EMPLOYMENT TRIBUNALS

Claimant: **Mr P J Lavender**

Respondent: **John Reid & Sons (Structsteel) Ltd**

Heard at: **Southampton** **On: 13 and 14 January 2021**

Before: **Employment Judge Rayner**

Representation
Claimant: **In Person**
Respondent: **Mr McDevitt, Counsel**

JUDGMENT

1. The parties attended in person.

2. The respondent fairly dismissed the claimant for breach of the respondent's workplace Mobile Phone policy.

3. The claimants claim of unfair dismissal is dismissed.

REASONS

1. Mr Patrick Lavender was employed by the respondent firm John Reid & Sons as a cleaner/maintenance assistant. He started work for the respondents on the 27 July 2015 and continued to be employed by them until his dismissal for gross misconduct on the 18 September 2019.

2. The claimant filed his claim to the Employment Tribunal on 16 October 2019, claiming that he had been unfairly dismissed.

3. The respondents have resisted the claim and assert that the claimant's dismissal for gross misconduct was fair and reasonable in all the circumstances.

4. The respondents assert that they dismissed the claimant because they determined that he had committed gross misconduct on two different occasions and in two different respects. The first misconduct alleged was that the claimant had breached the companies mobile phone use at work policy and the second was that he had fraudulently attempted to claim pay in respect of one day's sickness absence.

The hearing

5. This claim was the subject of a case management hearing before Employment Judge Gray on 21 July 2020 and the issues in the case were defined at that hearing as follows:

Unfair dismissal

1.1 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct, (it says the Claimant was dismissed for continued use of a personal mobile phone in working hours, failure to report an accident and claiming pay fraudulently for that absence), which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

1.2 Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;

1.2.1 The Claimant denies that he failed to report an accident and says that he did not seek to claim any pay fraudulently for that absence; and

1.2.2 Other senior employees were not disciplined for their use of a personal mobile phone in working hours.

1.3 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

1.4 Did the Respondent adopt a fair procedure?

1.5 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

1.6 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

2. Remedy

2.1 The Claimant does not wish to be reinstated and/or re-engaged.

2.2 What basic award is payable to the Claimant, if any?

2.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

2.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.4.1 What financial losses has the dismissal caused the Claimant?

2.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.4.3 If not, for what period of loss should the Claimant be compensated?

2.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.4.5 If so, should the Claimant's compensation be reduced? By how much?

2.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

2.4.7 If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce their compensatory award? By what proportion?

The hearing

6. The hearing took place over 2 days on the 13 and 14 January 2021.

7. I heard evidence from the claimant on his own behalf. Mr Stone has not produced a statement for the employment tribunal, although he had produced a handwritten document in which he set out the list of the paragraphs in the respondents' witness statement and the points in the respondents case which he disagreed with. With the agreement of Mr Lavender, the claimant and Mr McDevitt, who represented the respondent, the claimant's narrative contained within his ET1 and attached to it, and the handwritten note he produce were taken at the basis of the claimant's evidence in chief.

8. I also heard evidence from Mr Stone, who made the decision to dismiss the claimant, on behalf of the respondents. Mr Stone produced a written statement.

9. I received an agreed bundle of documents of 218 Pages.

Findings of Fact.

10. At the point of his dismissal, Mr Lavender had worked for the respondents for 4 years.

11. The respondent is a steel construction company based in Christchurch, Dorset. At the time the claimant worked for them, the respondent employed just over a hundred people. The claimant was employed as a cleaner and maintenance assistant.

12. Because the respondents' business is steel construction, the workplace is potentially a very dangerous one. I accept that the respondent placed a great deal of emphasis on the need to maintain extremely high health and safety standards in order to ensure that it could protect its workforce as much as reasonably possible.

13. As part of its health and safety regime the respondent had various rules about the use of mobile phones in the workplace.

14. The claimant's contract of employment to which I was referred includes, at paragraph 10 the section headed mobile telephones. The section states under 10.1 that *private mobile telephones are permitted, but they should not be taken to the employees workstation. If they are they must be switched off and can only be used during break times (provided it is safe to do so).*

15. The section also specifically prohibits, at 10.3, the use of a mobile telephones for any purpose, whilst working at any height other than ground-level; operating plant or equipment or when carrying out slinging or lifting operations.

16. Further, at 10.4 the contract states that *the Employer regards any breach of this clause 10 seriously and the Employer will take disciplinary action against any employee in breach of these rules. In certain circumstances, any breach may be considered gross misconduct, resulting in immediate termination of employment without notice or payment in lieu of notice.*

17. The claimant has signed his contract, and he knew that his employer considered the misuse of mobile phones in the workplace as a potential disciplinary matter.

18. On 8 September 2016 the respondent sent a memo to all staff. The memo was headed *use of personal mobile phones and the safe use of mobile phones provided by the company*.

19. It is stated that *this memo supersedes all previous memos on the use of mobile phones*.

20. The memo states *the use of personal mobile phones whether voice calls or text messaging is prohibited during working hours. The inappropriate use of personal mobile phones creates a real health and safety hazard. When you are talking on the phone you are not focused on your work nor your environment and this could result in personal injury to yourself or others*. The memo continues in bold as follows:

the use of personal mobile phones is forbidden during working hours. Personal mobile phones should not be taken to your workstation. if they are, then they are to be switched off and are to only be used during break times and only then, when it is safe to do so.,
The memo continues ***this policy will be rigorously enforced. Any member of staff who does not comply with the policy may be subject to formal proceedings.***

21. The memo repeated what was set out in the contract of employment and was provided to each member of staff who signed it. Mr Lavender signed the memo on 9 September 2016, and his managing director Simon Boyd also signed it.

22. Mr Lavender accepted that he had received the memo and was aware of its contents.

23. Paragraph 7 of the respondents disciplinary and grievance procedure contains details of gross misconduct. It sets out a non-exhaustive list of 21 examples of potential gross misconduct.

24. The first example of potential gross misconduct is breach of company's policy on health and safety and health and safety at work regulations and any act at work which seriously endangers the health or safety of any other person.

25. The next example is a refusal or failure to carry out a reasonable instruction and the fourth matter is theft or fraud. The policy states that theft or fraud, *however apparently minor*, (my emphasis) may be considered gross misconduct and this may include clocking on for another employee or falsification of records or timesheets for example.

26. Although the use or misuse of a mobile phone at work is not expressly stated as a potential act of misconduct, I accept the respondents evidence that they considered that the prohibition on the use of mobile phones was a health and safety concern, and within the list under that heading. I find that the rule and the fact that it was a rule based on health and safety considerations, was made crystal clear to all employees by the contract and the subsequent memo and the potential for it to be gross misconduct was also understood.

27. In addition to prohibiting the use of mobile phones at work, the policy also makes express reference to exceptional circumstances. It provides that an employee who needs to make important phone calls or receive phone calls during working hours must get express permission from the line manager, who will make suitable arrangements for them.

28. Whilst the claimant accepted that he was aware of the respondent's policy, he said in evidence that he did not believe that it was rigorously enforced in practice. He stated that he had raised numerous incidents of poor practice and of people using their mobile phones, during the course of his employment. He was not able to give any specific examples of other employees misusing their mobile phones or of occasions before the disciplinary action taken against him, when he had made a complaint, and he accepted that none of his complaints had been made formally.

29. The claimant also accepted that he had not raised any of his concerns about other employees using their phones at work this with Mr Stone during the course of the disciplinary proceedings against him.

Various incidents in 2019

30. The claimant and the respondent have provided a significant amount of detail in the claim and response forms, about a number of incidents which took place in the workplace in early 2019. The claimant set out details about an incident in which he claimed Mr White had allegedly picked on him. He raised a grievance and the respondents dealt with it.

31. In their response the respondents set out the details of the steps they took in dealing with the claimant's grievance in this respect and in dealing with a number of matters that occurred subsequently.

32. It is not suggested that the allegations made or the process followed in investigating those matters are relevant either to the suspension of the claimant or the investigation of the claimant or the subsequent disciplinary action which was taken against him in respect of the 2 allegations of gross misconduct, which formed the basis of the dismissal.

33. The only relevance of those events, is that they led to the claimant being given a final written warning in April 2019. It has not been suggested to me by either party that I need to make any findings of fact in respect of the earlier incidents, or to look behind the reasons the final written warning was issued. The claimant agreed that he was subject to disciplinary action for mobile phone misuse and that he had been subjected to a final written warning in April 2019 and that that final written warning remained live at the point that the allegations which led to his dismissal and which are the subject matter of his claim arose.

34. The claimant was sent a letter on the 17 April 29, confirming the outcome of the disciplinary hearing that had taken place on 15 April 2019.

35. In that letter. The respondent stated as follows

the use of mobile phones in the workplace is prohibited as it creates a distraction and therefore health and safety hazard. The company considers any failure to comply with health and safety policies and the clauses laid out in the contract of employment to be extremely serious. I have taken into account the fact that you were in the maintenance office at the time, but this does not fully diminish the fact that you should not have had your mobile phone switched on outside of your break times. Indeed you are fully aware of this requirement as you were reminded of it by a director only one week prior.

The findings in relation to both allegations as outlined above are serious enough for the company to consider terminating your employment. I note also that you have a previous written warning on file. I have however decided to give you another chance and I expect there to be no further use of your mobile phone during working hours. In consideration of the aforementioned and in line with the company's disciplinary and grievance procedure, I consider it appropriate to issue with a final written warning. This one is now in effect and will remain on your file for a period of 18

months from today 17 April 2019. I am obliged to warn you that any further failures in your performance or conduct that result in disciplinary measures within this timescale may result in further disciplinary action being taken against you up to and including the dismissal.

36. As a result of that letter, the claimant was in no doubt that his employer did not allow use of mobile phones during working time and would take disciplinary action up to and including dismissal if the claimant would breach the rules again.

Events leading up to the claimant's dismissal

37. It is not in dispute that during 2019 the claimant was dealing with a number of personal difficulties.
38. Firstly, the claimant's future father-in-law was suffering with terminal cancer. The claimant was very fond of his future father-in-law and took an active part in looking after him.

39. The claimant also suffered a number of health issues himself.

40. It is not disputed that the claimant suffered with a back problem. He stated in his claim form that he had been diagnosed with something ostropedia and spinal compression fractures. He stated that this meant that he lived with pain and had to take strong medication.

41. In addition, the claimant was suffering with a health problem of a personal nature which he thought may well require him to undergo some fairly unpleasant surgery.

42. On the 8 August 2019 the claimant says that he had an accident at work. He says that towards the end of the afternoon. He was in the canteen carrying a bin bag of rubbish when he slipped on some water, which was on the floor near the water dispenser. He says that a large quantity of water was on the floor and on tables and on some chairs. He states that he skidded for a couple of feet and was in some pain. In his evidence before the tribunal, he stated that he carries a topical pain relief spray with him and that he used it at the time of the accident and was therefore able to continue walking around.

43. The claimant accepts that he knew he was required to fill in an accident report form immediately following any accident at work, and that he did not do so that day.

44. Instead he left the canteen and carried out some other tasks. In his claim form to the employment tribunal which formed the basis the basis of his evidence before the tribunal in the absence of a witness statement, he says that he had a couple of things to do and that he wanted to go home at 4pm. This is what he did.

45. He states that the following day he found that his back had locked and he was not able to attend at work and so he rang in sick, initially leaving a message explaining that he would not be at work. He subsequently spoke to Terry Caws his line manager.

46. The claimant returned to work on the following Monday, which was 12 August 2019. He filled in his timesheet and claimed for 30 hours work the previous week instead of the usual 40 hours work. This was because he had not been at work on the Friday.

47. There is no dispute that the claimant was entitled to be paid statutory sick pay in respect of his absence from work. However, if the accident was the fault of the employer, then the claimant might have been entitled to be paid full pay.

48. When he returned to work he therefore made enquiries as to whether or not he could be paid full pay, because the accident at work was, he said , the fault of the employer because of water all over the floor.

49. This was the first occasion that the respondent was aware that the claimant had had an accident at work and was alleging it was the fault of the employer. There was no accident at work form filled in on the day, although on 12 August, Matt Collins, a safety officer had made a first aid report. This is a five-page accident report and sets out what the claimant said had happened.

50. The previous week, Ms Law, who dealt with human resources issues had been made aware that the claimant had been seen using his mobile phone at work. She had made a note to remind him that he may not do this. However, on 8 August 2019 she received a second report that Mr Lavender had been seen watching a video on his phone during working hours. The complaint was made using the company's reporting form.

51. She decided that she would therefore need to investigate the matter.

52. The claimant was then asked to attend two meetings, with different people, in respect of the two matters.

53. First he met with Mr Caws and Joanne White in respect of his accident. He was asked why he had not reported the incident and was reminded of the importance of using the correct form. The respondent was concerned about both the delay in reporting the incident but also were concerned that the claimant wanted to claim full pay in respect of the unreported accident.

54. The claimant does not deny that he failed to report the accident that he says he suffered at work.

55. The claimant also had a meeting with Mr White, Mr Stone and Ms law. At that meeting the claimant was told that a formal complaint had been made that he had been observed using his mobile phone to watch a video during working time.

56. The claimant does not deny that he had been using his phone. He states that he was in the canteen and was in the course of taking medication and that at the same time he was watching a video on his phone about the medical procedure that he thought he might have to undergo.

57. The respondent decided that the allegations against the claimant, who was subject to a final written warning at the time, would need to be investigated to consider whether disciplinary action should be taken.

58. Mr Stone was appointed to chair any subsequent disciplinary hearing. He is the company's Production Manager and Senior Manager responsible for the production side of the company. At the time of the allegations being made and the investigation and disciplinary hearing, Mr Stone had not been involved with any of the previous meetings concerning Mr Lavender and did not in fact have very much day-to-day dealing with Mr Lavender. He says in his witness statement and I accept that whenever he did meet Mr Lavender, Mr Lavender was always polite and friendly to him.

59. Mr Lavender was suspended following a meeting with Mr Stone on 14 August 2019. At that meeting the reason for his suspension was explained to him and he was told what the procedure would be for the investigation. Following the suspension Mr Stone sent Mr Lavender a letter dated 15 August 2019 which confirmed the allegations and informed Mr Lavender that an investigation would be carried out.

60. In that letter the allegations were set out as follows :

    a. that you have been using your mobile phone during working hours
    b. that you made a claim for full payment of wages for Friday, 9 August 2019 as a result of an accident at work the previous day when the company has no report of such an accident.

61. The claimant was informed that it was appropriate to suspend him pending investigation and that he was suspended from 14 August but would remain on full pay during the suspension.

62. The investigation into both allegations was carried out by Ms M Law and Ms J White, and Mr Stone took no part in it. A number of individuals were interviewed as part of the investigation in order to collate evidence.

63. The claimant was not interviewed again as part of the investigation, but would have been given the opportunity to address the evidence and answer the allegations should the matter then proceed to a disciplinary hearing.

64. During the course of the investigation a number of people were asked questions about what the claimant said in respect of his request to be paid full pay for a day when he was on sick.

65. Mr Stone wrote to the claimant again on 19 August 2019 to update him on progress. He told him he had received the investigation report which he was reviewing and that he would come back to Mr Lavender once he had done so.

66. On 29 August 2019, Mr Stone again wrote again to the claimant telling the claimant that there would now be a disciplinary hearing and inviting him to an investigation hearing. This was due to take place on 4 September 2019.

67. The allegations set out in the letter were as follows

    a. The alleged use of personal mobile phone during working hours

b. the alleged claim that a request for full payment of wages was made as a result accident at work. The previous day when the company has no report of such an accident.

68. Mr Stone also indicated that there was CCTV evidence which was relevant and set a date of 4 September 2019 for Mr Lavender to attend at the workplace and to review the CCTV evidence if he chose to do so. The claimant was also informed at this point that he could be accompanied to the disciplinary hearing by a colleague or a trade union representative. The investigation report complete with its attachments was sent to Mr Lavender with the letter.

69. The claimant's father-in-law died on 31 August 2019 whilst the claimant was suspended. His funeral took place on 16 September 2019 and the claimant was dismissed following the meeting, which he did not attend on the 18 September 2019.

70. On 3 September 2019, Mr Lavender made a telephone call to Ms Law to inform him that sadly his father-in-law had died. During the course of the telephone call he stated that he didn't care if the respondents made the decision about the disciplinary matter in his absence. He was at that point simply asking for some information which he had requested through a data access request to be provided to him. Ms Law however, told the claimant that he had a valid reason for not attending the disciplinary hearing and that she could therefore arrange for the disciplinary hearing to be delayed until a later date. She offered Mr Lavender her condolences. The claimant stated that he didn't care about the outcome. He understandably was very stressed about his father-in-law's death and at this point he was just seeking the information he had requested.

71. The disciplinary hearing that had been set for 4 September was convened, but the disciplinary hearing was rescheduled because of the claimant's situation. The respondent wrote to the claimant giving the claimant a new date for the hearing and also a new date that he could attend to view the CCTV evidence if he wished to do so.

72. The letter sent to the claimant on 4 September 2019 with the rearranged date for hearing also enclosed a copy of the original letter and stated that in all other respects the hearing remained unchanged. The letter also stated "I appreciate this must be a difficult time in view of your family. Therefore, if you wish to discuss the proposed dates, we will reschedule meetings or if you have any questions please do not hesitate to contact me".

73. The claimant did not attend at the rearranged meeting and the respondent again decided to postpone and reschedule.

74. Mr Stone wrote again to the claimant on 10 September 2019 proposing a further rescheduling of the disciplinary hearing. It was now scheduled to take place on the 13 September 2019. The letter reminded the claimant that it was important that he attend the hearing and that a failure to attend may result in it going ahead in his absence. It also reminded him that if it was easier for him to provide written representations that he could do so and that these should be sent to Mr Stone by Friday 13 September.

75. The claimant was again reminded of his right to bring a work colleague and given a further date on which he could view the CCTV image. He was told if he wanted to discuss the date or had any questions that he should contact Mr Stone.

76. Mr Stone's evidence which I accept was to the effect that had Mr Lavender contacted him and asked for a rescheduling of the meeting to another time he would have been open to that would have given it serious consideration. However, Mr Lavender made no contact with the respondent in respect of the date and did not provide any notes or any other information which he wanted taken into consideration.

77. What Mr Lavender had done in advance of the meeting and during this period of time was to contact his manager John White and provided him with screen shots which Mr Lavender told me that he considered showed that other employees had been misusing their mobile phones during work time. Mr Lavender's point was that he felt he was being treated differently by being taken through a disciplinary action than others who also breached the policy.

78. Mr Lavender accepts that he did not provide this information to Mr Stone. He accepts that he received the letters Mr Stone wrote to him and that he could have sent the information directly to him but that he believed Mr White would forward the information to Mr. Stone.

79. The Claimant did say that he had contacted a Mr John White, his manager, sometime prior to the disciplinary hearing and that he had sent Mr White a series of screenshots which he said suggested that other employees had been using their mobile phones during work time. He agreed that he had not sent the screenshots or any note of his concerns to Mr Stone, who he knew was dealing with his disciplinary, but he said he had just assumed that Mr White could pass the information on. The claimant's concern was that he was being treated unfairly in that he was disciplined for mobile phone misuse whilst others were not.

80. I accept Mr Stones evidence that he was wholly unaware that the claimant had raised any such matter with Mr White and that he had not in fact been passed any information of this type or any other type by Mr White.

81. He pointed out that all the letters that had been sent to the claimant in respect of the disciplinary allegations and then a disciplinary hearing had explained to the claimant that he could contact Mr Stone, and that Mr Stone was the person who would be dealing with disciplinary.

82. Mr Stone also stated and I accept that had Mr Lavender ever made any formal complaint about another employee misusing a mobile phone during the course of their employment, through the process of filling in what he referred to as the purple form (which is what had happened in the claimant's case) that those complaints would have been taken seriously and investigated just the allegations against the claimant were taken seriously and investigated. The respondent placed a great deal of emphasis on health and safety risks of people using their mobile phones at work and I find that this was a matter of real importance to the respondents.

83. The respondent had a formal reporting sheet, which it encouraged employees to use if they wished to raise a complaint or concern about another worker. They used this sheet in order to discourage informal comments or informal allegations.

84. The point is that Mr Stone himself was not aware of the concerns that the claimant had raised. Mr Stone had specifically indicated to the claimant in his letters in advance of the hearing that Mr Lavender could contact Mr Stone. Mr Lavender knew that it was Mr Stone who was dealing with the hearing and would be making the decision.

85. Whilst Mr Lavender may have felt frustrated by what he believed to be different treatment, I find that Mr Lavender was treated in the same way as others would have been treated had formal complaints also been made against them. I have no evidence to suggest that any such formal complaints were made, nor do I have any evidence of how any other such cases, if they existed, were dealt with.

86. The disciplinary hearing took place on 13 September. Mr Lavender did not attend but fairly full meeting still took place. I have been referred to the notes of the meeting which are three pages in length. The meeting started at 11.00am and ended just before 12.45pm.

87. I find from the notes and from the timing of the meeting and the evidence of Mr Stone that he took the matter very seriously and that he went through each of the allegations n detail. Part of his process was to go through the questions which he had prepared in advance and which he would have asked the claimant had Mr Lavender attended. Even though Mr Lavender did not attend Mr Stone still went through the questions and sought to find answers from the information that he had.

88. Mr Stone had by this point viewed the CCTV evidence. He notes in the minutes of the meeting his observation in respect of the CCTV evidence as follows:

continuing with the review of the CCTV footage I see PL walk along the walkway with binbags in his hands. PL then it disappears off camera for approximately 11 minutes. When he returns he does not have the binbags, which indicates to me, the time spent of camera he was taking the binbags to the skip, at this point the buzzer for the end of the day has gone and a few people are seen to leave for the end of the day. PL then walked to the toilets in the Mess Hut. He emerges a minute later, and then goes up the stairs into the Mess Hut. PL appears at the bottom of the stairs a minute later, he has taken his hi-vis off at this point. He then dodges out of another employee's way walkway and then turns to waive the employee before crossing the walkway towards the clock machine. PL then appears back in view approximately half a minute later and disappears of screen towards his car .

89. Following the disciplinary hearing Mr Stone took time to consider all the matters before reaching this final decision. He set out his decision in a letter dated 18 September 2019 and stated:

"*It was alleged that you were using your mobile phone during working hours on Wednesday 7 August 2019 and an additional allegation was raised that you made an inappropriate claim for your period of absence on Friday 9 August 2019*".

90. In the letter to Mr Lavender informing him of the outcome of the disciplinary hearing, the two allegations are set out separately . It states,
It was alleged that you were using your mobile phone during working hours on Wednesday, 7 August 2019.
An additional allegation was raised that you made an inappropriate claim for long period of absence on Friday, 9 August 2019.

and additional allegation was raised that you made an appropriate.

91. The letter then describes the background and process leading up to the hearing and then Mr Stone set out his reasons for his decision.

92. In the decision letter Mr Stone sets out his findings and his conclusion in respect of each allegation separately.

93. He deals firstly with the alleged use of a personal mobile phone during working hours. He sets out the findings from the investigation, including the fact that the company had granted Mr Lavender an exceptional circumstance to help with his personal matters outside work. The meant that the claimant could have his phone on whilst at work to receive emergency phone calls only. Mr Stone referred to the fact that this was not the first time that the claimant had misused his mobile phone during working hours. He concluded that Mr Lavender had been misusing his mobile phone during working hours and that Mr Lavender understood that it was not acceptable.

94. He concluded that the allegation was proven and he considered it to be a breach of the disciplinary and grievance procedures and of Section 7 on ross misconduct, referring to breach of the company policy on health and safety and the reference to a refusal or failure to carry out a reasonable instruction, and that Mr Lavender had committed gross misconduct.

95. The letter then deals with the allegation that a request for full payment of wages was made as a result of an accident at work on 9 August 2019. The company had no report of such accident.

96. Mr Stone stated *the company takes any potential fraudulent claims extremely seriously. The fact that he* [Mr Lavender] *made no report of the accident in line with the companies reporting procedures which are very clear, injuries must be reported before you either finish work or leave site ,concerns me greatly.*

97. He goes on to refer to the fact that the claimant had claimed he should be paid for his absence on Friday, 9 August on several occasions. He refers to what was written on the claim form by the claimant to the accounts department and a conversation the claimant had had with accounts querying his payslip and asking why he had not been paid for his absence as it was due to an accident at work.

98. Mr Stone concludes that *I find all these pieces of evidence reasonable to believe that you did in fact make a claim for full payment for your absence as stated in the allegation* .

99. Mr Stone addresses the CCTV footage and states that having reviewed it *it is clear to me that you had ample opportunity to report this incident before leaving the site that day. It troubles me that you insisted in the investigation report to Joanne White, conducted on 12 August 2019, that you could not have reported this incident at the time due to being too much pain to enable you to do so and that you had had enough for one day and just wanted to go home. On a review of the CCTV footage, it appears to me that this was not the case. I do not see how you could have continued with your work tasks, took the bin bags to the skip, used the lavatory, waved goodbye to a fellow colleague and clocked out (all taking approximately 15 minutes after the time you reported the accident has happened): This was all carried out before you left work. However, you claimed to be unable to report the incident due to being in so much pain. As noted in the disciplinary hearing minutes I acknowledge that your injury may not have been physically obvious, however, I would expect to see a greater level of discomfort from you immediately after the accident, for example, not walking as easily as you appear to be in the CCTV footage.*

To this end, I am obliged believe that you made a fraudulent claim for full payment of wages accident; that we had no report of on day and furthermore, an accident that I believe there is sufficient evidence to suggest did not happen.

100. Mr Stone concludes that he finds the allegation proven and finds that this allegation is a breach of health and safety and that is also theft or fraud.

101. Mr Stone then concludes by determining the penalty. He states that he has taken into account the claimant's length of service; the good work he has done for the company, as well as the fact that he was on a final written warning for using his mobile phone during working hours and the seriousness of his findings

102. He concluded that he had no option but to dismiss the claimant.

103. Whilst Mr Lavender was well aware of the nature of the allegation in respect of mobile phone misuse, he complains, as part of his claim that he was not told in clear terms or at all that he was being accused of behaving fraudulently or that it was being alleged that the accident had not in fact happened.

104. I have therefore considered how the allegation was put at suspension and in the subsequent letters in comparison with the way it was described in the termination letter.

105. I find in respect of the second allegation that the word fraud was only used for the first time in the letter dismissing the claimant.

106. I also find that the first time that it was suggested that no accident had in fact taken place was in the dismissal letter.

107. I find that the allegation which Mr Lavender had been informed of did not expressly state that he was being accused of making a fraudulent claim nor did it expressly state that he was being accused of lying about the fact of an accident having taken place at all. Further, I find that Mr Lavender could not have been expected to understand that these allegations were being or might be made against him from the letters which he received from the respondent inviting him to the disciplinary and telling him what the allegations against him were.

108. Mr Lavender did not attend at the disciplinary hearing and I find that he was not on notice that an allegation of fraud was being made or that an allegation that he was claiming a day's pay in respect of an absence resulting from an accident which the respondents considered may not have taken place at all, was being made.

109. The suggestion of fraud crystallised only on after the disciplinary meeting had taken place when Mr Stone viewed the CCTV evidence. An allegation of fraud is always a serious one and for a procedure to be fair Mr Lavender needed to be told precisely that such an allegation was being made, so that he had an opportunity to respond.

110. Because he was not told the precise nature of the allegations, he had no opportunity to address or answer the allegation that he was lying in respect of the fact of the accident before the disciplinary hearing.

111. He was not able to contradict Mr Stones understanding of the CCTV or offer any explanation for how he appeared on the CCTV. Had he been aware of the allegation of fraud, he may have decided to send a written statement, or he may have decided to in the light of those allegations, that he would attend at the disciplinary hearing or ask for a postponement.

112. Mr Lavender was given the right of appeal and did not attend.

113. The question that I must consider is whether or not this procedural error renders the whole or part of the decision to dismiss unfair, and whether or not part of the dismissal can be fair, even though part of it may be unfair.

114. I have therefore considered the process by which Mr Stone made his decision about each allegation.

115. When making his decision Mr stone had before him the notes of the interviews which had been conducted with several employees although not with Mr Lavender; a copy of the anonymous health and safety report of the allegation which was later confirmed to have been written by Mr Tom Reid and a note of an interview with Mr Reid. He had CCTV evidence from the day on which the claimant said he had his accident in the Mess Hall, a copy of the accident report which had been provided several days after the date of the accident and the claimant's timesheet which included an indication that he was on sick leave on the day after the accident.

116. Mr Stone told me, and I accept that following the disciplinary hearing he considered the two allegations by first deciding whether or not he was satisfied that either allegation was made out.

117. I find that , as he said, he considered whether or not the claimant had done each of the things that he was accused of separately. Only once he had determined that the claimant had committed gross misconduct in respect of each of them, had he then considered the appropriate sanction.

118. Mr Stone told me, and I accept that he had considered sanction in respect of each allegation separately.

119. Dealing firstly with the issue of the mobile phone usage, Mr Stone explained that the absolute prohibition on the use of mobile phones at work was of central importance to the organisation because of the potential health and safety risks.

120. I find that this is reflected in the claimant's contract of employment, it is reflected in the policy on mobile phone use and it is also reflected in a memo of 2016 and subsequent notes and memos sent to the claimant. I find that Mr Stone was satisfied that Mr Lavender was fully aware both of the policies and the prohibitions and of the fact that the respondent took the matter extremely seriously and that that was for serious health and safety reasons.

121. Mr Stone had taken into account that the prohibition expressly prohibits the use of mobile phones at work and even prohibits the having of a mobile phone switched on at work. Staff are only allowed to look at their own phone phones in specific circumstances which include when they are on a break or if they have received an express exemption an example might be a family emergency. He also took into account the fact that Mr Lavender had been given permission during the period prior to the disciplinary to have his mobile phone at work and to have it switched on but he was only allowed to use it in very limited circumstances. The respondents had recognised that the claimant's father-in-law was terminally ill and therefore agreed that the claimant could have his phone with him and switched on for the purposes only of receiving an emergency call in respect of his father-in-law's health.

122. Mr Stone also took into account that the allegation was that the claimant was using his phone to view a video whilst he was sitting in the Mess. There was no indication the claimant was either on his break and because the claimant did not attend at the hearing or provide any written statement about the incident Mr Stone had no information before him to contradict the evidence from Mr Reid, or to give him any further information about either the video that the claimant was looking at or the circumstances in which he came to find himself sitting in the Mess and reviewing it. Whilst the claimant has sought to give an explanation to me today, I have explained to the claimant that I can only look at the information that Mr Stone had before him, when considering whether the decision that Mr Stone reached was reached following a reasonable enquiry.

123. I find tht Mr Stone decided that the misuse of mobile phone by its self was a sufficient reason to dismiss the claimant for gross misconduct.

124. I find that he then considered the second matter, and went through a similar process. He looked at the notes he had made and the information he had, and reviewed the CCTV evidence.

125. He then decided that that the accident had not happened and that this was also a ground for termination for gross misconduct.

126. I accept the Stones evidence that, even if he had not concluded that the claimant had committed gross misconduct in respect of the second matter, that he would, in any event have dismissed the claimant for the first act of gross misconduct.

Applicable Legal principles

127. Section 98(1), (2) and (4) of the **Employment Rights Act 1996** provides that

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is
for the employer to show -

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

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) In any other case 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.

128. Once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, such as gross misconduct as alleged in this case, I must consider three aspects of the employer's conduct when deciding whether the employer acted reasonably or unreasonably in treating it as a reason for dismissal.

129. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer

believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief?
(see *BHS-v-Burchell* [1980] ICR 303 in deciding whethe , in dismissing for the reason set out,.

130. I remind myself that it is not for the tribunal to decide whether the employee actually committed the act complained.

131. If the answer to each of those questions is "yes", then I must decide on the reasonableness of the response by the employer deciding to dismiss the claimant.

132. In considering whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct in respect of the claimant I must consider the employer's decision by reference to the objective standards of the hypothetical reasonable employer, and not by reference to my own subjective views.

133. If the employer has acted within the range of reasonable responses, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. I must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". I must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice.
(See *Graham v Secretary of State for Work and Pensions (Jobcentre Plus) [2012] EWCA Civ 903*, *[2012] IRLR 759 per* Aikens LJ At [35] and [36])

134. When assessing whether the dismissal was fair or unfair, one question will be whether or not the employee knew what the allegations being made against him were. Fairness in a process requires that someone accused of gross misconduct should know the case that they have to meet,

135. This means they should be told the important parts of the evidence in support of the case and should have an opportunity to criticise or dispute the evidence and to produce their own evidence or argue in case .
(See *Spink v Express Foods Group Ltd [1990] IRLR 320* EAT) .

136. Knowing the charges that are being made is an elementary principle of justice. This means the employee must know the actual charges being pursued and that the employee should not be left to have to *speculate* as to those relevant charges. In any case of doubt, the onus is on the employer to show that the employee was sufficiently informed.
(See for example *Sattar v Citibank NA [2019] EWCA Civ 2000*, *[2020] IRLR 104*)

137. In this case, I have therefore considered whether the allegations which the claimant was informed of when the same allegations which Mr Stone determined and for which the claimant was dismissed. I have asked whether or not the claimant was fully aware of the case against him. Had he been given sufficient details of the allegations and the she was not fully aware of the allegations did the procedural defect with the dismissal intrinsically unfair?

138. I have considered both the judgements of the EAT in *Fuller v Lloyds Bank plc [1991] IRLR 336* where the EAT held that the employee was fully aware of the case against him and that accordingly it could not be said that the procedural defect was intrinsically unfair and of the ET in *Alexander v Brigden Enterprises Ltd [2006] IRLR 422*, where the EAT held that the employee had to be given 'sufficient detail of the case against them to enable them properly to put his side of the story'.

139. I have also considered the ACAS code which makes it clear that in most the procedures will be unfair unless the employee is given sufficient detail of the case against them to enable them to prepare a considered response, including being provided with witness statements.

140. An employer who relies upon more than one reason for dismissal, as in this case, runs the risk that if one of the two allegations which form the reason or principal reason for dismissal, is not established on the facts nor believed to be true on reasonable grounds, the court will find that the employer has not acted reasonably in all the circumstances in relying upon the reason for dismissal. In *Smith v City of Glasgow District Council [1987] IRLR 326*, *[1989] ICR 796*, the House of Lords held that an employment tribunal had erred in law in holding a dismissal to be fair in circumstances where the employer had, in dismissing an employee, relied upon the grounds for dismissal but one was shown to be unsustainable and could not be relied upon on reasonable grounds.

141. The failure to establish a particular ground or reason will not, however be fatal to the fairness of the dismissal in circumstances where the employer is alleging that he dismissed for a number of grounds, each of which justified the dismissal independently of the other. This will depend on the facts found by the Employment Tribunal and I remind myself that I must therefore specifically consider and determine whether the respondent in this case considered each of the two allegations as separate allegations, each capable of justifying dismissal for gross misconduct or whether the two allegations were considered by Mr Stone cumulatively.

142. I remind myself that I must focus on the reason which the employer actually relied upon when deciding to dismiss the claimant .

143. In *Robinson v Combat Stress UKEAT/0310/14 (5 December 2014, unreported)* (Langstaff P presiding) the EAT considered the test that a tribunal should apply where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer. The EAT said as follows

> *…to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss. An example might be where there had been a chain of events in which it is suspected that an employee had his "hand*

in the till". If only some of those events are sustained before a Tribunal, nonetheless that might be quite sufficient – indeed perhaps usually would be – for a dismissal for that reason to be sustained even if the employer believed that all the events had occurred whereas the Tribunal thought the employer was only entitled to consider that some had. Similarly, if an employer thought there to have been several different occasions on which racist language had been used by an employee, but a Tribunal concluded that some of those incidents did not bear close examination; or if the employer thought there had been a number of sexual assaults, but the Tribunal thought the number smaller, nonetheless a dismissal – "having regard to the reason shown by the employer" – might easily fall within the scope of that which it was reasonable for an employer to have done.

144. I remind myself that the reference to the reason is not a reference in general terms to the category within which the reason might fall. It is a reference to the actual reason. So, if the employer has more than one reason, which the tribunal considers formed a composite reason for dismissal, the tribunal will need to consider the whole of those reasons when assessing whether the dismissal was fair or not.

145. The approach required of the tribunal is to carefully consider the employers evidence, and to ask first of all what was the reason for the dismissal and then to consider whether the employer acted reasonably or unreasonably by having regard to that reason, that is, the totality of the reason given by the employer . There may be some cases and I have considered whether this is one of them , where, if one of the reasons is found not to be a fair reason, the tribunal concludes that looking at the matter Overall as required ERA 1996 s 98, that the dismissal, was unfair . The tribunal may equally determine that if one reason is found to be unfair, that the decision to dismiss is still fair because a 2nd independent reason would have justified dismissal by itself, and was treated by the employer as being capable of justifying dismissal by itself.

Discussion and Conclusions

146. I conclude that the claimant was dismissed for two reasons.

147. Firstly, he was dismissed for gross misconduct in respect of misuse of his mobile phone at work, and secondly, he was dismissed for gross misconduct for a fraudulent attempt to claim pay in respect of an accident which Mr stone determined had not taken place.

148. I find that the claimant was sent the interview notes as part of the investigation report and therefore he knew what was effectively being said about him.

149. I find that the investigation undertaken in respect of mobile phone use was a full and thorough one, the expectation being that any explanation in respect of any of the concerns raised or any contradiction of any assumptions being made would be provided by Mr Lavender at a hearing. He was provided with full opportunity to attend or to ask for an adjournment but did not do so.

150. Mr Lavender did speak to the respondents in the period leading up to the disciplinary hearing and knew that he could ask for an adjournment but did not do so.

151. The hearing took place in his absence only after it had been delayed on two earlier occasions.

152. I find that the decision that Mr Stone made was made only after he had carefully reviewed all the information before him and after he had reviewed the questions he set himself and that he concluded that the claimant was in breach of the policy after a full investigation and consideration of all the matters and that he genuinely formed the belief that the claimant had committed the breach of the policy.

153. I find that Mr Stone then reasonably concluded on the basis of the information before him that even this one off breach of the mobile phone policy was capable of amounting to gross misconduct in this particular set of circumstances. I find that Mr Stone did consider the claimant's position; that he took into account the claimant's service record, that he considered and took into account all the matters that he was entitled to including importantly the fact that at that point the claimant was subject to a final written warning. Mr Stone particularly took into account and placed emphasis on the fact that the final written warning that had been given to the claimant in April 2019 was itself in respect of mobile phone usage at work in breach of the Company's rules. He also noted and I accept that the claimant had been at that point warned that any further breach may well result in his employment being terminated and that even a single breach of the policy could be viewed by the respondents as gross misconduct.

154. At this point I note that the claimant has indicated in his claim form and before me that in respect of the matter for which he was given a final written warning, all he was doing was using his phone to show a colleague a video of a brass band that he had arranged to have played for his father-in-law. He said that this happened before work. However, he has accepted very fairly in cross examination that he did attend a hearing in respect of that matter and that the respondents did determine that he should be subject to a final written warning. He accepted that he had been given an opportunity to appeal against it and that he had not done so.

155. In respect of the first allegation, I conclude that Mr Stone conducted a thorough investigation and that he came to a conclusion that the claimant had misused his phone in breach of workplace procedures.

156. I conclude that his belief in the claimant's guilt was honest and reasonable. The claimant did not provide any evidence to the contrary and had accepted that he had been using his phone at work.

157. I find that at the point Mr Stone made his decision to dismiss, he had the information from the investigation and the CCTV evidence before him as well as information about the claimants past record, and the live final written warning in particular. I find that he was not aware of the information that the claimant has subsequently provided at this Tribunal about either his concerns about others using their phones at work, or about the use of a spray to treat

his back pain. I find that it was for this reason that he did not take it into account.

158. The hearing was also fairly conducted, and delayed on two occasions to enable the claimant to attend if he wished to do so, or to provide written representations, or to view the CCTV evidence. Mr avender did not choose to do so, and neither did he seek any further adjournments.

159. In the circumstances and given the claimant's non attendance at the disciplinary hearing where he may have been able to argue some mitigating circumstances either in respect of a final written warning or indeed in respect of later matters, I conclude that Mr Stone could only determine this issue on the basis of the information that he had in front of. He did not have the information that Mr Lavender has provided to this Employment Tribunal and he did not have the opportunity to evaluate it and to either accept or reject it or indeed to consider whether it would have made any difference to his decision. I cannot go behind that decision. It is not for me to carry out that exercise now.

160. Mr Stone therefore determined that a further breach within a relatively short period of time of the same centrally important rule linked to health and safety left him with no options but to dismiss the claimant and to dismiss for gross misconduct. He told me and I accept that he considered both whether or not it would be possible or appropriate to dismiss for misconduct rather than gross misconduct but he explained that in his view the health and safety requirements of the absolute ban on the use of mobile phones at work had to be strictly enforced because of its health and safety issues and that in this case it would amount to gross misconduct.

161. I conclude that Mr Stones decision to dismiss the claimant for gross misconduct on this issue was within the range of reasonable responses.

162. Mr Stone also stated in response to a question from me that he would have dismissed the claimant for gross misconduct at this point for the mobile phone usage alone whether or not the second matter had also been before him. I accept this is true and conclude that this is what he would have done in those circumstances.

The second decision

163. In respect of the second allegation, I conclude that the respondents carried out a separate, and full and fair investigation, that Mr stone took into account the necessary information and gave the claimant every opportunity to answer the allegations which were set out in the letters to mr Lavender.

164. He knew that he was being accused of claiming in respect of an accident which he had not reported, and he made no response to those allegations.

165. Mr Stone believed, on reasonable grounds that Mr lavender had failed to report the accidcen as he should have done.

166. However, the reason why Mr Stone decided that the claimant had committed misconduct is that he formed the view, on reviewing the CCTV after the hearing, that Mr lavender had not in fact had an accident at work, and tht therefore the claim for pay was a fraudulent one.

167. Whilst this may have been at the back of his mind, Mr stone had never made it clear to Mr lavender, that he suspected that Mr Lavender had not in fact had an accident at work. The word fraud had not been used at all.

168. I did ask Mr Stone whether he had considered either sending the claimant a written list of questions and asking Mr Lavender if he wished to comment and whether having decided that the CCTV was potentially evidence of a different sort of conduct that conduct being fraudulent that he considered contacting Mr Lavender and telling him about these concerns Mr Stone very fairly said that he did not consider it at the time and that he did not think that had he done so, he would have in any event have contacted Mr Lavender.

169. In cross examination it was put to Mr Lavender that had the respondents contacted him either with a list of the questions or with a further question about whether or not the accident had in fact taken place that he would not in any event have responded. The respondent suggests that the claimant's engagement with the respondent over the disciplinary matter supported a conclusion that Mr Lavender had decided to take no part in it and that this would have been no different. Mr Lavender strongly disagreed. His evidence was to the effect that if he had known that he was being accused of fraud and if he had known that the respondent was questioning whether the accident took place at all and whether he had really been in pain that he would have written back in response stating that he had used a cold spray on his back immediately following the accident and that this was why he may not have appeared to be in pain.

170. None the less, I find that Mr Stone formed an honest and genuine belief that the claimant had lied about the fact of the accident and I also find that had a proper procedure been followed in that the claimant had been informed of it, that this would potentially have been a conclusion which he might have been entitled to draw.

171. However, I conclude that the process by which Mr Stone reached his decision was not a fair one. Mr Lavender did not know the precise allegation being made against him.

172. I therefore conclude that the decision to dismiss Mr lavender for the second allegation, was not within the range of reasonable responses open to the employer.

173. I have considered whether or not Mr Stone was making two separate decisions about two separate disciplinary matters or whether he was making a combined decision and in doing so I bear in mind the guidance from case law.

174. I conclude that he was making two separate decisions. Firstly, the two allegations were in respect of different sets of events and in respect of different forms of alleged breach. Secondly, Mr Stone told me that the

process by which he considered the second disciplinary action was that he proceeded during the course of the hearing to again consider the various questions that he had posed to himself in respect of it and to seek to answer them.

175. I conclude that he dealt with the two matters separately both within the hearing itself, and in his subsequent decision making. I accept his evidence that his approach was to deal with the two matters separately.

176. I conclude that although the second allegation was not a fair reason for dismissal, that it is separate from the first, and that therefore dismissal for the first reason remains fair and reasonable in all the circumstances of this case.

177. If I am wrong, I have considered whether or not a fair procedure would have made any difference.

178. The claimant took no part in the disciplinary hearing and his reasons for not taking part were he said that he had had enough of the respondent who he felt had treated him unfairly in respect of a number of matters. He stated that the death of his father-in-law and the death earlier in the year of his former wife had impacted on him and he had decided to let things go and simply move on. However, he clearly did not feel the same about the accusation of fraud and the accusation that he had lied about the accident.

179. On balance of probabilities I find it is more likely than not that had the claimant been written to following disciplinary in respect of an allegation of fraud that he would have responded to the respondents.

180. I have considered whether any such response from the claimant would have made any difference to the decision made by Mr Stone to dismiss the claimant.

181. I find that Mr Stone is would have taken a full account of anything that Mr Lavender had said or written to him and would have considered it fully and fairly.

182. I make this finding because Mr Stone has demonstrated a careful and impartial approach to the evidence which has been presented to him and I am satisfied that he would have treated anything the claimant had said fairly and appropriately. The fact that he did not consider contacting the claimant to ask specific questions was not an indication of any form of unfairness on his part but was I find because at the time he did not think about whether it might be necessary and I find that it was entirely understandable.

183. Had there been further provision of information from Mr Lavender in the format that he suggests he might have provided it, it is possible that Mr Stone would have determined that the allegation that the claimant had behaved inappropriately and had committed fraud was not made out.

184. However, although I find that the procedural irregularity in respect of the second allegation renders that part of the reasoning unfair, in this case I find that it was nonetheless reasonable for the employer to determine to dismiss the claimant for gross misconduct for the reason related to the mobile phone

usage alone, and that Mr stone would have done so, even if he had determined that there was no misconduct in respect of the second allegation.
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185. The reason I come to this conclusion is that I am satisfied that this was a genuine, standalone reason why Mr Stone decided to dismiss the claimant for gross misconduct.

186. I conclude that the dismissal was therefore a fair dismissal and that the penalty imposed was within the range of reasonable responses.

187. The consequence of my judgement is that I find the claimant was fairly dismissed but only in respect of his misuse of the mobile phone at work in breach of the company's strict contractual policies and procedures.

188. If I am wrong about that and if the whole dismissal is tainted by procedural unfairness, I would have concluded that the claimant contributed to his own dismissal by his misuse of a mobile phone whilst on a final written warning. The claimant was well aware of the policy and the contractual provisions and he had been warned that any further misuse or abuse could result in a dismissal for gross misconduct.

189. Further and in any event, I would have found the claimant's failure to attend the disciplinary hearing, and his indication that he would not attend and his failure to appeal, which he is entitled to do would have meant that any compensation that might be awarded ought to be reduced in line with the ACAS provisions. I would have found a reduction of twenty-five percent.

190. Further and again, if I am wrong, I find that the respondents would have dismissed the claimant in any event for the mobile phone misuse and that they would have dismissed him for gross misconduct. I find that there is a hundred percent likelihood that this would have happened on the basis of the clear and forceful evidence from Mr Stone. I found Mr Stone to be an honest and fair-minded witness who took his responsibility as a disciplinary hearing officer and dismissing officer seriously.

191. I also find in so far as it is relevant, that Mr Lavender whilst accepting that he was in breach of company policy had within his own mind understandable reasons for using his mobile phone albeit that the usage was in breach of a clear and appropriate policy of the respondent.

Employment Judge Rayner
Date: 16 February 2021

Reasons sent to the parties: 23 February 2021

FOR THE TRIBUNAL OFFICE

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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