employee's refusal to obey an instruction the question as to whether that instruction is lawful is a relevant but not decisive question when considering the reasonableness of the dismissal under section 98(4) in a case of unfair dismissal. **Farrant** was approved in **Ford v Libra Fair Trades Limited [2008] UKEAT 0077_08_2406.** It was held that if a question arises as to the lawfulness of an instruction or as to whether the alleged misconduct occurred in the execution of a task which the employee was contractually obliged to carry out or not, the tribunal must consider the employer's belief and whether ,if the employer believed that the misconduct alleged arose in relation to a task which the employee was contractually obliged to carry out ,that belief was a genuine and reasonable one ,albeit mistaken. The primary factor a reasonable employer will consider in deciding whether or not to dismiss an employee for refusing to comply with an instruction is whether the employee was or could be acting reasonably in refusing to obey the instruction (**Union of Construction Allied Trades and Technicians v Brain 1981 ICR 542 ,CA .**

50 Mr Ennis relied on the case of **Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 699,CA** when an employee's dismissal was found to be unfair despite an admission of guilt because the manager holding the disciplinary hearing had initiated the disciplinary investigation and was biased against him as she had already made up her mind to dismiss. He also relied on the case of **Watson v University of Strathclyde 2011 IRLR 458 ,EAT** in which ,in the context of an appeal against the outcome of a grievance when the employee had unsuccessfully complained about the inclusion of a member on the appeal panel, an employee was held to have been constructively unfairly dismissed because the university had failed to consider not only actual bias on the part of the panel member in question but also apparent bias, applying the test in **Porter v Magill** of the fair-minded observer having considered the facts would conclude there was a real possibility that a tribunal or any member of it was biased. He submitted in those circumstances I should not follow **Davies v Sandwell Metroplitan Borough Council [2013] EWCA Civ 135** in which it was held that it was legitimate for an employer to rely on a final written warning when deciding whether to dismiss an employee provided the warning was issued in good faith and there were at least prima facie grounds for imposing it and it was not manifestly inappropriate and that it was not the function of the tribunal to reopen the final written warning and rule on whether it should or should not have been issued.

51 Mr Edwards referred me to the section on implied terms in Harvey on Industrial Relations and Employment Law (paragraph 30) in particular terms implied by conduct and by custom and practice (the existence of which is a question of fact and evidence).As was observed in Harvey there is considerable overlap between the two. In **Albion Automotive Ltd v Walker [2002] EWCA Civ 946** the Court of Appeal applied a multifactorial test which according to Underhill LJ in **Park Cakes Ltd v Shuma [2013] IRLR 800** 'should not always be used as a checklist though 'not unhelpful'. The burden of proof of establishing that a practice has become contractual is on the employee however and he will be unable to discharge it if the employer's practice is ,viewed objectively, equally explicable on the basis it is pursued as a matter of discretion. He submitted that permitting employees to leave early was equally explicable as a matter of discretion rather than legal obligation. No policy had been drawn to the attention of employees because it was the claimant's practice; some had followed it but not from 2018.The claimant had not come close to establishing the policy had become contractual.

52 As far as unauthorised deductions for wages are concerned section 14 ERA 96 states that section 13 (which enshrines the right not to suffer unauthorised deductions for wages) does not apply to a deduction made by the employer where the purpose is of the deduction is the reimbursement of the employer in respect of an overpayment of wages made (for any reason) by the employer to the worker.

Conclusions

53 I take the opportunity to thank Mr Ennis and Mr Edwards for their oral submissions which I have carefully considered.

54 Mr Ennis referred me to the definition of working time in regulation 2 Working Time Regulations 1998 which means at a) ' *any period during which he (the worker) is working at his employer's disposal and carrying out his activity or duties.* ' He submitted that it was part of the claimant's duties to change in and out of his clothes and while on its premises he was at the respondent's disposal; hence time spent in this way was working time or it was not unreasonable for it to be interpreted as working time. In my judgment regulation 2 Working Time Regulations 1998 had no relevance to the matters I had to decide. The claimant made no reference to it in any hearing nor did Mr Ennis explain to me its significance to any issue in dispute.

55 The basis on which Mr Ennis submits the management instruction to remain at his workstation was not lawful was that (at some point if not from the outset) a term had become implied into the claimant's contract of employment by conduct by the time he was dismissed in February 2018 whereby employees were permitted to finish production a few minutes before 5 pm to tidy up the clean room change back into their own clothes and assemble in the clocking out area to attend the clock ticking over to 5pm to leave at the end of the shift. I conclude that the claimant has failed to discharge the burden of proof on him to establish the existence of that implied contractual term. He relied on the notice dated 3 March 2016 to support this but that notice in my judgment is no more than a reminder to staff that they should clock out on time to avoid deductions being made to their wages. Although it was the claimant's contention that this had always been the practice of employees at New Cross he has provided no evidence from any other employees to corroborate the existence of the practice in question prior to 2018 or provided any satisfactory explanation for his failure to do so. If he and any other employees did conduct themselves in the way the claimant asserts that is equally explicable as being afforded to them as a matter of discretion by the respondent rather than legal obligation .The claimant has therefore failed to prove that the term for which he contends had become implied into his contract of employment by conduct as alleged prior to his dismissal in February 2018; I conclude by the time he was dismissed in February 2018 the claimant had become accustomed to act in that way at the end of his shift and erroneously but genuinely believed that he was contractually entitled to do so and the respondent was not allowed to change this without his agreement or giving notice of the change .

56 I now turn to the respondent's submission that it had a policy in place since 2015 requiring that all staff at New Cross clock in and clock out using the current Synergy Trak system and are present and available for work in the production area at the start of their shift until the end of their shift save for breaks .The respondent's Operations Director certainly wanted the respondent's policy to be that staff were present and available for work in the production area at the appointed start and finish times of their shifts on a site wide basis from October 2015 and that was what Mr Anderson told him was already the case at New Cross. However, I conclude that it was not until the introduction of the Synergy Trak performance and analysis and clocking system in February 2018 that the respondent put in place systems at New Cross to monitor employees and that the policy was implemented and applied .It did not communicate the policy to employees in writing but monitored its application using the Synergy Trak system and requiring staff to clock in and out. Employees adhered to the policy thereafter. That the policy was in place by then is supported by the induction Ms Heitzman received when she started work for the respondent in May 2018. That it

was monitored is supported by the actions taken by the supervisors when they became aware of the claimant's actions.

57 In my judgment therefore there was no unilateral change to an implied term of the claimant's employment by the respondent when he returned to work and was instructed to act in accordance with the policy which by then was in place. The instruction given to the claimant by the respondent was not therefore unlawful on the basis alleged by the claimant**.**

58 Having concluded it was not unlawful, was it a reasonable management instruction? I conclude that it was .The respondent wanted to ensure that productivity at its sites continued right up to the end of the shift to avoid 'down time' as Ms Doyle put it and that required employees to stay in their production areas until the end of their shift. By April 2019 the policy and (systems to monitor its application) had been in place for over a year and employees adhered to it. In those circumstances the respondent gave a reasonable instruction to the claimant to adhere to the requirement to stay in the production area.

Commented [SW1]: Anagement

59 Mr Ennis accepted in his oral submissions that the respondent genuinely believed that the claimant had refused to follow a reasonable management instruction and left his workstation early. The respondent has shown the reason for the dismissal related to the claimant's conduct which is a potentially fair reason for dismissal.

60 The times and occasions on which the claimant left his workstation were not in dispute. The complaints which Mr Ennis made in his submissions about the investigation -the respondent's failure to speak to colleagues and Mr Preston having looked at 'inconclusive' clocking records -lacked any real force as far as its reasonableness was concerned. It would have been preferable for Ms Doyle to inform the claimant about the outcome of the further investigations she undertook and give him the opportunity to comment before reaching her decision and she failed to speak to other employees (see paragraph 39) but these matters (either individually or taken together) were not such that I could conclude that the investigation which was carried out fell outside the range of reasonable responses.

61 I turn now to the specific allegations made by the claimant about the fairness of the procedure adopted by the respondent. He complains he should not have been disciplined before his appeal was concluded. He was not disciplined before his appeal was concluded as Mr Ennis accepted in his submissions. If I understood him correctly the point he sought to make was that the further noncompliance by the claimant had taken place at a time when there was still a dispute about whether or not the respondent was entitled to impose the instruction in question and I therefore should have regard to the fact that the dismissal invitation letter was only 24 hours after the appeal hearing giving the claimant no time to modify his behaviour in the meantime. If so, I do not agree.

61 The claimant submits it was not 'appropriate 'for Mr Preston to hear his appeal against the imposition of the FWW. The accusation against him submitted by Mr Ennis was (as I understood it) that he should have considered whether there was a real possibility of apparent, not actual, bias. and I should therefore examine the imposition of the FWW notwithstanding the case of **Davies .** Again, I do not agree. There is no evidence of bad faith or manifest impropriety or that the FWW

was issued without prima facie grounds. What is required under the ACAS Code is that the manager hearing the appeal had not previously been involved in the case. There was no evidence that Mr Preston had been so involved in this disciplinary matter. He was the appropriate manager to hear the appeal under the respondent 's disciplinary procedure and there was no evidence before me from which I could conclude that he did not approach his decision making in relation to the appeal against the imposition the FWW in an impartial way. If I am wrong about that and Mr Preston should have considered apparent bias in these circumstances and not have decided the claimant's appeal against the FWW in my judgment his failure to do so would not be sufficient in and of itself to render the dismissal unfair.

62 Lastly the claimant submits it was not 'appropriate' for Ms Heitzman to hear both disciplinary hearings. The specific criticism here is she was wearing too many 'hats 'as complainant investigator and disciplining and dismissal officer. There was no explanation from the respondent (which had access to HR resources) why it was not practicable for different people to carry out the investigation and disciplinary roles. Mr Edwards submitted she was the appropriate person to conduct the disciplinary hearings under the respondent's disciplinary procedure and I do not disagree. However I conclude that she failed to come to her decision making at the disciplinary hearings with an open mind ; she came with her mind already made up that it was the claimant who was in the wrong and had to change his ways .

63 However tribunals are required to look at the fairness of the whole of the procedure adopted by the respondent. The criticisms made by Mr Ennis of Ms Heitzman were not made of Ms Doyle; indeed, he made no criticism of her at all. The claimant does not say that during the appeal he was not permitted to put his case to her and or that there was material he wanted to rely on at the appeal that he was unable to put forward. His only complaint of Ms Doyle is that she did not overturn the decision of Ms Heitzman.I conclude that notwithstanding the lack of an open mind on the latter's part Ms Doyle did approach the appeal and her decision making with an open mind and overall (notwithstanding any earlier deficiencies) the procedure adopted by the respondent fell within the range of reasonable responses.

Commented [SW2]: s

64 The lawfulness of the instruction given by the respondent is a relevant but not decisive question when considering the reasonableness of the dismissal for refusing to obey such an instruction. In deciding whether to dismiss an employee for failing to comply with a management instruction a reasonable employer should consider if the employee in question was or could be acting reasonably. The claimant's explanation for not complying with the instruction was that he believed the respondent was unilaterally changing his terms and conditions of employment without notice and requiring him to work beyond the end of his shift without being paid for it because he had to leave the production area and then change out of his specialist protective clothing and into his own clothes before leaving the premises which he considered tantamount to extortion and the deprivation of his liberty . The effect of the management instruction so far as the claimant was concerned was that he was on the respondent's premises for a number of minutes without being paid for that time .It is implicit in Ms Doyle's appeal decision (paragraph 40) that she considered whether the claimant was or could have been be acting reasonably in refusing the instruction in question and decided he was not because having given the claimant the opportunity to state

his case and provide any material in support of it she reasonably concluded that the respondent had not unilaterally changed a term of the claimant's contract of employment without notice but had imposed a policy which was adhered to by other employees .

65 Although it was finely balanced ,I have concluded that the respondent acted within the range of reasonable responses in dismissing the claimant for his failure to obey the instruction that he stay in the production area until the end of his shift . The claimant was already subject to a FWW, which clearly warned him of the effect of further misconduct during its currency. Refusal to follow instructions is within the respondent's definition of gross misconduct. Mr Ennis submitted that the respondent could have taken a different approach and utilised dispute resolution rather than a disciplinary route or not taken disciplinary action straightaway in the context of an employee who had just returned to work after a substantial period away but that another reasonable employer might have done so does not make the claimant's dismissal outside the range of reasonable responses available to an employer .In my judgment in accordance with equity and the substantial merits of the case the respondent acted reasonably in treating the claimant's conduct as sufficient reason to dismiss him. The claim of unfair dismissal therefore fails and is dismissed.

66 As far as the unauthorised deduction from wages claim is concerned the pay increases to which the claimant is entitled are those which are contained in the Agenda for Change Handbook. The NHS published rates were incorrect and as a result the respondent had inadvertently applied to him the incorrect Agenda For Change pay rates resulting in an overpayment of wages to the claimant. I conclude that the claimant had been paid wrongly since 1 April 2018.The deduction of £ 372 from the claimant's final wages was made to reimburse the respondent in respect of that over payment .Section 14 ERA applies ;there was no unauthorised deduction from the claimant's wages by the respondent in those circumstances.

Commented [SW3]:

_____

Employment Judge Woffenden

Date 1 December 2020

JUDGMENT SENT TO THE PARTIES ON

.....

.....

FOR THE TRIBUNAL OFFICE

Case No: 1306785/2019