Case Number: 2201065/2020 **(V)**

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

A Jammeh **v** **Securitas Security Services (UK) Ltd**

Heard at: London Central (by video) **On**: 25 and 26 November 2020

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Ms J. Young, in-house employment counsel

For the Respondent: in person

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The claimant shall be awarded a sum for loss of statutory rights equal to two times his week's pay.

3. A 75% reduction in the compensatory award for unfair dismissal will be made under the principles in *Polkey v A E Dayton Services Limited 1988 ICR 142*.

4. The respondent has unreasonably failed to comply the ACAS Code of Practice on Disciplinary and Grievance Procedures and 15% increase shall be applied to the basic and compensatory award.

5. The basic award shall be reduced by 75% pursuant to section 122 (2) of ERA because of the claimant's conduct before the dismissal.

6. The claimant's blameworthy conduct contributed to his dismissal to the extent of 75% and therefore the compensatory award shall be further reduced by 75%.

7. The claimant's claim of breach of contract (wrongful dismissal) fails and is dismissed.

8. The exact amount of compensation to be awarded to the claimant shall, if not agreed by the parties before, be decided at a hearing on **30 December 2020**.

9. On or before **23 December 2020** the claimant shall submit to the tribunal and respondent his updated schedule of loss and mitigation documents. The claimant shall include any evidence and documentation supporting what is claimed and how it is calculated. The claimant shall also include information about what steps the claimant has taken to reduce any loss (including any earnings or benefits received from new employment).

REASONS

The issues

1. There was no agreed list of issues. At the start of the hearing, I discussed with the parties the issues I needed to decide. The issues are:

Unfair dismissal:

2. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct.

3. The claimant did not advance his case as a dismissal for making a protected disclosure contrary to section 103 of ERA. Although the claimant ticked box 10.1 (***Information to regulators in protected disclosure cases***) in the ET1 form, in the particulars of the claim he refers to his raising the issue of the respondent allegedly making a false confirmation to its client that security guards were being trained on using CCTV, as showing that the respondent did not have a "zero tolerance approach" to "security lapses". Therefore, he claims, it was a "disparity of treatment" in how the responded reacted to the security breach for which he was responsible, in comparison with how it dealt with other security lapses.

4. However, in his witness statement the claimant says that he believes that the decision to dismiss him was due to his raising issues related to the alleged falsification of CCTV training records and his reluctance to sign the

updated Assignment Instructions because he thought they contained incorrect statements in relation to CCTV training and operation.

5. I asked the claimant at the start of the hearing whether he was claiming that his dismissal was because of his raising those issues. He said that although he did not believe that it was the principal reason for his dismissal, he thought that the decision to dismiss was "partly motivated" by his raising a formal grievance and other concerns related to the assignment instructions and the use of CCTV by the respondent. In his evidence and closing submissions the claimant accepted that his raising the grievance and other concerns was not the principal reason for his dismissal, but this should be considered in assessing the fairness of the decision to dismiss him for misconduct as the relevant background.

6. I decided that the reason of the claimant's dismissal should be considered as an issue.

7. If the claimant's dismissal was for a reason related to his conduct, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses?

8. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in *Polkey v AE Dayton Services Ltd [1987] UKHL 8*.

9. Would it be just and equitable to reduce the amount of the claimant's basic award because of the claimant's conduct before the dismissal, as set out in section 122(2) of the 1996 Act, and if so to what extent?

10. Did the claimant, by his blameworthy or culpable conduct, cause or contribute to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6)?

11. Did the respondent unreasonably fail to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures? If so, is it just and equitable to increase the amount of compensation by up to 25% to reflect such unreasonable failure by the respondent?

Wrongful dismissal

12. Did the claimant fundamentally breach his contract of employment by committing an act of gross misconduct, entitling the respondent to dismiss him without notice or pay in lieu?

History of proceedings

13. By a claim form presented on 14 February 2020 the claimant brought complaints of unfair dismissal, wrongful dismissal, holiday pay and of unauthorised deduction from wages. The last two complaints were dismissed on withdrawal by the claimant.

14. The claimant claims that the respondent dismissed him unfairly and in breach of contract and seeks compensation. The respondent admits dismissing the claimant but avers that the dismissal was fair because the claimant was dismissed for a reason related to his conduct and in all the circumstances the decision to dismiss was fair. The respondent also denies that the claimant was wrongfully dismissed or entitled to notice pay. It avers that the claimant was in fundamental breach of his duties and the respondent was entitled to dismiss him summarily for that breach.

15. The claimant appeared in person and the respondent was represented by Ms J Young (in-house employment lawyer).

16. The respondent called three witnesses, Mr Nelson Paulino-Eufigenio (the claimant's former manager), Mr Jamie Curtis, (Account Manager – BAE Systems), who dismissed the claimant and Mr. Alan Rea (National Operations Manager- BAE Systems), who heard and dismissed the claimant's appeal. They gave sworn evidence and were cross-examined by the claimant.

17. The claimant gave sworn evidence and was cross-examined by Ms Young. The claimant also presented a witness statement of his wife, Mrs R Jammeh, but at the start of the hearing he said that he did not wish to call her to give evidence and withdrew her witness statement. I did not read her witness statement.

18. On the second day of the hearing the claimant applied for a witness order to compel Mr Michael Clay (former Account Manager – BAE Systems) to come and give evidence.

19. The claimant said that Mr Clay was the respondent's manager who had investigated the allegations against the claimant and had decided to suspend the claimant. He argued that Mr Clay had "interfered" in the disciplinary process by giving him false reassurances that he would not be dismissed and by advising him what to say at the disciplinary meeting, thus giving the claimant a false impression that the matter had been decided in a positive way for the claimant before the actual disciplinary meeting. Furthermore, after the disciplinary meeting resulting in the claimant's dismissal, Mr Clay advised him to appeal and gave suggestions what to say at the appeal meeting. Therefore, he said, Mr Clay's witness evidence would be relevant to the issues in the case.

20. The claimant said that he had assumed that Mr Clay would be called as a witness by the respondent and had only realised that he would not be giving evidence when the witness statements had been exchanged on 6 November 2020. The claimant admitted that he had made no attempts to

contact Mr Clay to asce,rtain whether he would be willing to give evidence at the hearing. He said he did not know that he could do that.

21. The respondent objected to the application, submitting that it until the hearing the claimant had had legal representation. He knew as early as 6 November 2020 that the respondent was not calling Mr Clay and yet made no attempts to contact Mr Clay himself. Facts in relation to which Mr Clay would be able to testify were within the knowledge of the claimant and other witnesses, and therefore his evidence would be merely to give his explanations of those events. The application was made on the second day of the hearing and after all the respondent's witnesses had testified. If granted, the hearing would have to be postponed. The respondent would have to incur further costs. Therefore, considering all these factors, granting the application would not be in the interest of justice.

22. I balanced the arguments put forward by the parties and decided to refuse the claimant's application. Under Rule 32 of the Employment Tribunals Rules of Procedure, the tribunal has the power to order any person in Great Britain to attend a hearing to give evidence. Although the Rule gives the tribunal a broad discretion to make such an order, the tribunal must exercise the discretion judicially and in accordance with the overriding objective. In particular, the tribunal must be satisfied that: (i) the intended witness can give evidence which are relevant to the issues in dispute, and (ii) it is necessary to compel the witness to attend (see *Data v Metal Box Co Ltd 1974 ICR 559*).

23. I was not satisfied that either of the two limbs of the test was met. Although Mr Clay might be able to give relevant evidence in relation to the issues in dispute, there were three respondent's witnesses who had first-hand knowledge of the same events (the claimant's suspension, disciplinary meeting, appeal meeting), and who the claimant was able to cross-examine. With respect to the alleged conversations between Mr Clay and the claimant, the claimant himself could give evidence on those events. The claimant knew for some three weeks before the hearing that Mr Clay would not be appearing as a witness for the respondent and yet made no attempts to contact him to ascertain whether he would be willing to give evidence for the claimant. At that time, he was legally represented and could have taken legal advice if he did not whether he could call Mr Clay himself. Therefore, I was not satisfied that it was necessary to compel Mr Clay to attend as a witness. Finally, considering that the application was made on the second day of the hearing and after the respondent had finished giving evidence, I decided it would cause substantial prejudice to the respondent to grant the application, it would require the hearing to be postponed and potentially to recall the respondent's witnesses. I decided that granting the application in these circumstances would be contrary to the overriding objective under Rule 2 to deal with the case fairly and justly.

24. I was referred to various documents included in the bundle of documents of 151 pages, which the parties introduced in evidence. On the second day of the hearing the claimant introduced an additional one-page document with text messages exchanged on 5 and 6 November 2019 between him

and Mr Clay. The respondent did not object to that document being introduced in evidence.

25. The hearing was listed for two days, including on the issues of remedy (if required). There was insufficient time to deal with remedy issues.

26. At the conclusion of the hearing, I decide to reserve my judgment on liability and told the parties that the remedy hearing (if required) would be listed for a later date.

27. Given my judgment on the issues of liability, including on the extent of Polkey and contributory fault reductions and increase for failure to follow the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures, the parties might be able to calculate and agree the final compensation amounts themselves, failing which these will be finally determined at a remedy hearing on 29 December 2020.

Findings of fact

28. The respondent is a national security company providing various security services to a wide range of clients across the UK.

29. The claimant was employed by the respondent as a security officer from 21 August 2000 until his dismissal on 6 November 2019. Until his dismissal the claimant had a clean disciplinary record.

30. The claimant's place of work was the offices of the respondent's client, BAE-Systems, in central London. He worked as a security officer on that site for another company prior to becoming the respondent's employee. The site is on list X for security classification, meaning that it has the highest level of UK National Security Classification.

31. The claimant knew the level of security required at that site. In particular, he signed the Assignment Instructions on 7 April 2018, confirming that:

"Under NO circumstances should family, friends or off-duty security staff be allowed access to the site unless authorised by the customer, contact or Securitas management."

32. The claimant was responsible for processing visitors and issuing passes and knew that the site policy prohibited visitors from taking photos on the site.

<u>Incident, which led to the claimant's dismissal</u>

33. Shortly before 4 March 2019, (the exact date was not established, but it is not material to the issues in the case) the claimant having finished his shift was getting ready to leave the site. He was in the onsite gym, changing from his uniform. He was due to meet his wife outside to, as the claimant put it, "spend some quality time together".

34. His wife called him and asked whether she could come onsite to use the toilet because she had a menstrual bleeding. The claimant let her enter the site, took her to the on-site gym and showed her to the toilet. When she came back from the toilet, she took a photo of herself and the claimant in the gym. She subsequently posted the photo on her Facebook account. The claimant saw the photo and copied it onto his Facebook profile.

35. On 30 July 2019 it came to the claimant's newly appointed line manager, Mr Paulino-Eufigenio, attention that the claimant had on his Facebook profile a photo of him with a woman, showing them in the gym on the BAE System's site. He contacted Mr Rae, who advised him that he should undertake a full investigation and if he determined that the claimant had committed a breach of discipline the matter should be referred to Mr Clay for further disciplinary actions. In his reply Mr Ray commented that: "*if founded this is a fundamental breach of both the trust placed upon him in his primary role as a security officer and also the restricted access to site*". Mr Ray sent Mr Paulino-Eufigenio a copy of the respondent's disciplinary policy and a template of note taking sheet for him to use at an investigation interview with the claimant.

36. Shortly after becoming aware of the incident the respondent disclosed it to BAE Systems. BAE Systems assessed the incident as a critical non-compliance and imposed a financial penalty on the respondent. The respondent did not tell the claimant about these consequences.

Disciplinary Investigation Meetings

37. On 31 July 2019 Mr Paulino-Eufigenio met with the claimant. Mr Paulino-Eufigenio did not use the Note taking sheet he had received from Mr Rae and did not take any notes of the meeting. In his witness statement he says that it was the claimant who "*refused to agree to the completion of the Note taking sheets because he didn't receive a formal invitation by [the respondent]*". The claimant disputes that, saying it was not for him to refuse the note taking and the failure to take notes was due to Mr Paulino-Eufigenio being new to the respondent's organisation and not understanding the correct procedure. I accept the claimant's account and find that the claimant did not refuse or otherwise stopped Mr Paulino-Eufigenio from taking notes of the meeting.

38. Following the meeting the claimant sent to Mr Paulino-Eufigenio an email in which he admitted that his wife had come to the gym and had taken the photo. He gave the following explanation:

"*[W]hen she arrived I happened to be in the gym to get changed and she called to say she badly needs to use the toilet, so without thinking I went to get her and brought her down to the gym so she could use the loo whiles I finish getting changed. She took the photo as a souvenir and uploaded it on her profile on Facebook. You could see from the photo that she was the one with phone in my (**sic**) her hand not me. As we have access to*

each other's facebook page, I copied the photo from hers and added it to mine because she was so proud of it."

39. He further added: "*In order to ensure that this matter doesn't cause any further embarrassment to anyone or bring the company into disrepute, I have taken immediate action to delete the photo and deactivated my face book account*."

40. The claimant did not receive a reply to his email. Mr Paulino-Eufigenio was told to hold a further investigation meeting with the claimant during his next shift on 3 – 4 August 2019, but the claimant was not able to come to work on those days due to his wife's illness. Because the claimant worked only the weekends, Mr Paulino-Eufigenio (who did not work on the weekends) did not see the claimant until Saturday 24 August 2019, when Mr Paulino-Eufigenio specifically came to hold another investigation meeting with the claimant.

41. Again, Mr Paulino-Eufigenio did not take any notes of the meeting. It appears that the purpose of the meeting was for Mr Paulino-Eufigenio to get the claimant's agreement to use his email of 31 July 2019 as a record of the investigation. Following that meeting, the claimant wrote to Mr Paulino-Eufigenio confirming his agreement to that:

"As I said during the interview today, I am more than happy for you and the company to use my written submission to represent the facts of the matter as it contains everything I have recalled about said event.

I can assure you, Mick Clay and everyone that I have learnt a valuable lesson from this and would like to apologise again for any inconveniences and embarrassments my actions may have caused. It wont happen again.

I hope my apology and assurances are good enough to draw a line under the event which will enable me to move forward and continue to provide an excellent service for BAE on behalf of Securitas as I have done in the past 18 years."

42. On the same day, Mr Paulino-Eufigenio wrote to Mr Clay, copying the claimant, summarising his meeting with the claimant, and expressing his view on the matter:

"Front my point of view regarding this matter I can say that an action happened but I can't see an intention in this case. Amadou Jammeh assumed his actions straight away, apologised for it and accepted that this could lead to being raised any disciplinary action.

Attending to the dates that we believe this took place (many months ago), the level of service provided by Amadou Jammeh during the past 18 years in this site, his reputation with the client, staff and colleagues, and the way he honestly spoke about this I don't feel that he will put in cause the security of the site any other times or put in disrepute the Company.

*I hope this can close the interview process and and (**sic**) this incident as well."*

43. On 7 September 2019, the claimant was called into the third investigation meeting. The meeting was conducted by Mr Clay. Mr Paulino-Eufigenio was in attendance as a witness.

44. This time the note taking sheet was used, which records the allegations put to the claimant. These were:
    1. *Misused your authority by allowing your partner to enter BAE Systems Stirling Square, a List X restricted site without the appropriate visitor approval / Security Clearance.*
    2. *Posted a picture on Facebook which had been taken inside BAE Systems Head Office site in Stirling Square, a List X restricted site without the express permission of BAE Systems.*
    3. *Failed to follow Security Officer standing instructions within Securitas Assignment Instructions for BAE Systems Stirling Square by permitting your partner onto site.*
    4. *Failed to follow BAE Systems visitor policy by allowing your partner to enter site without the express permission of BAE Systems.*
    5. *Brought discredit to Securitas by undermining the fundamental principles of Security placed upon you by our Customer BAE Systems by allowing access to an unauthorised person.*

45. The claimant accepted that items 1 to 4 were "*absolute offences*", for which he was responsible, but did not accept the fifth allegation. He said that he did not believe that his actions had caused a security risk because his wife was always with him and never entered any secure or specific list x areas. He apologised for the "*mindless moment*" due to his wife's need to use toilet and pointed out to his long service and clean disciplinary record.

46. Mr Clay thanked the claimant for acknowledging his responsibility for allegations 1 to 4 and said that the fifth allegation was "*more subjective and as such he needed to talk to various other individuals from within his management team and client base to establish the perceived extent of risk*".

47. At the end of the meeting, Mr Clay suspended the claimant on full pay.

Claimant's Suspension and Grievance

48. The claimant remained on suspension until his disciplinary meeting on 6 November 2019. During that period, the respondent did not undertake any review of whether the continuation of the suspension was required.

49. Mr Rae explained that in his witness evidence that the respondent considered that as there were no new facts arising and the claimant remained on full pay there was nothing that necessitated to review his suspension.

50. On 15 September 2019, the claimant raised a grievance. His grievance had three separate complaints: (i) the manner, in which his disciplinary was handled, including "threat of unfair dismissal"; (ii) harassment and bullying by a third-party employee; and (iii) use of CCTV cameras in the security control room.

51. During his suspension, the claimant tried to find out what was happening with his disciplinary process by contacting Mr Clay who was first on holiday and then off sick. Eventually Mr Clay replied on 12 October 2019 saying that a disciplinary meeting was arranged for 16 October 2019 to be conducted by Mr Curtis.

52. On 15 October 2019 Mr Clay telephoned the claimant to say that due to Extension Rebellion protests in London the disciplinary meeting was postponed to 23 October 2019 and that he would be receiving a formal letter inviting him to the disciplinary meeting. The claimant says that the protest was used by the respondent as an excuse to delay the meeting as it had failed to send the claimant a letter inviting him to the disciplinary meeting and the relevant documents, as that was required under the respondent's disciplinary policy. I find the claimant's explanation is more probable.

53. On 26 October 2019, the claimant received a letter inviting him to a disciplinary meeting to be held on 30 October 2019. The letter was dated 30 August 2019. The respondent says that the reason for the wrong date was simply because a prior template was used in the preparation of the letter, and the person who typed up the letter simply had failed to notice the wrong date. The claimant says that the letter had been prepared on 30 August 2019 following his meetings with Mr Paulino-Eufigenio but the letter was not sent because the respondent had realised that it had failed to follow a proper investigation process.

54. On the balance of probabilities, I find that the respondent did prepare the letter on 30 August 2019. However, having realised that it had not had a proper investigation record and the conclusions of the investigation manager (Mr Paulino-Eufigenio) was that he did not "*feel that [the claimant would] put in cause the security of the site any other times or put in disrepute the Company."* and recommended that "*this can close the interview process and and (**sic**) this incident as well"* had decided not to send the letter. Instead, it decided to conduct a further investigation meeting on 7 September 2019 to create the necessary record upon which it could then bring disciplinary charges against the claimant, including the allegation that his actions brought discredit to the respondent.

55. I find this because. There was no apparent need to conduct further investigation into the incident, as the claimant had accepted at the very first investigation meeting on 31 July 2019 that he had allowed his wife to come onsite and that she had taken the photo in the gym. Further, the 30 August 2019 letter contains a list of allegations which is repeated verbatim in the disciplinary note of 7 September 2019 and in the same font as in the letter, with other text in the note written in a different font. The letter also omits to

mention the notes of the investigation meeting of 7 September 2019 in the list of documents to be used at the hearing.

56. When the claimant received the letter on 26 October 2019, he telephoned Mr Clay to say that he was going to be abroad on 30 October 2019 and requested to postpone the meeting until after his return. The meeting was arranged for 6 November 2019.

57. On 5 October 2019, the claimant received messages from Mr Clay, who wished to speak with the claimant about work matters. I accept the claimant's evidence that when they spoke, Mr Clay told him to be relaxed about the hearing and that everything would be ok.

Disciplinary and Grievance meetings

58. The grievance and the disciplinary hearings were held on 6 November 2019 by Mr Curtis. The claimant's grievance was considered first. Mr Curtis and the claimant discussed all three items of the claimant's grievance and Mr Curtis agreed to go away and investigate the issues before confirming the outcome to the claimant in writing.

59. Turning to the disciplinary hearing, Mr Curtis took the claimant through the five allegations of misconduct against him. The claimant accepted that he let his wife to enter the site and that he did not sign her in, as the rules required, and that "*in hindsight*" he should have done that. In mitigation the claimant said that when his wife had called him, he had already finished his shift and was ready to leave, that she was his wife and was desperate for the toilet, and that she had been on the premises only a few minutes. He pointed out that in his 18 years working on the site he had never let any member of the public to enter the site against the rules.

60. The claimant accepted that taking the photo and posting it on Facebook was a breach of the rules. He said that he had not "allowed" his wife to take the photo, and she had done that herself, and that it was she, and not the claimant, who had posted it on Facebook. He accepted that he had "*let [his] guard down*" and should have deleted the photo straight away. He also admitted that he had copied the photo onto his Facebook profile. In mitigation the claimant submitted that he had deleted the photo as soon as the matter had been brought to his attention.

61. After a short adjournment Mr Curtis told the claimant that he had found that the allegations against him were proven, that the claimant was guilty of gross misconduct, and that having considered the mitigation he still had decided that the appropriate sanction was summary dismissal. The dismissal was confirmed in writing by letter dated 8 November 2019.

62. On 8 November 2019, Mr Curtis also sent the claimant a letter with his findings and the decision on the claimant's grievances. He rejected the claimant's grievance in relation to the alleged "threats of unfair dismissal". With respect to the allegations of harassment and bullying by an employee

of another company, Mr Curtis said that the respondent took such allegations "*extremely seriously*" and that "*the matter [would] be investigated*." Prior to that, on 28 October 2019, the respondent had passed the claimant's allegations against the third-party's employee to that employee's employer to investigate and take appropriate actions. Mr Curtis rejected the claimant's grievance in relation to the use of CCTV in the security control room.

Appeal

63. By email of 16 November 2019 the claimant appealed his summary dismissal and the "*failure to follow due process to address a Grievance*", enclosing his detailed submissions in relation to each of the allegations against him, his points of appeal on the procedural irregularities and his submissions on his three complaints in his grievance.

64. His appeal was heard by Mr Rae on 4 December 2019. The claimant wished the appeal to deal with his dismissal (disciplinary appeal) and his grievance. However, at the appeal meeting Mr Rae declined to deal with his grievance and told the claimant to send a separate appeal letter in relation to his grievance "*to arrange a grievance appeal meeting*". The claimant said he would do that but that he would not be able to do that in the next two weeks due to him going away. Mr Rae said that it was not a problem and the claimant could email him his grievance appeal when he was ready.

65. At the appeal hearing Mr Rae told the claimant that the incident had been disclosed to BAE Systems because of the "transparent relationship" with the client, which required security breaches to be reported. The claimant said that until then he had not been told that BAE Systems were "*upset*" with him.

66. The claimant said that it was customary for family members to use the gym but could not provide any names or details of such visitors.

67. The claimant also said that "*someone*" had contacted him and told to relax and not to worry about the disciplinary. When asked by Mr Rae who that person was, the claimant declined to name them because he "*did not feel that person was trying to catch [him] out*". Mr Rae replied that at every stage of the process it was possible to look at the previous steps and that he would look into this "*thoroughly*". In his evidence the claimant said that he had named that person as Mr Clay. Mr Rae in his evidence said that as part of his appeal review, he had decided that any contacts that Mr Clay might have had with the claimant was not a relevant issue for him at that stage. On the balance of probabilities, I find that the claimant did reveal the name of Mr Clay at the appeal hearing as that person.

68. On 17 December 2019, Mr Rae sent a letter to the claimant confirming the decision to reject his appeal and uphold the summary dismissal. In the letter Mr Rae said that the disciplinary process timescales were "*more excessive due to management sickness and holidays*" and apologised for the delay and for "*any undue stress*" caused to the claimant. However, his conclusion

was that allegations against the claimant were proven and summary dismissal was the appropriate sanction. The letter stated:

> *"[…] I cannot find any error in the evidence from your initial investigation and believe that summary dismissal is fitting for the allegation in accordance with the Securitas Disciplinary Policy. I considered that this is the first time that you have been disciplined in your 18 years of service. Your intent may not have been to let your personal relationship cloud your professional judgement; however, the impact of your actions has breached the highest level of UK National Security Classification. I have considered the mitigation and the longer than usual timeframes you have referenced, however due to the severity of the allegation and the major breach in security you not only allowed, but facilitated, I am unable to uphold your appeal point."*

The law

69. The law relating to unfair dismissal is set out in S.98 of the **Employment Rights Act 1996 (ERA)**.

"(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;

70. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

> *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.

71. A reason for dismissal is "*is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*." *(*Abernethy v Mott, Hay & Anderson *[1974] ICR 323)***.**

72. Just because there is misconduct which could justify a dismissal does not mean that the tribunal is bound to find that this is indeed the true reason for the employer's decision to dismiss. If the employee adduces some evidence casting doubt on the employer's advanced reason, the employer will have to satisfy the tribunal that its advanced reason was in fact the genuine reason relied on at the time of dismissal (*Associated Society of Locomotive Engineers and Firemen v Brady 2006 IRLR 576, EAT).*

73. In a misconduct case, the principles in *British Home Stores v Burchell [1978] IRLR 379* apply. The three elements of the test are:

    a. Did the employer have a genuine belief that the employee was guilty of misconduct?
    b. Did the employer have reasonable grounds for that belief?
    c. Did the employer carry out a reasonable investigation in all the circumstances?

74. The tribunal must then determine whether the employer's decision was within the range of reasonable responses which a reasonable employer could come to in the circumstances. It means that the tribunal must review the employer's decision to determine whether it falls within the range of reasonable responses, rather than to decide what decision it would have come to in the circumstances of the case.

75. If the dismissal falls within the range the dismissal is fair: if the dismissal falls outside the range it is unfair. Further, in looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the tribunal's view, have been appropriate, but rather whether dismissal was within the range of reasonable responses that an employer could reasonably come to in the circumstances. The tribunal must not substitute its view for that of the reasonable employer. (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563*).

76. When the employee is dismissed for a reason of his conduct, the "range of reasonable responses" tests applies both to the decision to dismiss and to the procedure by which that decision was reached. (*HSBC Bank plc v. Madden 2000 ICR 1283 CA*). However, the correct approach is not to consider these as two separate questions, but as relevant considerations the tribunal must have regard to in answering the single question posed by section 98 (4) of ERA (*USDAW v Burns EAT 0557/12*).

77. If the employee is dismissed for gross misconduct, in answering the question posed by section 98(4) of ERA the tribunal must also consider whether it was reasonable for the employer to consider the employee's conduct as gross misconduct (*Eastland Homes Partnership Ltd v Cunningham ETA 0272/13*).

78. Even if the tribunal is satisfied that it was reasonable for the employer to characterise the employee's conduct as gross misconduct, it must still consider whether in all the circumstances it was within the range of reasonable responses for the employer to dismiss the employee for that gross misconduct (*Burdett v Aviva Employment Services Ltd EAT 0439/13*)

79. Where there are problems with the disciplinary hearing itself, those can in some circumstances be remedied by the appeal, even if the appeal is not a complete rehearing, however the procedure must be fair overall (*Taylor v OCS Group Limited [2006] IRLR 613)*.

80. In any case where the employer has dismissed for a substantively fair reason but has failed to follow a fair procedure, the compensatory award (but not the basic award) may be reduced to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed. Such reduction can be reflected by a percentage representing the chance that the employee would have been dismissed. In exceptional cases the award can be reduced to nil if it can be shown that a fair procedure would have resulted in a dismissal anyway (*Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*).

81. **Section 122(2) of ERA** states that: "*Where the tribunal considers that any 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.*"

82. **Section 123(6) of ERA** states that: "*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."*

83. In finding contributory conduct the tribunal must focus only on matters, which are "*causally connected or related*" to the dismissal (*Nejjary v Aramark Ltd EAT 0054/12)* and evaluate the employee's conduct itself and not by reference how the employer viewed that conduct (*Steen v ASP Packaging Ltd [2104] I.C.R. 56).*

84. In determining whether to reduce an employer's unfair dismissal compensation on grounds of contributory conduct, the tribunal must consider three questions. Was there conduct by the employee connected with the unfair dismissal which was culpable or blameworthy? Did that conduct caused or contributed to some extent to the dismissal? Is it just and equitable to reduce the amount of the claimant's loss to that extent? *(Nelson v BBC No. (2) 1979 IRLR346)*

85. To determine the question of whether the dismissal was wrongful, that is in breach of the employee's contract, the tribunal should be not concerned with the reasonableness of the employer's decision to dismiss but with the factual question: Was the employee guilty of conduct so serious as to amount to a

repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (*Enable Care and Home Support Ltd v Pearson EAT 0366/09*)

Discussion and conclusions

1) What was the reason for the dismissal?

86. Having considered all the evidence and heard the parties' submissions I find that the claimant was dismissed for a reason related to his conduct, namely for breach his duties by letting his wife to come onsite, allowing her to take the photo in the gym and subsequently copying that photo onto his Facebook profile.

87. I reject the claimant's claims that his raising concerns related to the use of CCTV in the security control room or his "*reluctance*" to sign the updated Assignment Instructions made him "*a prime target for dismissal*" and the incident was used as "*an opportunity to get rid of [him] and silence [him] forever*". I find this because, his concerns related to the use of CCTV have been dealt with. Mr Bradely, with whom the claimant had raised these issues on 17 June 2019, thanked him and said that he would look into that. Mr Bradley was not in any way involved in the claimant's disciplinary. I accept the respondent's evidence that it considered the CCTV issues raised by the claimant and made its determination on those as part of its normal business review process. There were no evidence that the issues raised by the claimant caused any problems to the respondent. Neither Mr Curtis nor Mr Rae were aware that the claimant had not signed the updated Assignment Instructions. The CCTV issue was discussed at the grievance meeting, and Mr Curtis has made his determination on it. The claimant disagreed with Mr Curtis, but I find nothing on the facts to suggest that this issue was the reason Mr Curtis decided to dismiss the claimant.

88. The claimant himself accepted during the hearing that his raising those issues was not the principal reason for his dismissal. However, he argues, that "partly motivated" the respondent to apply the sanction of dismissal and not a lesser sanction. I reject this. For the reasons explained in the paragraph above, I find that the claimant's raising those concerns played no part in the respondent's decision to dismiss him.

Burchell test (see paragraph 73)

Reasonable ground and genuine belief?

89. Turning to the question of whether the respondent had reasonable grounds to believe that the respondent was guilty of the misconduct and whether that belief was genuine. I find that it had, and it was. The evidence speak for themselves. The claimant admitted committing breaches of discipline and the relevant rules and procedures. Other evidence available to the respondent (the photo) corroborated that.

Reasonable investigation?

90. In these circumstances, where the facts were clear and the offence admitted, there was not much that the respondent needed to do by way of further investigation.

91. Therefore, I find the delay between the initial investigation meeting on 31 July 2019, at which all these facts had been fully established, and the eventual disciplinary hearing on 6 November 2019 was unreasonable.

92. Following the third investigation meeting on 7 September 2019 there were no further investigation steps undertaken by the respondent. I reject the respondent's reason that the delay was due to "management sickness and holidays". The only evidence adduced to support that contention was in relation to Mr Clay's holiday and sickness immediately following the third investigation meeting, however, given the size and administrative resources of the respondent and bearing in mind that no further investigation was done after the third investigation meeting, I find that the delay was unreasonable, and the respondent breached its own disciplinary policy, which states that the period of suspension "*will be kept to a minimum, but will vary depending on the complexity of the issue to be investigated and will be reviewed periodically with the employee being kept up to date*".

93. Mr Rae was right to acknowledge at the appeal meeting that "t*he management team may have made mistakes*" and in his appeal letter that the delay was "*excessive*" and to apologies to the claimant for "*undue stress*" caused by it.

94. The claimant's suspension was not periodically reviewed, and the claimant was not kept up to date, except when he himself was trying to find out what was going on by contacting Mr Clay and Mr Paulino-Eufigenio. In his evidence Mr Rae said that he had not considered that there was anything to review because the situation remained the same and the claimant continued to be paid. However, this does not explain why the respondent needed to keep delaying the process and keeping the claimant on suspension, if it was not undertaking any further investigation into the disciplinary issue.

95. Keeping the claimant on suspension after all the relevant facts were established, suggests that the respondent decided, before the disciplinary meeting on 6 November 2020, that the claimant would not be returning to work on the site. This, however, does not mean that I find that by that stage the respondent already decided to dismiss the claimant.

96. I remind myself that in assessing the delay I must apply the "range of reasonable responses" test (see paragraph 74). I do not consider the delay, by itself, would have rendered the dismissal unfair. However, it is a relevant consideration in assessing the overall fairness of the process.

Did the Respondent adopt a fair procedure?

Relevant information not shared

97. By the time of the third investigation meeting on 7 September 2019, the respondent knew that the incident had caused BAE Systems to record a critical failure and to impose a financial penalty on the respondent. I find these facts formed part of the respondent's decision to include the allegation of bringing disrepute into the disciplinary charge against the claimant. The respondent, however, did not share that information with the claimant and only told him at the appeal stage that the matter had been disclosed to BAE Systems, but not of the consequences to the respondent.

98. It should be remembered that after the first two investigation meetings, Mr Paulino-Eugenio conclusion was that he did not "*feel that [the claimant would] put in cause the security of the site any other times* ***or put in disrepute the Company***" (**my emphasis**). After the third investigation meeting when this charge was put to the claimant and he disagreed with it, Mr Clay's conclusion was that it was "*more subjective and as such he [Mr Clay] needed to talk to various other individuals from within his management team and client base to establish the perceived extent of risk*". The respondent did not adduce any evidence of any such further discussions between Mr Clay and the management team and/or the client.

99. Mr Rae in his evidence admitted that he had been in discussions with Mr Clay concerning the incident, its consequences and mitigation steps. However, no information was provided to the claimant about those discussions, despite such information clearly being relevant for the claimant to understand the grounds of the "bringing disrepute" charge.

100. Therefore, on the one hand, the charge was downplayed by the investigating officers, and the claimant was not made to understand the severity of the business repercussions on the respondent his actions had caused, where, on the other hand, in my judgment, this issue was very much central in the respondent's assessment of the gravity of the claimant's conduct.

101. This should be considered against the background of another incident (a break-in), which occurred in November 2018 and which resulted in the dismissal of two security officers (one being later reinstated on appeal with a final written warning) and the site manager.

102. I find it was unreasonable for the respondent not to provide the claimant with any details about the consequences of his misconduct. Such consequences, in my judgment, were the foundation of the allegation of bringing disrepute, which, together with the allegation of misuse of authority, were two specific examples of gross misconduct in the respondent's disciplinary policy, for which the claimant was dismissed.

103. Even after being dismissed for gross misconduct on that charge the claimant was still not provided with any details upon which the respondent concluded that the allegation of disrepute was proven. In his dismissal letter Mr Curtis states that "*any breach of security at BAE will automatically bring [the respondent] into disrepute*" but gives no further details.

104. Without having those details and being left with the impression that the disrepute charge was, as at its highest, "subjective" and needed further investigation, the claimant was not given a reasonable opportunity to prepare for his disciplinary and appeal meetings to answer the charge.

Giving false sense of security

105. I find that until the dismissal the respondent had been acting in a way that made the claimant to reasonably assume that the disciplinary process would not result in his dismissal. The claimant was copied to the email from Mr Paulino-Eufigenio to Mr Clay, where Mr Paulino-Eufigenio following his two investigation meetings appears to be recommending that the incident should be closed and that his conclusions was that the claimant would not pose any security risk to the site or would bring disrepute on the respondent.

106. I accept the claimant's evidence that Mr Clay called him on the eve of the disciplinary hearing and told him not to worry and be relaxed and that everything would be fine. Mr Clay was the investigation officer, having taken over Mr Paulino-Eufigenio, and it would have been his decision whether there was a disciplinary case to answer and its severity.

107. I also accept the claimant's evidence that following the disciplinary meeting Mr Clay gave him advice on how to appeal his dismissal. Mr Clay was not called by either party (and I refused the claimant's late application to make a witness order against him for the reasons explained above), and therefore one can only speculate as to what motivated Mr Clay to act in that way. Whatever his motives might have been, the fact is that the claimant was led to believe by his manager's manager, who was directly involved in the disciplinary process, that he should not worry about the outcome, and this created an unfair disadvantage for the claimant in a run up to the disciplinary hearing.

108. The claimant did raise this matter at the appeal and Mr Rae promised to investigate it, but then decided that it was not relevant. In my judgment, it was a relevant issue, and the respondent's failure to deal with it properly at the appeal stage was another flaw in the disciplinary process. I expand on this conclusion below under the Appeal section.

109. I shall briefly deal with the claimant's submission that there was an inconsistency in treatment between his incident and the early break-in, for which one of the security officers had been initially dismissed, but then reinstated on appeal with a final written warning. In his witness evidence Mr Rae explained that the reinstated officer was not on duty at the time of the break-in and was disciplined for not escalating the matter when it had

come to his attention. The security officer and the site manager, who were on duty at that time and failed to prevent the incident, were both dismissed for gross misconduct. I am, therefore, satisfied that there was no inconsistency in treatment between the claimant and the other security officers in similar circumstances.

110. I equally reject the claimant's suggestion that there was inconsistency between the respondent not taking seriously the alleged security breaches related to the security staff not being trained on the use of CCTV and his incident. My conclusions in relation to the claimant's raising concerns related to the use of CCTV are set out in paragraph 87 above. In any event, the issue of whether the respondent should have given more CCTV training to its security staff, and whether they were asked to sign confirmations of receiving such training without it being provided, and the issue of the disciplinary sanction applied to the claimant for his conduct, are two very different issues and cannot be used for the purposes of determining whether the claimant's dismissal was an inconsistent treatment afforded by the respondent to its other employees in the same circumstances.

111. I also do not accept the claimant's arguments that his disciplinary hearing was conducted in breach of the respondent's disciplinary procedure and therefore was unfair, because the letter inviting him to the hearing does not list the 7 September 2019 investigation meeting note, which was not enclosed with it, as was not a copy of the respondent's disciplinary policy. My finding is that the initial draft of the letter was prepared on 30 August 2019 before the investigation meeting took place. Therefore, it made no mention of the note. Whoever was responsible for updating the letter in October failed to notice that. However, the investigation meeting note was sent to the claimant on 7 September 2019 and he raised no objections as to its content. The letter directed the claimant to the respondent employee portal for a copy the disciplinary policy. He had both documents available to him for the disciplinary meeting.

112. Finally, I do not accept the claimant's argument that Mr Curtis did not consider other sanctions because a copy of the disciplinary policy was not "present in the meeting for [Mr Curtis] to check". Mr Curtis was clear in his evidence that he did, and I accept his evidence on this question. I also do not find anything untoward in Mr Curtis speaking with HR after the disciplinary hearing and before announcing his decision to dismiss the claimant. The claimant argued that it showed that it was not Mr Curtis who decided to dismiss him.

<u>Were procedural flaws rectified by the appeal process?</u>

113. The procedural flaws could have been rectified on appeal, thus making the process overall fair, but I find that the appeal, although conducted by way of a rehearing, had three further serious flaws.

114. The respondent's disciplinary procedure requires that appeals against dismissals "*be heard **by at least** one more senior manager than those*

who undertook the original disciplinary hearing" and that *"[t]hat manager must not have **any involvement** in either the investigation of the case or the disciplinary proceedings*". The policy also requires that "***[t]he panel** hearing the appeal must **unanimously agree** the outcome*" and that "*[i]f there is a different view by **the panel members**, advice must be sought from a more senior member of the HR team*." (**my emphasis**).

115. These requirements are in addition to the requirements in the policy in relation to appeals of all types of disciplinary actions, which allow appeals to be dealt with by "*an independent person or panel*". Reading these provisions together I conclude that they require that appeals against dismissals are heard by a panel comprising of more than one person, even if such person is independent and of a suitable seniority. The appeal was heard by Mr Rae alone.

116. Furthermore, Mr Rae is the respondent's National Operations Manager-BAE Systems and according to his witness statement is "*operationally responsible for the delivery of Securitas UK's largest strategic account across 46 customer sites*". In his evidence Mr Rae accepted that he had to deal with the consequences of the incident caused by the claimant and that he had attended a business review meeting with BAE Systems in August 2019, at which the incident had been discussed, and the critical non-compliance had been recorded. He also admitted discussing the incident with Mr Clay. He, however, says that those discussions were not about the claimant's disciplinary process, but about the security breach as such and mitigations that needed to be taken. He says his involvement in those discussions did not compromise his independence when it came for him to determine the claimant's appeal.

117. Mr Rae was aware of the incident and in fact advised Mr Paulino-Eufigenio how to deal with it and in doing so expressed his view that if the allegation were proven this would be "*a fundamental breach of both the trust placed upon [the claimant] in his primary role as a security officer and also the restricted access to site*".

118. Although I do not find that the claimant's appeal was necessarily doomed by reason of Mr Rae's prior involvement and him having direct accountability vis-à-vis the client and his management for the incident, I do find that he was involved in the investigation of the matter and was not totally independent. If the appeal were heard by a panel, as required by the policy, Mr Rae being part of the panel would not, in my judgment, have rendered the appeal process unfair, but as it was not, I find that in those circumstance Mr Rae hearing it alone was unfair on the claimant.

119. The second flaw with the appeal process was Mr Rae's failure to properly deal with the issue of the claimant being misled by Mr Clay into believing that he would not be dismissed (see paragraph 108). It was Mr Rae's role (according to the respondent's disciplinary policy) to ensure that the disciplinary process was undertaken in accordance with the respondent's procedures, evaluate new evidence and "*most importantly evaluate if the outcome was fair and reasonable in all the circumstances*". I find that by

dismissing the claimant's evidence that Mr Clay had been "interfering" as not being relevant for him to consider at that stage, and that is despite telling the claimant that he would investigate this issue "thoroughly", Mr Rae failed to carry out properly his duties as the appeal manager.

120. Finally, the claimant appealed both his disciplinary sanction and the refusal to uphold his grievance. His first grievance issue overlaps with his grounds of appeal of his dismissal. However, without waiting for the claimant's grievance process to conclude, Mr Rae decided to reject the disciplinary appeal and uphold the dismissal. In his appeal outcome letter, he said that "*the decision of the appeal hearing [was] final and [was] the final stage of the Securitas disciplinary process*."

121. The claimant did not send his grievance appeal letter. He says, and I agree, that there was no point in appealing his grievance because on appeal his dismissal was confirmed and that was the final decision. The claimant was told by Mr Rae that the disciplinary and grievance appeals were "*two separate entities*". Given that the first grievance issue was the claimant's contention that he was subjected to unfair treatment and "threats of unfair dismissal" it was intrinsically linked with his appeal against the dismissal. By telling the claimant to submit his grievance appeal separately Mr Rae suggested to him that this issue would be determined at a later grievance appeal meeting.

122. Reading Mr Rae's appeal outcome letter, he, albeit acknowledging "excessive" timescales and apologises for that, dismisses the claimant's contention of procedural irregularities because he could not "*find any error in the evidence*". However, this does not address the issue of whether those flaws made the decision to dismiss "*fair and reasonable in all the circumstances".* In any event, having told the claimant that the procedural unfairness issue would be dealt with in a separate grievance appeal, Mr Rae appears to have made his "final" determination on it without giving the claimant the opportunity to present his arguments on this issue at a future grievance appeal hearing.

123. I find that each of these procedural flaws in isolation would not have taken the decision to dismiss outside the range of reasonable responses. I also find that the decision *per se*, albeit might be seen by some as too harsh in the circumstances and considering the claimant's long service and clean disciplinary record, would still be open to a reasonable employer to make. However, I must consider the decision to dismiss "in all the circumstances", and not assess the decision and each of the procedural flaws one by one to see whether each falls within or outside the reasonable responses' range.

124. On the facts, as I found them, and considering all the circumstances I find that the decision to dismiss in those circumstances fell outside of the range of reasonable responses open to a reasonable employer and therefore was unfair.

Polkey reduction

125. The next question I need to consider is if a fair procedure were followed whether the claimant would have been fairly dismissed in any event.

126. I find there is a strong chance that if a fair procedure were followed the claimant would still have been dismissed. I do not, however, find that it would have been a virtual certainty. That is because different managers of the respondent, especially if they were not as closely connected to the BAE System account as Mr Curtis and Mr Rae, might have given more credit to the claimant's early and honest admission of his fault, his long service and clean disciplinary record. If the claimant was given all the relevant facts about the consequences of his misconduct and was not lulled into the sense of false security by Mr Clay, he might have approached the matter differently and sought representation or other assistance in defending the disciplinary charges against him.

127. Alternatively, if a properly established appeal panel acting in accordance with the requirements of the policy had properly considered the earlier flaws in the disciplinary procedure, it could have decided that the dismissal was not "*fair and reasonable in all the circumstances*" and applied a lesser sanction. Mr Rae's evidence was that BAE Systems did not ask for the claimant to be removed from their site. The respondent might still have decided that it would be inappropriate for the claimant to return to work on that site. However, given the size and a large client base of the respondent, it would not have been impossible for the respondent to find another place of work for the claimant.

128. Nevertheless, the claimant was guilty of a serious misconduct that went to the heart of his duties as a security officer. His conduct had severe repercussions for the respondent, both financially and reputationally, and was clearly something the respondent regarded as a very serious matter. Therefore, I find that if a fair procedure were followed, there is a 75% chance that the claimant would still have been dismissed.

<u>Blameworthy contributory conduct</u>

129. I have no hesitation in finding that the claimant's conduct was blameworthy and that it was connected and contributed to his dismissal.

130. The claimant knew that by letting his wife to come onsite and to take the photo in the gym he was breaching the express prohibition in the Assignment Instructions and the site visitors' policy. I dismiss his arguments that his misconduct was less serious because:(i) he did not "allow" his wife to come onsite because her visit was not planned, (ii) he was unaware of her taking the photo because he was changing his shirt at that time, (iii) she was not a "visitor" because he did not book her as such, (iv) she was only in the gym with him and not in more security sensitive areas of the site, or (v) when she came he had already finished the shift and was no longer on duty. In my judgment these arguments do not mitigate, and some aggravate, the claimant's misconduct.

131. I am equally unimpressed by his attempts to persuade me that the Assignment Instructions containing the relevant rules did not apply, or at any rate did not apply when the photo was taken, because the version he signed was due to be reviewed on 5 March 2019, and he did not sign the updated version, and that updated version was not signed by the respondent and BAE Systems either. His argument that the photo was not taken on 4 March 2019 because the time stamp on it is 4 March 2019, 23:15, when he was not onsite, is an unfortunate and ill-conceived attempt to confuse the matter. The time stamp is when the photo was posted by his wife on Facebook and therefore on any account it would have been taken before that time.

132. The claimant further aggravated his misconduct by copying the photo into his Facebook account, which ultimately led to his misconduct being discovered. The claimant accepted that people familiar with the gym would have recognised from the photo that it was taken at the BAE-Systems on-site gym, which would have indicated to them that an unauthorised visitor was being allowed to enter the site, thus breaching its security.

133. I have considered whether it would be just and equitable to apply 100% contribution reduction to the basic and compensatory awards, but I take into account that the claimant admitted and apologised for his misconduct, that he was cooperative, open and frank during the disciplinary process, as well as the circumstances of the offence. Although it was not a true emergency, I accept that the claimant was driven by a natural reaction to help his wife in an uncomfortable situation, and to his misfortune allowed that instinctive reaction to cloud his professional judgment. Therefore, I find that it will be just and equitable to reduce the basic and compensatory awards by 75% to reflect the claimant's culpability.

ACAS Code of Practice on Disciplinary and Grievance Procedures

134. I find the respondent unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, both in how it conducted the claimant's disciplinary procedure and his grievance. I find this because the respondent did not provide the claimant with all the necessary information as to the consequences of his misconduct on the respondent. It did not deal with the disciplinary matter promptly and unreasonably delayed the disciplinary meeting. The period of suspension was excessive, and it was not kept under review. The appeal manager was involved in the case prior to hearing the appeal. The decision to dismiss was taken before the appeal of the overlapping grievance could have been heard and determined. Therefore, I find there should be an uplift on the compensation awarded to the claimant in the sum of 15% to reflect the unreasonable failure by the respondent.

Wrongful dismissal

135. Turning to the final issue of wrongful dismissal, I must decide if the claimant committed an act of gross misconduct entitling the respondent to

dismiss him without notice. In distinction to the claimant's claim of unfair dismissal, where the issue is one of the reasonableness of the respondent's decision to dismiss in all the circumstances, and it is immaterial what decision I would myself have made about the claimant's conduct, here I must decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

136. My findings and conclusions in paragraphs 128 to 132 are equally applicable to this question. I find that the claimant has committed an act of gross misconduct. His actions were deliberate and fundamentally breached his key employment duties, and that gave the respondent the right to dismiss him summarily. It follows that his breach of contract (wrongful dismissal) claim fails and is dismissed.

_____
Employment Judge P Klimov
London Central Region

Dated 16 December 2020

Sent to the parties on:

.17/12/2020

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For the Tribunals Office

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