



EMPLOYMENT TRIBUNALS

Claimant: Mr O Adeshina

Respondent: Corps Security (UK) Limited

Heard at: London South Tribunal **On:** 15th December 2020 **by:** CVP

Before: **Employment Judge Clarke (sitting alone)**

Representation

Claimant: Mr O Adeshina (in person)

Respondent: Catherine Urquhart (Counsel)

RESERVED JUDGMENT ON LIABILITY

- (1) The complaint of unfair dismissal is well-founded. This means that the Claimant was unfairly dismissed by the Respondent.
- (2) A 50% reduction in the Compensatory award for unfair dismissal will be made under the principles in ***Polkey –v- A E Dayton Services Limited 1998 ICR 142.***
- (3) No adjustment to the damages award for contributory negligence.
- (4) No adjustment to the damages award for failure to comply with ACAS Codes.
- (5) The Tribunal will decide the remedy for unfair dismissal at a further hearing on 11th February 2021. The parties will be sent a separate case management order setting out the required steps for preparing for the remedy hearing.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Security Officer, undertaking shifts at the St Thomas's Hospital. He was dismissed on 1st October

2019 and notified ACAS under the early conciliation procedure on 10th November 2019. The ACAS certificate was issued on 10th December 2019.

2. By a claim presented to the employment tribunals on 15th December 2019 the Claimant complained that his dismissal was unfair.
3. The Respondent resists the claim asserting that that it fairly dismissed the Claimant after a thorough investigation and following a fair procedure and that the decision to dismiss was a fair one in all the circumstances.
4. The case has been before the tribunal on 2 previous occasions, on 5th February 2020 when it was listed as a final hearing but was given case management directions as the Claim had not been identified with sufficient precision to proceed. Directions were given and the case was then due to be heard on 14th April 2020 but had to be postponed again due to coronavirus restrictions.

The Evidence

5. At the Hearing, the Claimant represented himself and gave sworn evidence.
6. The Respondent was represented by Counsel, Ms Catherine Urquhart, who called sworn evidence from Mr Clarence Hyman, Contract Manager covering London Sites, Mr Glen Bowen, Key Account Manager for the Southern Region, and Mr Seetan Varsani, Regional Operations Director for the London area.
7. I was also referred to, and considered, documents contained in a bundle comprising 84 pages and witness statements from each witness who gave oral evidence. References to page numbers hereafter are to pages of this bundle. I was also provided with a 4 page "Respondent's Note" authored by Ms Urquhart.
8. I also viewed various sections of CCTV footage that were agreed between the parties to be relevant.
9. At the conclusion of the evidence both the Claimant and the Ms Urquhart (on behalf of the Respondent) made brief oral submissions.

The Issues for the Tribunal

10. The list of issues was agreed between the parties during the case management hearing on 22nd June 2020 (page 27B), namely:
 - (i) Was the Claimant dismissed for a potentially fair reason in accordance with s.98(1) of the Employment Rights Act 1996 ("ERA")? The Respondent relies on conduct which is a potentially fair reason (s.98(2)(b) ERA).
 - (ii) Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and the merits of the case (s98(4) ERA).

- (iii) In accordance with the test in ***British Home Stores -v- Burchell [1980] ICR 303***, has the Respondent shown that:
 - (a) It had a genuine belief that the Claimant was guilty of misconduct?
 - (b) It had in its mind reasonable grounds upon which to sustain that belief?; and
 - (c) At the stage at which the belief was formed, it had carried out as much investigation into the matter as was reasonable in the circumstances?
 - (iv) Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances?
 - (v) If the Claimant's dismissal was unfair, is the Claimant entitled to a Basic Award and/or a Compensatory Award, and, if so, should there be any of the following adjustments:
 - (a) A reduction in the Compensatory Award on the basis the Claimant has mitigated or failed to take all reasonable steps to mitigate, his loss?
 - (b) Any adjustment to the Compensatory Award as a consequence of any failure (by either side) to follow procedures under the ACAS code?
 - (c) Any reduction or limit in the Compensatory Award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with *Polkey?*; and/or
 - (d) Any reduction in either award to reflect any contributory fault on the Claimant's behalf towards his own dismissal?
11. At the commencement of the Hearing, I confirmed with the parties that this list of issues remained relevant and covered what was in issue between them.
12. The Claimant confirmed that he did not wish to change the Schedule of Loss dated 30th June 2020 (pages 83-84) in any way.
13. As the Claimant had not previously seen all the CCTV footage it was agreed that he would view it before the commencement of evidence whilst I read the witness statements and the documents at pages 45-49, 53-54, 56- 58, 61- 69, and 71-74 of the Bundle that the parties specifically asked me to have regard to.
14. After seeing the CCTV footage himself, the Claimant considered it necessary for me to view the footage and the parties agreed between themselves the short sections that I would view. All of those sections were shown to me.
15. It was agreed that I would, in the first instance address liability and general unfair dismissal remedy issues where appropriate.

Relevant Findings of Fact

16. The Respondent is long-established company providing a national manned guarding service throughout the UK. It employs approximately 3,000 persons,

including security officers who undertake shifts on different sites to fulfil the various security contracts the Respondent has entered into with other organisations.

17. The Claimant started his employment with the Respondent having been transferred under TUPE (pages 43-44). The effective start date of his continuous employment was agreed by the Claimant at the outset of the hearing to be 28th January 2008, notwithstanding the assertion on his claim form that his employment commenced on 30th January 2007.
18. The parties are agreed that the Claimant was dismissed without notice on 1st October 2019 and that the reason for the dismissal was gross misconduct by way of theft and/or suspected theft. At the time of his dismissal, he held the post of Security Officer.
19. Between 17th August 2019 and 20th August 2019, the Claimant worked as a security officer on the night shift at St Thomas' Hospital. His work involved spending time at the control desk in the management office. Amongst other things, his job involved checking and locking up each department using a bunch of master keys.
20. The St Thomas' Hospital site is covered by a large number of CCTV cameras. There are at least 2 cameras (no's 361 and 039) covering the St Thomas's control desk where the Claimant was based during his shifts and other cameras outside that office. The CCTV footage from these cameras is retained only for a limited period. The footage is not owned by the Respondent but is owned by, and is in the control of, St Thomas' Hospital/the NHS Trust that controls the hospital and is only available to the Respondent with the co-operation of the hospital security staff.
21. On Friday 16th August 2019, at about 16:38 Michelle Robinson, a security officer employed by the Respondent was given a lost wallet containing credit/debit cards and £80 in cash that had been found at St Thomas' Hospital. She logged the wallet in the lost property book, filled in a lost property form and placed the wallet and form into a green transparent patient property bag and placed the patient property bag into a blue property bag at the St Thomas' control desk in the management office (page 53).
22. Subsequently, on Monday 19th August 2019 when the blue property bag was taken to the security management office and opened it was discovered that the wallet was not within it.
23. The footage from the cameras covering the control desk for the **full weekend** (my emphasis) was reviewed by Joe Galea, the Security Contract Manager and a St Thomas's Hospital site-based employee of the Respondent, as per his e-mail (page 51).
24. On 29th August 2019 Carl McIntosh, a Security Operations Manager for Guy's and St Thomas' NHS Trust and a former police officer, also reviewed CCTV footage. Although his statement (page 54-55) says that he reviewed footage from

between 14.00 on 19th August 2019 to 0100 on 20th August 2019 this is assumed to be a typing mistake. The time stamp on the footage that shows the incident he refers to took place from apx 00:10 to 00:35 on 19th August 2019. At least some parts of this footage were also reviewed by Belayeth Hussain, the Security Operations Manager for the hospital trust.

25. As a result of what he had seen on the CCTV footage, on 29th August 2019 Belayeth Hussain sent an e-mail (page 50) requesting that the Respondent suspend the Claimant with immediate effect and carry out an investigation. His view was that the CCTV appeared to show the Claimant opening the property bag for no reason, taking the patient property bag out, hiding the contents then walking out of the control desk and later returning to the office and shredding paper and what appeared to be a card.
26. As a result of this e-mail, on 30th August 2019 the Respondent suspended the Claimant and in early September 2019 Clarence Hyman, one of the Respondent's contract Managers covering sites in London commenced an investigation.
27. He reviewed statements from Michelle Robinson and Carl McIntosh. He trusted the information received from Joe Galea and Carl Mackintosh about the review of CCTV footage.
28. He then interviewed the Claimant. The notes of the interview are available to me at pages 56 to 58 of the Bundle.
29. During the interview, which took place on 10th September 2019, some 3 weeks after the events it concerned, the Claimant gave quite generalised responses to generalised questions such as whether he recalled shredding papers. The Claimant was told what the CCTV was thought to show, namely him going into the bag, taking the wallet, leaving he control room and returning to shred paper but he was not shown the footage. The Claimant said that it wasn't him. After being informed that people had identified him on the CCTV footage, the Claimant said that he wasn't saying that it wasn't him on the CCTV footage but that he did not take the wallet or shred paperwork. He also stated that as there was CCTV footage it should be clear who took the wallet but that it definitely was not him.
30. Contrary to what is said at paragraph 6 of his witness statement Carl Hyman admitted in oral evidence that he did not review *all* of the CCTV footage at any point and that prior to interviewing the Claimant had not himself seen any of the footage.
31. Following the interview with Claimant Mr Hyman reviewed the extracts of CCTV footage showing the Claimant in the early hours of 19th August 2019 (from at least 00:10 to 00:35) which had been described by Carl McIntosh but undertook no further investigation.
32. He did not re-interview the Claimant after viewing the footage, did not give the Claimant the opportunity to view the footage and subsequently comment upon it, and did not ask the Claimant to explain the specific actions that the Claimant was

seen undertaking on the CCTV footage which were not clearly represented by the still photographs. He took the view that the Claimant would have access to the CCTV footage during his disciplinary hearing and he did not therefore need to do so.

33. Consequently, he did not at any time investigate the Claimant's explanation, given during the disciplinary hearing, as to what his actions shown on the CCTV footage actually were.
34. Mr Hyman also did not query the inconsistency between the written information received as to the period of the CCTV footage reviewed by Carl McIntosh and the date and time of the CCTV footage showing the Claimant's actions.
35. Mr Hyman had no details as to the circumstances or manner in which the wallet was discovered missing and did not explore when or how the relevant bag had been transported to the location where the wallet was found to be missing or who had been involved in that transfer.
36. He also took no steps to himself find out what the remainder of the CCTV footage from the window between when the wallet was received and when it was discovered to be missing showed, and in particular whether there was CCTV footage showing the wallet being placed in the property bag on 16th August 2019 and/or the bag being removed and opened on 19th August 2019. He relied entirely upon the statement of Joe Galea that the footage for the window between these 2 events had been reviewed. He could not recall the details of a conversation with Joe Galea and did not consider it relevant to view any of the other CCTV footage which might have shown where the Claimant went during his absence from the office within the window 00:10 to 00:35 on 19th August 2019.
37. Mr Hyman was the Claimant's manager. The Claimant had not brought any grievances to his attention. He therefore did not ask the Claimant whether he had any issues or grievances with any of the hospital security team or management so did not discover that the Claimant had had a historical and ongoing issue with Jayne King, the senior manager at St Thomas' hospital and the overriding client of the Respondent.
38. He had no further involvement in the disciplinary process after writing to the Claimant on 23rd September 2019 to invite him to a disciplinary hearing with Glen Bowen, the contract Manager for the Trust.
39. In advance of the disciplinary hearing the Claimant was provided with the statements of Michell Robinson and Carl McIntosh (pages 53-55) and still photographs taken from the CCTV footage of 19th August 2019 (pages 45-49). He was not provided with the footage itself nor any opportunity to view it.
40. The Claimant's disciplinary hearing took place on 27th September 2019 with Mr Glen Bowen, the Respondent's Key Account Manager for the South Region. The notes of that hearing are available to me at pages 61-65 of the Bundle.

41. In advance of the hearing, Mr Bowen received and reviewed the statements from Michelle Robinson and Carl McIntosh, Mr Hyman's notes of the interview with the Claimant on 10th September 2019 and the limited CCTV extracts from about 00:10 to 00:35 on 19th August 2019. He did not review all of the CCTV footage of the office area from the time the wallet was received on 16th August 2019 to the time it was discovered to be missing on 19th August 2019.
42. Mr Bowen relied on Joe Galea having reviewed all the footage from between the property arriving and going out to when the wallet was found to be missing and was comfortable that the extract concerning the Claimant which Mr Bowen was provided with was the only potentially relevant footage.
43. The Claimant was not afforded the opportunity to see any of the CCTV footage before or during the disciplinary hearing.
44. The hearing concentrated primarily on whether or not the Claimant was the person seen in the still from the footage and the sequence of events shown.
45. During that hearing, the Claimant admitted that he was the person shown in the CCTV footage stills but maintained his denial that he had taken the wallet. He gave an explanation of his actions shown in the stills of looking in one of the bags, stating that he was looking for an accommodation key. He denied concealing anything under his coat. He explained that his reason for using the shredder was that when he went to the toilet and took off his jacket 2 cards fell out and that prompted him to look through other cards in his wallet and when he found some that he no longer needed he disposed of them in the shredder.
46. This explanation was subsequently fleshed out with further details in his witness statement for these proceedings, which included the assertion that at 6am on 19th August 2019 Clausio Ciocan (an Operation Manager) had called the control room and asked for paperwork and Body Worn Camera to be sent to him and his colleague had put all Body worn Cameras in the blue property bag containing lost property and sent it to Mr Ciocan.
47. No decision was reached at the hearing. Mr Bowen took time to consider his decision.
48. Following the hearing Mr Bowen reviewed the CCTV footage again but was not convinced by the explanation provided by the Claimant as he did not find it plausible.
49. He did not however take any steps to investigate the explanation given by the Claimant for the actions seen in the CCTV footage. In particular, at no time did either Mr Hyman or Mr Bowen look at any video footage of the property bag being taken out of the control room to where the loss of the wallet was discovered, and no enquiry was made regarding this. Also, no enquiry was made regarding the locations of the accommodation key. Further, although another man is shown in the CCTV footage, it does not appear that this man was ever interviewed to verify or disprove any aspect of the Claimant's account. Nor was CCTV footage sought

for the camera outside the control room to see what the Claimant did after leaving that room.

50. Mr Bowen reached the conclusion that the Claimant had indeed stolen the wallet based upon his belief that the Claimant had taken something from the lost property bag and used his jacket to conceal the theft. Also, that the Claimant had used the shredders to dispose of the lost property form and the cards from the wallet.
51. He considered the Claimant's length of service and HR record and would have liked to consider a different sanction such as re-allocation to a different site but took the view that a security officer is in a position of absolute trust and that accordingly, honesty is an essential requirement for the role and unless there were extenuating circumstances, he could not guarantee that there would not be a further occurrence with a different customer. He formed the view that the Claimant could no longer be trusted. He also considered that the Hospital Trust had reached a similar conclusion that the Claimant had stolen the wallet and would not allow the Claimant back onto their premises. He considered that the usual penalty for theft was summary dismissal and decided to terminate his employment with immediate effect.
52. By a letter dated 30th September 2019 (pages 66-67), Mr Bowen informed the Claimant of his conclusions and advised him that he was dismissed on the grounds of misconduct for theft of patient property and breach of trust. The letter referred to a theft on 19th September 2019 but this was an obvious typing error and the dismissal was in fact in respect of theft on 19th August 2019.
53. Following receipt of that letter, the Claimant sent an e-mail on 1st October 2019 (page 68) appealing against his dismissal.
54. An appeal hearing took place before Mr Seetan Varsani, the Respondent's Regional Operations Director covering the London area, on 17th October 2019.
55. Mr Varsani had had no previous involvement in the disciplinary proceedings. Prior to the hearing he reviewed the case file and viewed only the extracts of the CCTV footage concerning the Claimant in the early hours of 19th August 2019. He made no additional investigations and received no additional information.
56. The contemporaneous note taken of the disciplinary hearing was available to me (pages 71-72). During the hearing the Claimant was asked whether the disciplinary processes were followed and sanctioned correctly, and he confirmed that they were and that there had been suspension, investigation and notification of the disciplinary hearing by letter. The Claimant maintained his denial of theft although he admitted being the person shown in the CCTV images. The Claimant specifically asked to see the CCTV footage during his appeal hearing but was not given access and was only able to see the stills taken from the footage. Mr Varsani responded to that request by stating (hearing notes page 72) that the case was based on the CCTV still footages shown during the investigation and that new evidence could not be introduced after the case had been concluded.

57. Mr Varsani took no decision at the appeal hearing. After the hearing Mr Varsani reviewed the CCTV footage again and reached the view that the Claimant had stolen the wallet, concluding that what he saw on the CCTV was consistent with Mr Bowen's beliefs. He reviewed the disciplinary process but found no procedural failings and concentrated on the sanction and the severity of the sanction but supported the decision to dismiss due to honesty and integrity being essential qualities in a security officer which could not be compromised. He informed the Claimant of the outcome of the appeal by letter dated 5th November 2019 (pages 73-74).
58. So far as is relevant to this matter, the CCTV extracts that I viewed show the Claimant removing one smaller transparent bag from inside another non-transparent bag, then opening the transparent bag and rummaging in it before removing something. The Claimant then left that area and moved to the other side of the control room to collect his high vis jacket before returning to the area. On return, the Claimant collects something and puts it under his jacket before checking around and leaving the control room. He then comes back just inside the control room door and has an interaction with the other guard in the room resulting in something being passed to him. The Claimant then leaves and shortly after returns again to the control room entrance where he throws something back to the other guard before he leaves once more. The Claimant then returns and is seen to go to the shredders and shred first a piece of paper and then something else that looks like a card.
59. The CCTV extracts shown to the Tribunal were of reasonable video quality but did not allow for all details to be discerned. In particular, it was not possible to discern the colour of the bag from which the transparent bag was removed, nor was it possible to make out the details of the contents of the transparent bag, what was removed from it, what was passed between the guards or what exactly was being inserted into the shredder.
60. During the hearing there was disagreement between the Claimant and Mr Hyman as to the exact location of the lost property bag within the control centre and whether it was in the location where the Claimant was seen looking into a bag. The Claimant asserted that it was not located there. Mr Hyman asserted, based on a visit to the site in connection with the investigation, and regular other site visits that it was. However, under my questions, whilst Mr Hyman indicated familiarity with the patient property transparent type of bag into which the wallet and lost property form had initially been placed, he referred to a green property bag and was not familiar with the blue bag which Michelle Robinson referred to having placed the patient property bag into.

Relevant Law and Conclusions

61. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of complaint to the Tribunal under section 111.

62. The Claimant must show that he was dismissed by the Respondent under section 95 but in this case, the Respondent has admitted that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 1st October 2019.
63. Section 98 of the 1996 Act deals with the fairness of dismissals. There are 2 stages that the Tribunal must consider. Firstly, the Respondent employer must show that it had a potentially fair reason for the dismissal within section 98(2).
64. Secondly, having established the reason for the dismissal, if it was a potentially fair reason, as then Tribunal has found that it was, the Tribunal has to consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.
65. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question of whether or not the dismissal was fair or unfair, having regard to the reason shown by the employer:
 - (a) depends upon whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.
66. There is also well-established guidance for Tribunals on the fairness within s.98(4) of misconduct dismissals in the decisions in ***British Home Stores -v- Burchell [1980] ICR 303*** and ***Post Office -v- Foley [2000] IRLR 827***. In summary, the Tribunal must consider whether:
 - (i) the employer had a genuine belief in the employee's guilt;
 - (ii) such genuine belief was held on reasonable grounds;
 - (iii) the employer had carried out a reasonable investigation into the matter;
 - (iv) the employer followed a reasonably fair procedure; and
 - (v) dismissal was an appropriate punishment as opposed to some other disciplinary sanction, such as a warning.
67. In considering all aspects of the case, including those set out above, and in deciding whether or not the employer acted reasonably or unreasonably within section 98(4) of the 1996 Act, the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances.
68. I do not have to decide whether in fact, the Claimant committed theft by taking the wallet and indeed I make no findings in relation to this.
69. It is also immaterial how I would have handled events or what decisions I would have made. I must not substitute my view for that of the reasonable employer – ***Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439***, ***Sainsbury's Supermarkets Limited -v- Hitt [200]3 IRLR 23***, and ***London Ambulance Service NHS Trust -v- Small [2009] IRLR 563***.

Potentially Fair Reason for Dismissal

70. In this case, it is not in dispute that the reason that the Respondent dismissed the Claimant was because it believed that the Claimant was guilty of gross misconduct by reason of theft. Misconduct is a potentially fair reason for dismissal - section 98(2)(b). The Respondent has therefore satisfied the requirements of section 98(2).

Genuineness of Belief

71. Having heard from the Respondent's witnesses orally, as well as receiving their written evidence, I find that all the Respondent's relevant management, Mr Hyman, but more importantly Mr Bowen and Mr Varsani, held a genuine belief that the Claimant was guilty of misconduct, namely the theft of the wallet.
72. Mr Bowen's evidence was clear and unequivocal about why he dismissed the Claimant and Mr Varsani's was equally clear about why he dismissed the appeal. The dismissal letter (page 66-67) and the appeal hearing outcome letter (pages 73-74) are also consistent with this being a genuine belief. The Claimant did not seriously challenge the genuineness of the Respondent's management's belief and offered no independent evidence to contradict it or any obviously viable alternative.
73. Further, the Claimant's behaviour, as seen on the CCTV footage, was suspicious and provided an objectively reasonable foundation for a genuine belief. The Claimant's explanation for his actions was not substantiated by any supporting evidence and it was not beyond the range of reasonable responses for the Respondent to find the Claimant's explanation implausible or incredible in all the circumstances. Accordingly, I am satisfied that the Respondent's genuine belief was held on reasonable grounds.

Investigation and Procedure

74. I must also consider therefore whether, at the time the belief was formed, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.
75. The allegation of theft was a serious one. Not only does theft amount to gross misconduct justifying summary dismissal under the Respondent's disciplinary policy, but a dismissal for theft was potentially career ending, or at least highly damaging, to the Claimant's career prospects within the industry.
76. The Respondent in this case is a fairly large organisation, employing around 3,000 people and operating a number of different contracts across different sites. It has an extensive management structure, as indicated by the status and job descriptions of the 3 witnesses who gave evidence on behalf of the Respondent, and administrative resources, as evidenced by the presence of notetakers at,

and transcription of notes from, the various hearings during the disciplinary process as well as the existence of a written disciplinary policy and site assignment instructions.

77. Notwithstanding the resources available to it, there were other restrictions on the Respondent's ability to investigate this matter, as the events that this dismissal concerns took place on premises not directly controlled by the Respondents, who were reliant upon the co-operation of their customer, the Hospital Trust to provide relevant CCTV footage and key information.
78. I have the band of reasonable responses and these factors clearly in mind in reaching my decision as to whether the investigation was reasonable in the circumstances.
79. Taking all the circumstances into account, I find that there were deficiencies in the extent and quality of the investigation conducted by the Respondent.
80. The CCTV evidence was not unequivocal. I cannot agree with Ms Urquhart's submissions that it left no room for doubt as to what was happening or that evidence that did not emerge during the disciplinary process was merely a red herring.
81. The CCTV footage does not clearly show the Claimant taking the wallet or that the items that the Claimant was shredding were those connected to the wallet (the lost property form and the cards from within it). The allegation of theft was strongly disputed by the Claimant and an alternative and innocent explanation for his actions on the CCTV was advanced.
82. The alternative explanation for his actions offered by the Claimant would, if found to be correct, have substantially undermined the belief of the Respondent's managers, which was based on the CCTV footage alone, that the Claimant had committed theft.
83. There was no suggestion by any of the Respondent's witnesses that they had taken any steps whatsoever to investigate that alternative account. Although they may have been reliant on the further co-operation from the Hospital Trust to make available CCTV evidence, identify and interview potential witnesses or provide other details, there was no suggestion by any of the Respondent's witnesses that they had requested further co-operation but that such co-operation was declined. The potential difficulties faced by the Respondents in obtaining further evidence because they did not have control of the site or ownership of the CCTV footage do not excuse the unfairness in the Respondent's management's actions of failing to make any attempt to investigate the Claimant's account or obtain further evidence before reaching a disciplinary decision.
84. A reasonable investigation would have sought to verify the Claimant's explanation for the actions seen on CCTV.
85. No reasonable employer in the Respondent's position would have failed to:

- (1) take steps to investigate the Claimant's alternative explanation of the behaviour seen on the CCTV footage by:
 - (a) seeking to review CCTV footage of the Claimant after he left the control room at apx 00:20 on 19th August 2019; and/or
 - (b) interviewing the other security guard who was on duty in the control room at that time; and/or
 - (c) seeking to ascertain where the accommodation keys were kept and whether there had been any request that evening for any of the accommodation to be opened as the Claimant asserted.
 - (2) Consider or investigate the possibility that the wallet went missing at one of the other 2 definite points of contact with the property bag, namely when the patient property bag containing the wallet was placed in the property bag and when the property bag was transported to where it was it was checked, and the wallet was discovered missing. This could have been done by the Respondent's decision makers requesting and reviewing the CCTV showing those 2 occurrences.
86. A reasonable investigation would not have required each of the Respondent's managers involved in the disciplinary process to review all of the CCTV footage between approximately 16:38 on Friday 16th August 2019 (when the wallet was placed in the lost property bag) to the time when the wallet was discovered missing on 19th August 2019. It was within the range of reasonable responses for the Respondent's managers to rely on a review of that CCTV footage by one of their employees to identify suspicious footage. That review was undertaken by Joe Galea and identified the CCTV footage between 00:10 and 0035 on 19th August 2019 as being the only relevant footage. However, a reasonable employer would have clearly ascertained the scope of the footage that had been reviewed. Neither Mr Hyman, Mr Bowen, nor Mr Varsani did so. The reference in Joe Galea's e-mail to having reviewed the CCTV for "the full weekend" was ambiguous given that the relevant window commenced on a Friday and concluded on a Monday morning. Although Ms Urquhart urged me to find that the Respondent's managers had no reason to doubt that Mr Galea had reviewed the full footage, I do not consider that to be sufficient. A reasonable employer would have expressly clarified this.
87. Further, a reasonable employer would have identified that the 2 other points of undoubted contact with the patient property bag were also relevant and should have been reviewed by the decision makers.
88. The deficiencies in the Respondent's investigation made this dismissal unfair.
89. The Claimant took issue with the procedure adopted by the Respondent in that he asserted that the Respondent should have asked him questions before suspending him. I do not agree. The allegation of theft was serious and, if proved, was incompatible with the Claimant's continued employment. The Hospital Trust had clearly indicated that they did not wish him to return to their site and the suspension was for a short duration prior to the investigatory hearing when questions were asked.

90. The Claimant also asserted that the process adopted by the Respondent was unfair in that he did not have an opportunity to view the CCTV footage during the course of the investigation.
91. I concur. Although the Claimant was provided with 10 still photographs from approximately 45 minutes of footage in advance of his disciplinary hearing, in the circumstances of this case where there was a dispute as to what the footage showed, this was not a reasonable substitute for seeing the footage itself. Mr Bowen himself said in evidence “The stills don’t do the moving image justice”.
92. A reasonable employer would have afforded the Claimant the opportunity to view the CCTV evidence for at least the period between 00:10 and 00:35 on 19th August 2019 and comment in detail upon it before reaching a disciplinary decision. There was no reason why this couldn’t have been done. Even if, as suggested, the CCTV footage was not directly available to the Respondent’s managers at the investigatory stage or when the disciplinary hearing took place, it was available to them before the decision to dismiss was taken and could have been made available to the Claimant and then the Claimant could have been re-interviewed before a decision was taken.

Reasonable Belief

93. I have no hesitation in finding that on the basis of the genuinely held and reasonable belief of the Respondent’s managers that the Claimant had stolen the wallet it was within the range of reasonable responses for the Respondent to characterise theft of a wallet as gross misconduct and to decide that dismissal was the appropriate punishment for such an act.
94. However, although the Respondent’s belief was genuinely held, I do not consider that it was reasonably held.
95. The flawed process adopted in respect of both the investigation and procedure meant that the Respondent did not gather evidence which was potentially highly relevant to whether or not the Claimant had in fact been guilty of theft.
96. The genuinely held belief that the Claimant was guilty of theft was based on the CCTV footage. This was the only substantive evidence on the issue that was available to the Respondent’s managers following a very limited investigation. It was by no means so conclusive that further investigation was irrelevant and the Claimant had provided an alternative explanation which should not have been dismissed without proper investigation.
97. This was a first offence and the Claimant had a long history of employment without any relevant disciplinary record.
98. In all the circumstances, the deficiencies were such that the Respondent could not have had a reasonable belief in the Claimant’s guilt because of the unreasonable process which led to that belief.

Conclusion on Fairness

99. For the reasons set out above, I find that the Claimant was unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.
100. I must therefore also go on to consider whether there should be any adjustments to the Claimant's award.
101. I have not considered the issue as to whether a reduction should be made in the compensatory award on the basis that the Claimant has mitigated or failed to take all reasonable steps to mitigate, his loss. That is a matter which I will consider and determine at the hearing on remedy if necessary.

Polkey

102. In accordance with the principles in **Polkey -v- AE Dayton Services Ltd [1987] UKHL 8**, I must consider whether any adjustments should be made to the compensation element of the Claimant's award on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed, that is, if the procedural and investigative flaws that I have found had not occurred what would be the chance of a fair dismissal?.
103. Neither party addressed me at any length on whether there should be a reduction under **Polkey** principles, although Ms Urquhart sought briefly to persuade me that there should be a 100% reduction if I found a procedural failing, on the basis that there was still a serious and substantial finding of theft.
104. I cannot agree with her. Had a reasonable investigation been undertaken, further evidence may or may not have emerged which either verified, supported or undermined the Claimant's explanation for his actions between 00:10 and 00:35 on 19th August 2019.
105. Had evidence emerged which verified or supported the Claimant's explanation, or which indicated that there had been an opportunity for someone other than the Claimant to have taken the wallet either during the time the wallet was placed into the property bag or when the property bag was transported to where the wallet was discovered to be missing, the Respondent managers' conclusion that the Claimant stole the wallet, which was based on the CCTV evidence alone, might well have been different. This is particularly so having regard to the Claimant's long length of service, the lack of any previous concerns about his honesty and Mr Bowen's frank assertion in oral evidence that he would have liked to have considered re-allocating the Claimant to another site but that the loss of the Claimant's integrity as a result of his conclusion that the Claimant had committed theft prevented that from being viable.
106. Alternatively, if no such evidence had emerged, then the Respondent's conclusions and the decision to dismiss were not likely to have been different.

107. **Polkey** reductions tend to arise in cases where there has been procedural unfairness. In this case I have concluded that there was procedural unfairness both as a result of the failure of the Respondent to afford the Claimant an opportunity to view the CCTV footage prior to the conclusion of the disciplinary process and the deficiencies in the Respondent's investigation.
108. I conclude that if the Respondent had permitted the Claimant to view the CCTV so as to enable him to provide the fuller explanation of his actions contained in his witness statement and had the Respondent's undertaken a proper investigation, there is more than a nominal chance that they would have uncovered additional evidence which may have cast doubt on the Respondent's interpretation of the Claimant's actions shown in the CCTV footage. Had such doubt arisen, the Respondent's may still have concluded that the Claimant stole the wallet and dismissed the Claimant and, had they done so, it is likely that such a decision would have been within the range of reasonable responses open to them. However, I do not regard it as inevitable that they would have done so.
109. It is impossible to ascertain with any certainty what evidence may have been unearthed by a proper investigation and what conclusions any such additional evidence would have led to. Taking into account the prospect that a proper investigation would have unearthed relevant evidence, I consider that there is a 50% chance that the Claimant would still have concluded that Claimant had taken the wallet and the Claimant would still have been dismissed.

Contributory Fault

110. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.
111. Section 122(2) provides:
- “Where the Tribunal considers that the conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.”
112. Section 123(6) provides:
- “Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”
113. Neither party addressed me at length on the issue of contributory fault. Ms Urquhart simply asked me to apply the same submissions she had made in relation to a **Polkey** reduction.

114. In determining whether any deduction should be applied to either part of the Claimant's award as a result of contributory fault, I must first identify what conduct on the part of the Claimant could give rise to contributory fault. I must then also consider whether any such conduct was culpable, blameworthy or unreasonable and whether the blameworthy conduct caused or contributed to the dismissal to any extent.
115. The only conduct that I can identify which could potentially give rise to contributory fault are the Claimant's actions as seen on the CCTV footage.
116. However, if the Claimant's explanations for those actions is accurate, such actions were entirely innocent and cannot be said to be culpable, blameworthy or unreasonable.
117. The evidence before me did not include anything which illuminates the accuracy or otherwise of the Claimant's explanation as this was a matter the Respondents failed to investigate, and the Claimant did not himself have the ability to obtain such evidence.
118. I have considered whether the Claimant could reasonably be criticised for not having provided the explanation that he subsequently gave at an earlier stage, during the investigatory stage of the disciplinary process. I have concluded that he cannot as during the investigatory stage he was asked only generalised questions and had not seen either the CCTV footage relied upon or the still photographs taken from it. Also, at no stage in the disciplinary process was he afforded the opportunity to see the CCTV footage itself.
119. I am not therefore able to conclude on the balance of probabilities that the Claimant's conduct was culpable, blameworthy or unreasonable and accordingly I do not find that it is appropriate, just or equitable to make any deduction from either the Claimant's basic or compensatory awards on the basis of contributory fault.

ACAS Adjustment

120. The list of issues which the parties agreed to be relevant at the start of the hearing included whether or not any adjustment should be made as a consequence of a failure (by either side) to follow procedures under the ACAS code. In the event, neither party addressed me on this issue. I have nevertheless considered it.
121. It is clear from the evidence that I heard that the Respondents had in place an appropriate disciplinary policy and followed a process of suspension, investigation, disciplinary hearing and appeal. The Claimant was afforded the opportunity to be accompanied or represented at relevant stages through the process but chose not to be. Nevertheless, he participated in, and co-operated with, the Respondent's procedure. There is therefore no doubt in my mind that there was substantial compliance with the Code by both parties.

122. It troubles me somewhat that Mr Varsani appeared to take the view that new evidence could not be admitted during the appeal process (hearing notes- page 72).
123. This contrary to the ACAS Discipline and Grievances at Work Guide February 2019 which states “The opportunity to appeal against a disciplinary decision is essential to natural justice, and appeals may be raised by employees on any number of grounds, for instance, new evidence...” and also “At the meeting . You should: pay particular attention to any new evidence that has been introduced, and ensure the employee has the opportunity to comment upon it”.
124. Nevertheless, I do not consider that this amounted to a material deviation from the ACAS code in the circumstances of this case. The Claimant was not in fact prevented from presenting fresh evidence to Mr Varsani at the appeal as he had none to present, only an explanation, which he had already given to a reasonable degree during his disciplinary hearing. The primary deficiency in this case lay in the investigation which failed to discover whether there was any other potentially relevant evidence, not in the exclusion of available evidence.
125. I therefore find that it is not appropriate to impose an adjustment on either party for breach of the ACAS code.

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Employment Judge Clarke
Date: 25 January 2021